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The Potential Impact of Climate Change Litigation on Government Policy

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The Potential Impact of Climate Change Litigation on Government Policy

Cover Page Footnote

Juris Doctor Candidate, Notre Dame Law School, 2021; Bachelor of Arts in International Affairs, George Washington University, 2015. I would like to thank Professor Mary Ellen O'Connell for her guidance on choosing this topic. I would also like to thank the members of the Notre Dame Journal of International & Comparative Law for their review of this note in preparation for publication. All errors are my own.

THE POTENTIAL IMPACT OF CLIMATE CHANGE LITIGATION ON GOVERNMENT POLICY

FON BISALBUTR*

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INTRODUCTION

“Can anybody still deny that we are facing a dramatic emergency?” —if actions speak louder than words, the United Nations Secretary-General Antonio Guterres was met with silence at the 2020 Climate Ambition Summit.¹ The largest greenhouse gas emitters have been shifting from harder to softer international climate change laws rather than adopting new breakthrough policies.² In response, those affected by climate change or are concerned about the issue are seeking recourse through litigation. In exploring litigation in the three largest emitters (China, US, and India) in context to the larger global trend, this paper argues that litigation has a compounding impact on political will that would pave way for a more robust international regime. Given the differences between the political systems of the three countries and their idiosyncrasies, it is unsurprising that litigation would have varied impact on policy. In India, litigation has had the largest impact on policy due to its democratic political system and highly independent and activist judiciary. In the US, barriers to

* Juris Doctor Candidate, Notre Dame Law School, 2021; Bachelor of Arts in International Affairs, George Washington University, 2015. I would like to thank Professor Mary Ellen O’Connell for her guidance on choosing this topic. I would also like to thank the members of the *Notre Dame Journal of International & Comparative Law* for their review of this note in preparation for publication. All errors are my own.

1 Jessica Corbett, “Can Anybody Still Deny That We Are Facing a Dramatic Emergency?” Asks UN Chief at Climate Summit, COMMON DREAMS (Dec. 12, 2020), <https://www.commondreams.org/news/2020/12/12/can-anybody-still-deny-we-are-facing-dramatic-emergency-asks-un-chief-climate-summit>.

2 Armin Rosencranz et al., *The Evolution and Influence of International Environmental Norms*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10125, 10132 (2019) (elaborating that the Kyoto Protocol had stringent caps on developed nations’ emissions while the Paris Agreement lacks such provisions).

litigation are similarly low, but the judiciary is not as activist in nature and hesitant to overstep the boundaries of separation of power. In China, litigation is highly controlled under an autocratic government and is the least likely to have an impact on policy. Where litigation has an impact, it can pressure the government to make greater commitments. Where its impact is blunted, litigation in other countries can increase international pressure on that country's government.

On January 17th, 2020, the Ninth Circuit Court of Appeals in the US dealt a devastating blow for climate change campaigners worldwide.³ The 21 youth plaintiffs in *Juliana v. United States* accused the US government of failing its constitutional mandate not only by allowing climate change to become an existential threat but contributing to the issue.⁴ *Juliana* could have been another swell under the wave of successful litigation around the world. Its potential as a turning point was poignantly captured by Judge Josephine Staton in her dissent:

The government accepts as fact that the United States has reached a tipping point crying out for a concerted response – yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation. My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary.⁵

There are some who acknowledge the issue of climate change, but believe that the decision was correctly made. One of them would likely be renowned professor, Eric Posner, who voiced concerns that climate change litigation would drive business away from the country if courts start granting relief or penalizing polluters.⁶ However, this is how litigation may be able to create economic incentives for political leaders to negotiate for an international framework of uniform rules to combat climate change, rather than providing financial incentives for companies to stay. The issue of climate change would be less of a tragedy of the commons. Professor Posner is right, but there are many ways for policymakers to act in the US' national interest in response to the after-effects of litigation.

While it may be discouraging to see such high-profile cases fail, there is much more litigation activity that does not garner as much attention, but can play their part in making an impact on national policy and toward a stronger multilateral scheme. Litigation can impact policy in six distinct ways: by "(1) framing issues in terms of institutional failure and the need for institutional

3 Brady Dennis, *Federal Appeals Court Tosses Landmark Youth Climate Lawsuit against U.S. Government*, THE WASH. POST (Jan. 17, 2020), <https://www.washingtonpost.com/climate-environment/2020/01/17/federal-appeals-court-tosses-landmark-youth-climate-lawsuit-against-us-government/>.

4 See *Juliana v. United States*, No. 18-36082, 2020 U.S. App. LEXIS 1579 (9th Cir. Jan. 17, 2020).

5 *Id.* at *33-*34.

6 Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1940 (2007). See also Jennifer Kilinski, *International Climate Change Liability: A Myth or a Reality?*, 18 J. TRANSNAT'L L. & POL'Y 377, 407 (2009).

reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions.”⁷

Recently, there has been a dramatic increase in climate change litigation in response to the insufficient political will on the national level in reducing emissions.⁸ These high-profile cases get more attention and are labeled as climate change cases because there is no universal definition of “climate change litigation.” Attention to other cases that are indirectly related to climate change is lacking.⁹ While most scholarship tends to limit the scope of the term to actions that explicitly and overtly refer to climate change, there are other less visible cases that can be reinterpreted as climate change cases.¹⁰ Most high-profile cases target public law changes and attempt to stimulate government action or challenge government failures on climate change efforts. They usually invoke broad principles or make constitutional arguments. However, other types of climate change litigation that are lower-profile are often overlooked because they are more local in nature or redress specific harms without overtly referring to climate change. This note addresses both types of litigation and argues that both are important in influencing government policy because they play different roles.

This note will first explore the ways in which high profile and lower profile climate change litigation can make an impact on policy in general. Then, the note will analyze the situation in India, US, and China, the three largest emitters, and the potential for litigation to make an impact on policy in each respective country. India demonstrates how successful high-profile climate change litigation can effectively push for policy change. However, it was made possible because of an activist judiciary. The US has a more cautious judiciary that hinders high profile litigation, but allows lower profile litigation to redress harms and play a role in changing the conversation around climate change. Nevertheless, high profile litigation is still worthwhile in the US because the US is a big “net exporter” of constitutional principles.¹¹ China has the least room to accommodate high profile litigation, but external pressure from other countries and internal pressure to grant relief to those affected by climate change can and has pressured China to make further commitments to combat climate change.

7 Timothy D. Lytton, *Harnessing the Power of Information for the Next Generation of Environmental Law: III. Access and Dissemination of Information: Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1838 (2008).

8 Posner, *supra* note 6, at 1925.

9 Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENVTL. L. 483 (2018).

10 *Id.*

11 Angioletta Sperti, *United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence*, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 393, 393-94, 399 (2013).

I. HIGH-PROFILE AND LOW-PROFILE LITIGATION

Climate change regulation can be divided into two general orientations: top-down and bottom-up regulations.¹² Top-down regulation refers to actions or initiatives imposed by the local or central government. It can also refer to international law imposing restrictions on countries through multilateral or bilateral treaties. Bottom-up regulation refers to initiatives taken by individuals or entities, which could include social movements and activities such as lobbying and media publicity. Litigation straddles top-down and bottom-up regulation because the judiciary can address both government and non-governmental actors, providing a platform where non-governmental actors can influence the regulatory landscape.¹³ Litigation allows public involvement in making and defining the rules, especially in common law countries.

High profile litigation has increasingly had a worldwide impact, inspiring litigation elsewhere along similar lines of argument. According to the United Nations Environmental Programme, global climate change litigation has nearly doubled between 2017 and 2020.¹⁴ This can be seen in the *Urgenda*, *Leghari*, and *Juliana* cases in the Netherlands, Pakistan, and the US, respectively. Even if unsuccessful, high profile cases help spread awareness on climate change and pressure governments to acknowledge the issue. It also inspires litigation in other countries that are more receptive of the arguments, either because of the form of government, governing law, or nature of the judiciary. Lower profile cases are more likely to succeed in holding the private polluters accountable. The costs could impact the viability and health of polluting corporations and investors are increasingly demanding environmental, social, and governance (ESG) information and predictions. Better disclosure rules could lead to more transparency and better litigation against polluters. The costs polluters bear supports the competitiveness of greener companies and alternatives in the market. This is discounting any frivolous litigation, which can and should be promptly dismissed by courts.

A. INTERNATIONAL INFLUENCE OF HIGH-PROFILE CASES

Most high-profile cases in climate change litigation invoke broad principles and themes related to constitutional law and human rights. However, although they garner more attention, they are also more difficult in terms of standing, burden of proof, and redressability. But because they spark publicity, they have inspired litigation along similar lines of argument elsewhere. Plaintiffs can borrow ideas from each other, and successful litigation in one country can further encourage potential plaintiffs in another. Courts can also be influenced and emboldened by decisions elsewhere, though some are more willing to entertain foreign law than others. India has had a long legacy of studying and

¹² Jiangfeng Li, Note, *Climate Change Litigation: A Promising Pathway to Climate Justice in China?*, 37 VA. ENVTL. L. J., 132, 138 (2019).

¹³ *Id.* at 140.

¹⁴ UNITED NATIONS ENVIRONMENTAL PROGRAMME, *Global Climate Litigation Report* (Jan. 26, 2021), <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>.

adopting parts of foreign law as their own as they see fit.¹⁵ US courts are much less open to viewing foreign law as persuasive sources.¹⁶ Some countries have constitutions that are more readily usable by the public to enforce their rights. Both India and the US constitutions are legally enforceable. However, the Chinese constitution is not, and only espousing goals to strive towards. Several countries, such as Costa Rica, Portugal, and South Africa, explicitly mandate in their constitution a right to a healthy environment, requiring less indirect interpretation.¹⁷ These various factors influence the difficulties in pursuing and succeeding in high profile climate change litigation.

There has been a spate of high-profile climate change litigation worldwide and continues in twenty-seven countries and international tribunals.¹⁸ It is possible that the wave of high-profile climate change litigation is due to a borrowing of ideas as plaintiffs in one case inspire and influence potential plaintiffs elsewhere. Another possible cause would be the increase in climate change intensity and thereby devastation, giving rise to possible claims. However, it would not explain the strikingly similar line of reasoning across the high-profile cases, responsible for garnering attention due to the fact that they blame higher authorities for abusing their power or neglecting their duties under their constitution. Several high-profile cases illustrate this effect.

On June 14th, 2015, the District Court of The Hague ordered the Dutch Government to reduce greenhouse gas (GHG) emissions in order to protect citizens from the harmful effects of climate change in the *Urgenda v. State of the Netherlands* ruling.¹⁹ The case was brought by 900 co-plaintiffs, spearheaded by Urgenda Foundation, a Dutch environmental group. The Court of Appeal upheld the decision on October 9th, 2018 and the Supreme Court upheld the Appeals Court decision on December 20, 2019. It was a groundbreaking victory, marking the first instance in which citizens established that the government has a legal duty to combat climate change, with the court ordering that the government must cut emissions by at least 25% by the end of 2020. On September 4th, 2015, Ashgar Leghari, a Pakistani farmer suffering the effects of climate change successfully sued the government for failure to carry out core provisions of a 2012 National Climate Policy and Framework legislation. *Urgenda* and *Leghari* furthered the debate as to whether there exists a legal path to American climate change litigation success. Both the Dutch and Pakistani cases used the constitutional “right to life” as the legal basis of their claim.²⁰

The two cases likely inspired or encouraged the *Juliana* case. There had been high profile climate change litigation in the US ever since the Supreme Court found in *Massachusetts v. EPA* that the Environmental Protection Agency can regulate GHGs in 2007.²¹ However, for the first time in US courts, plaintiffs

15 Valentina Rita Scotti, *India: A “Critical” Use of Foreign Precedents in Constitutional Adjudication*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 96 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

16 Sperti, *supra* note 11, at 393-410.

17 Deepa Badrinarayana, *A Constitutional Right to International Legal Representation: The Case of Climate Change*, 93 *TUL. L. REV.* 47, 49 (2018).

18 Grace Nosek, *Climate Change Litigation and Narrative: How to use Litigation to Tell Compelling Climate Stories*, 42 *WM. & MARY ENVTL. L. & POL’Y REV.* 733, 739-40 (2018).

19 Badrinarayana, *supra* note 17, at 75-77.

20 Marc Z. Goldgrub, *Could Foreign Judicial Climate Action Victories Influence American Legal Perspectives?*, 25 *CARDOZO J. INT’L & COMP. L.* 287, 297 (2017).

21 *Id.* at 294.

argued a similar constitutional “right to life” in *Juliana*, filed on August 12th, 2015—only two months after the district court’s decision in the *Urgenda* case.²² The *Juliana* case also claims a government obligation to protect the environment for future generations under the public trust doctrine, which has not been used before, but was successfully argued under the *Leghari* case.²³ Many were surprised the case survived a motion to dismiss, with Judge Ann Aiken upholding the idea that “a climate system capable of sustaining human life is a fundamental to free and ordered society.”²⁴ Scholars have suggested that plaintiff’s not only borrowed from other landmark cases abroad, but the case inspired foreign courts to hold their governments liable for climate change.²⁵ In other words, the impact reaches both potential new plaintiffs and repeat players in the judiciary.

Court decisions are coming in from key countries. On April 29th, 2021, the German Supreme Court ordered the government to come up with a more detailed plan for reducing emissions. It announced the 2019 climate change act was unconstitutional for being incompatible with fundamental rights by lacking greater detail and burdening climate action on the youth.²⁶ The decision came a only a few months after a Paris court ruled France was legally responsible for its failure to meet emission cutting targets. A similar case from Portugal was fast-tracked at the European Court of Human Rights in October 2021.²⁷

An increase in litigation against the government sends a message that there is an increasing public concern on the issue, even if litigation is unsuccessful. It also raises awareness on the issue locally and internationally, where courts of different countries may find the arguments compelling. However, as stated, even though the information may easily inspire potential plaintiffs elsewhere, there are other factors that play into whether litigation elsewhere can influence the court. These factors, including openness to considering foreign law and interpretation, enforceability of the constitution, and regime type vary extensively between the three largest emitters, China, US, and India.

B. LOWER-PROFILE CASES PLAY AN IMPORTANT ROLE

In countries where high profile litigation is unlikely to be successful, there may be avenues for change through low-profile litigation. Lower profile cases are often overlooked because they tend to be smaller scale, localized, or more banal and they tend to be in the realm of private law.²⁸ While it may be difficult to imagine how self-contained disputes between private parties can have public policy impacts, they can cumulatively change the economic landscape and thereby the playing field over which climate change policy is negotiated and

²² *Id.* at 300-01.

²³ Eleanor Stein & Alex G. Castermans, Comment, *Urgenda v. The State of the Netherlands: The “Reflex Effect”- Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care*, 13 MCGILL J. SUSTAINABLE DEV. L. 305, 318-19; Rosencranz, *supra* note 2, at 10127.

²⁴ *Juliana v. United States*, No. 6:15-cv-1517-TC, 2017 U.S. Dist. LEXIS 89000, at *16 (D. Or. May 1, 2017).

²⁵ Stein, *supra* note 23, at 317-18.

²⁶ Ivana Kottasová, *Kids are Taking Governments to Court Over Climate. And They are Starting to Win*, CABLE NEWS NETWORK (May 9, 2021), <https://www.cnn.com/2021/05/09/europe/climate-lawsuits-governments-intl-cmd/index.html>

²⁷ *Id.*

²⁸ Bouwer, *supra* note 8, at 483-84.

made. Company investors can no longer ignore the rise of climate change litigation and risk, which increasingly impact company profitability, leading to demand for greater transparency through higher disclosure rules and standards.²⁹ Additionally, litigation calling for greater transparency creates more opportunities for companies to be penalized for greenhouse gases for torts, fraudulent disclosure, and investors are deterred from investing in the company.³⁰ The improvement in transparency could create a feedback loop as it improves the quality of litigation, which further impacts the company's profitability.

Corporations have increasingly had to factor in the risk of climate change litigation for their polluting behaviors.³¹ Recently, 3,500 European in-house lawyers completed a survey on whether they anticipate the organization to face legal risks due to climate change. About 50% said they did.³² Institutional investors worldwide are demanding companies disclose climate-related risk.³³ Six out of ten institutional investors modified their voting approach or incorporated an environmental criterion.³⁴ The United Nation's (UN) Principles of Responsible Investment organization, which started in 2006, now has signatories of investors with \$80 trillion in assets under management.³⁵

Despite backsliding in US climate policy with the Trump Administration, investors are increasingly interested in corporate plans regarding climate change in terms of risks, impacts, and the prospect of long-term mitigation policies.³⁶ Companies like Glass Lewis and Sustainalytics are making information more digestible for the public.³⁷ There is a push for a reporting standard, which could normalize disclosure on climate change.³⁸ Without anywhere to hide, polluters run the risk of increased climate change litigation due to fraudulent disclosures or exposure to tort litigation due to their disclosures. Polluters would be incentivized to go green due to increased pressure to disclose climate change litigation risk, affecting the profitability and therefore viability of their business.

Legal mobilization plays a role in helping courts get power to interpret statutes to interpret disclosure rules.³⁹ It is a necessary condition for judicial intervention in government administration.⁴⁰ In this way, litigation works as an alternative form of political influence because of low barriers and high public interest. Disclosure rules will stay judicialized because they are about process, not policy. Lower profile litigation on information disclosure has the advantage of circumventing the standing and justiciability issue that many high-profile

²⁹ *Id.* at 501.

³⁰ *Id.*

³¹ Pilita Clark, *Should Company Lawyers Do More on Climate Risk?*, FINANCIAL TIMES (June 18, 2019), <https://www.ft.com/content/5d1dae3e-765f-11e9-b0ec-7df87b9a4a2>.

³² *Id.*

³³ Hana V. Vizcarra, *Corporations and Climate Change: How Businesses are Changing the Environmental Landscape: Climate-Related Disclosure and Litigation Risk in the Oil & Gas Industry: Will State Attorneys General Investigations Impede the Drive for More Expansive Disclosures?*, 43 VT. L. REV. 733, 735-36 (2019).

³⁴ *Id.* at 737.

³⁵ *Id.* at 736.

³⁶ *Id.* at 736-37.

³⁷ *Id.* at 740-41.

³⁸ *Id.* at 739.

³⁹ Jonathan Marshall, *Who Decides the Role of Courts, State or Society?*, in EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW 135, 142 (Harry N. Scheiber ed., 2007).

⁴⁰ *Id.* at 144.

climate change cases have to overcome.⁴¹ Such rules are also beneficial in that politically, there is no way to undo disclosure, preventing a reversal upon a change in government.⁴² It forces officials to revise their expectations as activists push boundaries outwards.⁴³

Disclosure rules vary between stock exchanges. A more rigorous requirement would increase transparency, and a mandatory disclosure would allow for litigation over fraudulent disclosure. At least seven stock exchanges require social and/or environmental disclosure as part of their listing requirements, including the stock exchanges of Australia, Brazil, India, Malaysia, Norway, South Africa, and the UK.⁴⁴ However, some key countries have not gone as far.

The Shanghai Stock Exchange (SSE) has offered only incentives through environmental disclosure, which could result in selective disclosure by companies and preclude fraudulent disclosure litigation.⁴⁵ If companies listed on the SSE face increasing climate change litigation, there may be a call for higher standards. However, as elaborated below, environmental litigation in China is limited and cases against large and influential companies, usually the largest polluters, are stalled indefinitely.

In the US, the Security and Exchange Commission (SEC) stated that publicly-traded companies must disclose "material impacts" of climate-related changes.⁴⁶ The concept of materiality has been a point of debate due to its vagueness on what should count as material and therefore must be disclosed. To broaden this definition would force corporations to disclose more information. The improvement in transparency would allow for better quality litigation in holding polluters accountable.

Litigation against corporations increase costs polluters have to bear. This adds pressure on the government for fear of these corporations leaving the country. While there are numerous ways to convince corporations to stay, such as subsidies, it may be less cost-effective than supporting an international regime that punishes polluters uniformly, forcing corporations to change their polluting ways rather than finding a haven elsewhere. In this way, litigation can change the conversation that governments have about climate change, making it less of a tragedy of the commons issue. A lack of political will may be due to avoiding hypocrisy while calling for higher commitments from other countries, but if country governments are already paying the price for pollution, it becomes in their interest to press for stronger international commitments. It can incentivize governments towards an enforceable international framework.

Therefore, an increase in both higher and lower profile climate change litigation can create incentives for the government to call for a stronger

41 *Id.* at 155.

42 *Id.* at 137.

43 *Id.* at 152.

44 Williams & Fisch, *Petition to SEC for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure*, HARV. L. SCH. FORUM CORP. GOVERNANCE 5 (Oct. 9, 2018), <https://corpgov.law.harvard.edu/2018/10/09/petition-to-sec-for-rulemaking-on-environmental-social-and-governance-esg-disclosure/>.

45 Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges, INITIATIVE RESPONSIBLE INV. 4, http://iri.hks.harvard.edu/files/iri/files/corporate_social_responsibility_disclosure_3-27-15.pdf.

46 *Id.* at 15.

international regime. Even if unsuccessful, higher profile cases notify the government of a growing concern and raise awareness on the issue at the local and international level. Courts of a different country under a different constitution or regime may find the arguments compelling, creating change to policy elsewhere. An increase in lower profile litigation can indirectly encourage the government to call for other countries to make stronger commitments to battling climate change and more standardized mandatory rules, so that companies will not seek polluting havens elsewhere.

II. THE THREE LARGEST EMITTERS

Litigation can have a substantial impact on the three largest emitters: India, US, and China. India began taking a more aggressive stance against climate change and stronger commitments during a high-profile litigation in India, despite a lack of change in the administration. Similarly situated countries of high vulnerability to climate change have also had to respond to increasing litigation and judiciary decisions imposing liability on polluters. US courts have seen in *Juliana*, its first high profile litigation that is possibly inspired by high profile litigation elsewhere, following a similar trajectory. However, it is still behind in issuing judgments for plaintiffs as its courts are less activist in nature. Lower profile litigation can help create pressure for change in the US. Litigation in China may not follow the same trajectory in imposing pressure on the government to combat climate change because of its authoritarian government's tight constraints on litigation. Change in China may have to be due to external pressure as the government works to maintain its image by combating climate change. Increase in litigation in China can increase internal pressure on the Chinese government, encouraging it to relax its controls on litigation to promote stability by allowing a pressure valve for those suffering from climate change effects.

A. INDIA: POLICY CHANGE IN INDIA

Climate change has become a larger concern in India, and it is likely that climate change litigation in India will increase in volume and success. India's change in policy and increase in commitments to combating climate change can be explained by increasing litigation and likelihood of success in litigation. India has one of the highest risks of climate change impacts but is also the third-largest emitter. Recently, a trend of successful litigation is observed in India along with other high-risk countries. India's stronger political will is best explained by stronger internal pressure due to increasing volume and success of climate change litigation. However, this is made possible because of the nature of India's judiciary, which is highly independent and has become increasingly activist.

In August 2019, India changed its longstanding position and made a public statement to make stronger commitments. It will increase its climate pledges, or

nationally determined contributions (NDCs) under the Paris Agreement.⁴⁷ Going beyond what was highlighted in Paris, India commits to increasing its renewable energy capacity five-fold.⁴⁸ This is despite its enduring past position of reluctance to agree to revise its climate targets ahead of 2020. In the past, India was also criticized for setting goals that they were on target to achieve without any changes to usual business plans or due to efficiency gained by global market demands.⁴⁹ Reduction targets reflected an “accidental quality” rather than “proactive framing” approach.⁵⁰ In 2014, national missions were being implemented at a slow pace.⁵¹ India stated that it would only be open to increasing its climate pledges provided other countries, particularly the rich industrialized countries, stepped up their commitments and fulfilled past pledges. The change in rhetoric and stronger commitments are the first time since the adoption of the Paris Agreement in 2015 and ratification of the treaty in 2016 that India stated in an official statement its intention to step up its NDCs.

1. *Role of Litigation in Changing Policy in India*

It is likely that litigation in India played a part in influencing political will with regards to climate change policy. Prior to a constitutional amendment in 1976 to expressly address environmental quality, the Indian Supreme Court has interpreted the right to life to encompass a right to a healthy environment in the interest of sustainable development and intergenerational equality.⁵² Climate change litigation did not exist in India until 2016, which then rapidly mobilized.⁵³ In 2017, India saw the filing its latest high-profile case in *Pandey v. India*, based on the public trust doctrine, similar to *Urgenda*, *Leghari*, and *Juliana*.⁵⁴ The case is now pending in the Supreme Court of India.

India has had other recent high-profile cases. In 2016, the National Green Tribunal ordered in *Court v. State of Himachal Pradesh*, for the State government to take action to redress the environmental degradation of Rohtang Pass, an eco-sensitive “Crown Jewel” of Himachal Pradesh, caused by excessive vehicular air pollution. The court noted that black carbon pollution has been a major cause of rapid melting of glaciers in the north-western Himalayas and a significant contributor to climate change.⁵⁵ In 2018, the National Green Tribunal

47 Urmi Goswami, *India Signals it is Ready to Do More to Slow Down Climate Change*, ECON. TIMES (Aug. 26, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/india-says-it-will-do-more-to-slow-down-climate-change/articleshow/70813231.cms>.

48 Anjali Jaiswal & Sameer Kwatra, *India Announces Stronger Climate Action*, NRDC (Sept. 23, 2019) <https://www.nrdc.org/experts/sameer-kwatra/india-announces-stronger-climate-action>.

49 Jagadish Thaker & Anthony Leiserowitz, *Shifting Discourse of Climate Change in India*, 123 CLIMATE CHANGE, 107, 115-16 (2014).

50 *Id.*

51 *Id.*

52 Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359, 383 (2004) (discussing cases including *M.I. Builders Pvt. Ltd v. Radhey Shyam Sahu*, A.I.R. 1999 S.C. 2468 (India); *Th. Majra Singh v. Indian Oil Corporation*, A.I.R. 199 J&K 81).

53 *Climate Change Litigation in India*, ANALYSIS (Aug. 14, 2016), <https://theanalysisweb.wordpress.com/2016/08/14/climate-change-litigation-in-india/>.

54 *Pandey v. India*, CLIMATE CHANGE CHART, <http://climatecasechart.com/non-us-case/pandey-v-india/>.

55 Brian J. Preston, *The Evolving Role of Environmental Rights in Climate Change Litigation*, 2 CHINESE J. ENVTL. L. 131, 147 (2018).

of India made many orders in *Vardhaman Kaushik v. Union of India*, directing the Indian government to take particular actions to address air pollution.⁵⁶

The Indian government acknowledged for decades the country's particular vulnerability to climate change. While it is difficult to prove that the swell in litigation has led to a change in government policy, the timing shows a correlation. The cases were high profile enough to garner attention, and the judiciary has the power and independence to force policy change and dole out relief for victims. The fact that India is highly vulnerable country to climate change impacts have possibly contributed to the policy change. However, this fact was long-established since the late 1980s.⁵⁷ The recent wave of litigation took place during the wave of litigation in the countries most vulnerable to climate change, coinciding with or shortly prior to India's official statement to step up its NDCs.

2. *India's Idiosyncrasies*

The success of high-profile climate change litigation in India can be difficult to replicate in countries with weaker and less independent judiciaries. The progress made in India and the pressure for a change in policy through climate change litigation was made possible because India's judiciary plays a fiercely activist role and is arguably one of the most powerful constitutional courts in the world.⁵⁸ The Supreme Court expanded its own jurisdiction in the First Judges' Case of 1981 by endorsing public interest litigation ("PIL") and allowing individual action for "violation of some provision of the Constitution."⁵⁹ PIL took on challenges to government illegality became highly assertive in environmental policy post-1990.⁶⁰ The Supreme Court also solidified judiciary independence in the Second Judge's Case in 1993, allowing judicial appointments and transfers to be made by the Supreme Court and High Court.⁶¹

The judiciary's independence allows it to hold the political elite and enfranchised accountable as the courts' activism is not a measure of the executive or legislative branch's commitment to environmental protection.⁶² In fact, it is in response to the lack of engagement from the other two branches to protect the environment.⁶³ However, the judiciary had support for its initiatives from other national elites (in academia, law, politics, journalism) that gave the justices reassurance that their activism would not elicit governmental retaliation.⁶⁴ The judiciary also was selectively assertive throughout history, carefully picking their battles.⁶⁵ But the driving force behind its activism was to ensure constitutional control over the other branches and to improve the

⁵⁶ *Id.*

⁵⁷ Thaker, *supra* note 49, at 109.

⁵⁸ Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 262, 262-63 (Diana Kapiszewski ed., 2013).

⁵⁹ *Id.* at 272.

⁶⁰ *Id.* at 273.

⁶¹ *Id.* at 276-277.

⁶² Hill, *supra* note 52 at 382.

⁶³ *Id.* at 382.

⁶⁴ Mate, *supra* note 58, at 283.

⁶⁵ Mate, *supra* note 58, at 275.

confidence of the people in the judicial system and in the Constitution.⁶⁶ The fact that India’s constitution is legally enforceable, coupled with the judiciary’s broad power and activist role, creates an environment that is conducive to high-profile climate change litigation.

Even with its peculiarities, Indian courts and their judgments can still exert influence in other courts. It is also likely the case that Indian courts found influential judgments from courts in other countries with activist judiciaries. Countries with less activist judiciaries that reside in high-climate-change-risk countries could also see greater pressure as plaintiffs are inspired by rulings elsewhere. India is the fifth-most vulnerable to climate change,⁶⁷ followed by Pakistan, Philippines, and Bangladesh. The judiciaries of the other three countries to be most impacted by climate change have also been aggressive in climate change cases. As mentioned above, cases such as *Urgenda*, *Leghari*, and *Juliana*, and others from Pakistan, Philippines, and Bangladesh likely affected or inspired one another and other cases brought in India, since many follow lines of strikingly similar reasoning.

Pakistan saw the aforementioned high-profile case *Asghar Leghari v. Federation of Pakistan*. There, the Lahore High Court decided that the government’s inaction in combating climate change as part of its Climate Change Policy violated Leghari’s fundamental rights to a healthy and clean environment, which are to be read with the constitutional principles and public trust doctrine.⁶⁸ An additional high-profile case, *Ali v. Federation of Pakistan*, may succeed. The Supreme Court overturned the lower court’s dismissal of the petition, and the decision on the substantive hearing is pending. This action alleges that the development of a particular coalfield violates the doctrine of public trust.

The Philippines also had its own high-profile case in *Segovia v. Climate Change Commission*. The applicants alleged the government failed its public trust obligation by failing to adequately mitigate climate change by using an immodest amount of fossil fuel.⁶⁹ The Supreme Court said petitioners had standing under the Rules of Procedure for Environmental Cases. However, they failed on proving causation. Still, it is a step forward, indicating to future plaintiffs to be diligent in gathering information to meet the burden of proof. The Supreme Court also had decided in *Oposa v. Factoran* in 1993 to grant standing to unborn generations, further opening up the possibility for more high-profile litigation.⁷⁰

In Bangladesh, the Supreme Court ordered the government in *Farooque v. Government of Bangladesh* to adopt adequate and sufficient measures to control pollution after a public interest lawyer claimed ineffective implementation of industrial air pollution legislation. In a subsequent case, the same petitioner argued failure of the government to adequately regulate vehicle-generated air pollution in a way that safeguards fundamental rights.⁷¹ The Supreme Court then

66 Scotti, *supra* note 15, at 95.

67 Bhasker Tripathi, *India 5th Most Vulnerable to Climate Change Fallout, Its Poor the Worst Hit*, INDIA SPEND (Dec. 5, 2019, 5:27 AM), <https://www.indiaspend.com/india-5th-most-vulnerable-to-climate-change-fallouts-its-poor-the-worst-hit/>.

68 Preston, *supra* note 55, at 143.

69 *Id.*

70 *Id.*

71 *Id.* at 145.

ordered the government to take “urgent and preventative measures” to control vehicle emissions.⁷²

It is also likely the case that India’s judiciary is not only activist in nature but also is more open to borrowing constitutional interpretations from outside of India. Since 1950, 179 out of 1,908 constitutional cases (9.3 percent) quote foreign precedents.⁷³ India demonstrates how litigation in one country can not only be used as an example for plaintiffs, but can be persuasive authority for the judges. Since its independence, India felt the influence of external factors, and the Supreme Court often takes into account British precedents, and later American precedents in its constitutional adjudication.⁷⁴ India had influence from foreign constitutionalism from a wide array of countries, including the USSR, Australia, Japan, Canada, Ireland, and the Weimar Constitution of Germany.⁷⁵

Therefore, it is likely that litigation in India, partially inspired by litigation elsewhere, led to a change in policy by the government. Part of its success may be due to the characteristics of its judiciary. Nevertheless, India provides an example of how litigation can encourage policy change not only domestically but internationally. Litigation can lead to tangible results as the other branches are held accountable, making an impact its international commitments, and inspire potential plaintiffs elsewhere. India’s judiciary has a profound impact partially due to its activism, fostering an environment where climate change litigation can have a direct impact on policy. It may be difficult to pursue litigation along similar lines in a different type of regime (such as an authoritarian regime) or a democracy where the judiciary is weak and unassertive. Even then, the driving force behind the Indian judiciary’s activism is the pressure to preserve confidence in the constitution, a sentiment echoed by Judge Staton in the *Juliana* dissent as constitutional rights protect similar values at an abstract level.⁷⁶ India’s increased NDCs adds support to the Paris Agreement and indicates the possibility that India would support a more robust international regime that forces other countries to increase their own commitments.

B. UNITED STATES: WHERE LITIGATION IS MOST NEEDED

Litigation in the US has the greatest potential for payoff, because policy change is desperately needed, litigation is relatively accessible, and the US is the biggest proliferator of rights-based litigation ideas. There has been an exponential increase in climate change litigation in the United States.⁷⁷ A major factor contributing to the surge is the federal government’s failure to address and mitigate climate change. About eight out of ten Americans believe human

⁷² *Id.*

⁷³ TANIA GROPPPI & MARIE-CLAIRE PONTHEUREAU, THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 412 (Tania Groppi et al. eds. 2013).

⁷⁴ Scotti, *supra* note 15, at 70.

⁷⁵ *Id.* at 74.

⁷⁶ Sperti, *supra* note 11, at 399.

⁷⁷ Nosek, *supra* note 18, at 739–41.

activity is the leading cause of climate change.⁷⁸ Around half believe action is urgently needed to prevent the worst effects.⁷⁹ Among them is the failure to ratify the Kyoto Protocol during the Clinton and Bush Administrations.⁸⁰ Even with the Trump Administration's pulling out of the Paris Agreement and refusal to discuss climate change at the G-7 summit,⁸¹ many of the suits, including *Juliana*, were initiated against the Obama Administration.

The US is the second-largest emitter in the world, contributing sixteen percent of global emissions.⁸² It was also the largest emitter for 150 years and is the largest per capita contributor today.⁸³ As a result, activists have turned to litigation as an alternative platform to reduce greenhouse emissions.⁸⁴ Lawsuits challenging government action are on the rise relative to those against private parties.⁸⁵ As of now, the U.S. Climate Change Litigation database indicates over 700 federal statutory claims and over 70 constitutional claims.⁸⁶ Such rights-based litigation is likely to continue to increase and attract public attention.⁸⁷ However, rights-based litigation, which are usually higher-profile, is difficult in the US because the judiciary is not activist and cautious of stepping over the boundary into the role of the other branches of government. However, high-profile litigation is still worthwhile and may not be hopeless. Lower-profile litigation plays an important role in promoting awareness. Pushing on the lower-profile front can change the narrative surrounding climate change by changing the economic landscape by forcing polluters to be more transparent and to pay for their polluting behavior.

1. *Difficulty of Rights-Based Litigation in a Cautious Judiciary*

Rights-based climate change cases garner public attention, but face an uphill battle in US courts. These rights-based cases are usually challenged on the doctrine of standing, injury, causation, redressability, and on the political question doctrine. These obstacles, including the rhetoric surrounding the issue, have led courts to practice caution and declare the claims nonjusticiable.⁸⁸

78 Brady Dennis et al., *Americans Increasingly See Climate Change as a Crisis, Poll Shows*, WASH. POST (Sept. 13, 2019), https://www.washingtonpost.com/climate-environment/americans-increasingly-see-climate-change-as-a-crisis-poll-shows/2019/09/12/74234db0-cd2a-11e9-87fa-8501a456c003_story.html.

79 *Id.*

80 Nosek, *supra* note 18, at 740.

81 Alexa Lardieri, *Climate Change Not on Agenda for 2020 G7 Summit*, US NEWS (Oct. 17, 2019), <https://www.usnews.com/news/politics/articles/2019-10-17/climate-change-not-on-agenda-for-2020-g7-summit>.

82 *Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS (last visited Feb. 9, 2020), <https://www.ucsusa.org/resources/each-countrys-share-co2-emissions> [hereinafter UNION OF CONCERNED SCIENTISTS].

83 Christine Loh & Robert Gottlieb, *The U.S. and China Need to Put Aside Their Rivalry and Focus on the Common Enemy: Climate Change*, TIME (Oct. 28, 2019), <https://www.time.com/5711951/us-china-climate-change-environment/>.

84 Benjamin T. Sharp, Note, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 DUKE J. CONST. L. & PP 39, 42 (2019). See also R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 322 (2017).

85 Nosek, *supra* note 18, at 741.

86 *U.S. Climate Change Litigation*, SABIN CENTER FOR CLIMATE CHANGE L. (last visited Feb. 9, 2020), <http://climatecasechart.com/us-climate-change-litigation/>.

87 Sharp, *supra* note 84, at 43.

88 *Id.* at 44-58.

Hurricane Katrina had around 1,500 victims and economic damage was over \$125 billion. “It is now a truism that Katrina was, in a deep sense, a ‘man-made disaster.’”⁸⁹ Two cases arose out of Katrina, which were dismissed on justiciability. Although the *Juliana* case has proceeded further than past cases, it was dismissed based on the political question doctrine.⁹⁰ However, as demonstrated in *Juliana*, it is not an easy decision for judges on the panel, as acknowledged by the majority opinion and demonstrated by the fact that there was a dissenting opinion.⁹¹ Judgments are influenced by courts’ composition. These hurdles are likely to impede successful litigation in the US, despite successful rights-based litigation in other countries, which bears little influence in US courts. High profile litigation may yet see further breakthroughs, especially as scientific advancement aids in establishing proof.

Successful litigation outside of the US is unlikely to have an impact on US courts. In contrast to India’s judiciary, the US judiciary is unlikely to see foreign court judgments as examples or persuasive authority. There are inklings of possible change, but the US is mostly an exporter of constitutional principles and lacked interpretation using foreign law, largely due to a lack of comparative law courses in law schools and inaccessibility to foreign languages.⁹² US constitutional law appeared until a few years ago to be “insular and inward looking” than other countries, including those of common law.⁹³ This is disregarding early use of foreign law due to a lack of American case law.⁹⁴ As recently as 2003, the Supreme Court has begun showing greater attention to foreign law, but not without opposition.⁹⁵ Notable American scholars argue the need to study foreign laws and to apply them in limited circumstances.⁹⁶ Anna-Marie Slaughter observed that foreign authority can provide new approaches or greater insight to a particular problem.⁹⁷ Vicki C. Jackson argues it can shed light on the “suprapositive” dimensions of constitutional rights since many modern constitutions “include individual rights that protect similar values at an abstract level,” reflecting the “inescapable ubiquity of human beings as a central concern” for any legal system.⁹⁸

With the current status quo of courts not granting relief in rights-based litigation, courts will feel increasing pressure to redress harms. Victims have suffered very tangible, long-term harms and hurricanes are predicted to become more severe. A lack of action in all three branches leads to a weakening of the system’s legitimacy. “[O]ur normative order looks increasingly fragile in ‘an era of unlimited harm.’”⁹⁹ There are analytical and practical difficulties in trying to configure climate-related harms within substantive frameworks such as tort and constitutional law. Against the backdrop of a potentially existential threat,

⁸⁹ Weaver, *supra* note 84, at 307-08.

⁹⁰ *Juliana*, 2020 U.S. App. LEXIS 1579.

⁹¹ *Id.*

⁹² Sperti, *supra* note 11, at 393-94.

⁹³ *Id.*

⁹⁴ *Id.* at 395.

⁹⁵ *Id.* at 398-400 (referring to *Lawrence v. Texas*, a Supreme Court case citing a European Court of Human Rights case in overruling American case law).

⁹⁶ *Id.*

⁹⁷ *Id.* at 399.

⁹⁸ *Id.*

⁹⁹ Weaver, *supra* note 84, at 296 (citing, Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. J. 350, 350 (2011)).

judges that avoid an attempt at a substantive analysis “reinforce a sense of law’s disappearance into the maw of normative rupture” because there is a paradox of “routine catastrophe and legal order.”¹⁰⁰

2. US Litigation is Worthwhile

Despite the uphill battle, high profile litigation in the US is beneficial and worthwhile in that it raises awareness on the issue, galvanizes grassroots movements, translates scientific language into more easily understandable terms, and demonstrates the tangible impact of climate change.¹⁰¹ Many Americans still do not believe in climate change or see it as a distant threat, despite a consensus in the scientific community on the urgency and severity of the issue. Although about half see climate change as an issue, forty-eight percent still think that only minor sacrifices should be made and fourteen percent believe it will require not much sacrifice.¹⁰² High-profile litigation can close the gap between the scientific consensus and the general public’s perceptions of climate change.¹⁰³

In addition, despite a lack of US use of foreign citation, the US is one of the most important countries in the landscape concerning comparative exchange among constitutional courts. This is made possible due to the US system containing majority, concurring, and dissenting opinions with extensive explanations and records (as opposed to other countries such as France and Italy).¹⁰⁴ The US Supreme Court is the landmark reference for almost all other courts worldwide,¹⁰⁵ making litigation of high-profile cases worthwhile, even though they may not succeed.

The reluctance by the US judiciary to find for the plaintiffs in rights-based litigation should not be discouraging. Although *Juliana* may not succeed, the defeat is not total. Each case lays breadcrumbs for the next and slowly pushes the boundary outward. India’s change in policy is an example that even if litigation does not always succeed or is still in progress, it still achieves a galvanizing effect. It is possible that India was ripe for change through litigation due to the fact that it is one of the countries most vulnerable to climate change effects. Litigation in the US cannot afford to wait until more of the population is threatened. High-profile litigation still plays an important role in sowing the seeds for policy change and spreading awareness. It also inspires low-profile litigation, which could start making polluters pay.

Low-profile litigation can play a role in making polluters pay and increasing transparency through disclosure rules. Investors are increasingly interested in corporate plans to respond to climate change.¹⁰⁶ While progress is being made, there is a large room for improvement. A study found that the SEC filings and sustainability reports of fifteen oil companies were “generally weak,” with minimal disclosure of the impacts of climate change and climate targets.¹⁰⁷

100 *Id.* at 295-97.

101 Nosek, *supra* note 18, at 737.

102 Dennis, *supra* note 78.

103 Nosek, *supra* note 18, at 742.

104 Sperti, *supra* note 11, at 410.

105 Groppi & Ponthoreau, *supra* note 73, at 418.

106 Vizcarra, *supra* note 33, at 736-37.

107 *Id.* at 742.

Energy companies have yet to release more detailed information in their mainstream financial filings.¹⁰⁸ Pushing for greater disclosure also increases the chances that shareholders and the public can detect inconsistencies in their filings, which could potentially violate the SEC rule against false and misleading statements or omissions.¹⁰⁹ One of the existing regulations most relevant to climate change include “capital expenditures and the “material effects” of complying with the provisions regulating the “discharge of materials into the environment, or otherwise relating to the protection of the environment.”¹¹⁰ A greater amount of litigation on the subject could build upon the common law of what “materiality” means or even expand the scope. Materiality depends on the concept of the “reasonable investor,” which, given the current trend is increasingly conscious of climate-related information, as it has become financially significant. The SEC acknowledged that such a shift could broaden disclosure rules.¹¹¹ Litigation on disclosure is an area with potential for success, but is only one of many types that can and should be pursued.

Therefore, although the judiciary is wary of risk in overstepping their bounds, litigation is likely to increase, especially as climate change effects increase in frequency and severity. A time may come when enough members of the judiciary agree with Judge Staton in *Juliana*, and that the judiciary must prevent the other branches of government from enabling the endangerment of mankind. But it will likely be too late. During a time when the political branches refuse to heed the concerns of the public, the public must engage and push for policy change through all legitimate means. This includes both high-profile and low-profile litigation to further spread awareness, force polluters to pay, pressure the judiciary to defend constitutional rights, and pressure the political branches to change their policy in favor of regulations. Once the political branches accept that carbon emissions must be curbed, there is a self-interest to pressure other governments to do the same, and to advocate for a stronger international system.

C. CHINA: INCREASING INTERNAL AND EXTERNAL PRESSURE THROUGH LITIGATION

China is the largest emitter of greenhouse gases by volume,¹¹² emitting twenty-eight percent of the global total.¹¹³ Despite the sixty percent rise in environmental litigation nationwide over 2001,¹¹⁴ China has kept theirs under a tight lid.¹¹⁵ Nevertheless, environmental disputes, brokered through government deals and private concessions, are on the rise.¹¹⁶ Although that is not to say that climate change litigation specifically has increased, it shows an increase in environmental consciousness and litigiousness on environmental issues.¹¹⁷ Even

108 *Id.* at 743.

109 *Id.* at 745.

110 *Id.* at 747.

111 *Id.* at 753.

112 Loh, *supra* note 83.

113 UNION OF CONCERNED SCIENTISTS, *supra* note 77.

114 Rachel E. Stern, *From Dispute to Decision: Suing Polluters in China*, 206 CHINA QUARTERLY 294, 295 (2011).

115 Li, *supra* note 12, at 133.

116 Stern, *supra* note 114, at 295.

117 *Id.* at 296.

under tight control, China follows the trend of increasing suits as a result of widespread harm.¹¹⁸ Although recent legal developments suggest China may open the doors to litigation, there are many limitations. Climate change litigation outside China can provide China with examples for more bottom-up enforcement (encouraging the government to allow climate change litigation and to enforce laws) and pressure China to increase top-down measures (encouraging policy change and lawmaking).

1. *China's Commitments and Vulnerability to Climate Change*

China has made weak commitments to combating climate change, which fall in the range of being "highly insufficient." Their pledge falls outside the fair share range and is "not consistent with holding warming to below 2°C, let alone the 1.5°C target of the Paris Agreement."¹¹⁹ This is especially troublesome considering China is responsible for almost one-third of global emissions.¹²⁰ In the meantime, China is increasing its coal consumption and has recently added coal power plant construction projects.¹²¹ The Chinese economy is still a carbon economy. In 2018, fifty-nine percent of China's energy consumption comprised of coal, more than the rest of the world combined.¹²²

The Chinese government is doing this while fully aware of its vulnerability to climate change. A 900-page report released in November 2015 found China faces significant threats from climate change.¹²³ The report was a collaborative effort by 500 experts from the leading Chinese universities, which found that the average temperatures have risen more than the global average. The livelihood of more than 550 million people who live in the coastal areas are threatened. 641 of its 654 largest cities now experience regular flooding.¹²⁴ Its agricultural industry and water resources are endangered, risking a far-reaching impact. Many have already been suffering the consequences of climate change. As an unsurprising result, litigation on environmental issues have also been on the rise.¹²⁵

2. *Potential of Climate Change Litigation in China*

Litigation may be on the rise, but high-profile rights-based litigation on the issue of climate change is highly unlikely to succeed in China. First, constitution-based claims are not available, despite similar language on equality.¹²⁶ The enforceability of a nation's constitution plays no small part in allowing for social change. In a tangible way, it provides all individuals a

118 *Id.* at 294

119 *China*, CLIMATE ACTION TRACKER, (last visited Feb. 9, 2020),

<https://climateactiontracker.org/countries/china/> [hereinafter CLIMATE ACTION TRACKER].

120 UNION OF CONCERNED SCIENTISTS, *supra* note 77.

121 CLIMATE ACTION TRACKER, *supra* note 114.

122 How is China's Energy Footprint Changing?, CTR. STRATEGIC INT'L STUDIES (last visited Feb. 9, 2020), <https://chinapower.csis.org/energy-footprint/>.

123 *China's Vulnerability to Climate Change*, SIPA CTR. GLOB. ENERGY POLICY (last visited Feb. 9, 2020), <https://chineseclimatepolicy.energypolicy.columbia.edu/en/chinas-vulnerability-climate-change>.

124 Loh, *supra* note 83.

125 Stern, *supra* note 114, at 295.

126 Li, *supra* note 12, at 151.

reference point to which they can be sure that even the highest level of government has to adhere. The ability to bring a private right of action based on the constitution is important because not only does it provide redress and force the government to change and adhere, but it strengthens the common people's knowledge of the constitution and their rights. Therefore, unlike the US and India, there is nothing tangible in the Constitution for those affected by climate change to rally around.

Second, the judiciary is hardly activist and lacks independence from the other branches of government, dominated by the ruling party. As "recent history . . . reveals . . . the Chinese communist state has never entertained judicial independence beyond . . . rhetoric."¹²⁷ There is no separation of powers and political interference was blatant during the Cultural Revolution.¹²⁸ Although some judges embrace their role as environmental regulators, even those with strong environmental leanings acknowledge the importance of economic growth, the ruling party's priority.¹²⁹ The environmental courts are intertwined in the bureaucracy.¹³⁰ Therefore, it is unlikely that the judiciary will take a leading role in enforcing the constitution like in India. However, there may be a glimmer of hope for climate change litigation.

3. *Developments in Climate Change Litigation in China*

Recent legal developments suggest China is opening its doors to climate change litigation.¹³¹ The Chinese national legislation agenda in 2016 included a "Climate Change Response Law" as a research project.¹³² It included a provision for public participation for individuals to report noncompliance to the regulatory authorities or bring enforcement lawsuits through public interest litigation ("PIL").¹³³ A pilot program of facilitated prosecutions was launched in 2015 against sub-national governments to enforce environmental laws.¹³⁴

Although still a pilot program, PIL may be the start of climate change litigation.¹³⁵ PIL aims to protect the interest of the public or a large group of people beyond those bringing or defending the lawsuit, and is usually brought by environmental NGOs. China has an Environmental Protection Law ("EPL") that does not seem to preclude lawsuits on climate change. The pace of PIL picked up in 2015 when the revised version of the EPL went into force. Since the new EPL, Chinese courts have tried more than fifty cases of environmental PIL.¹³⁶ However, it took until 2019 for China to see its first real environmental PIL, when environmental activists sued private companies for pollution.¹³⁷ There is a danger that not enough cases will be brought and the government will

127 CHOR-WING CHIU ET AL., *THE LEGAL SYSTEM OF THE PRC* 75 (2003).

128 *Id.* at 76.

129 Rachel E. Stern, *The Political Logic of China's New Environmental Courts*, 72 *CHINA J.* 53, 61-62 (2014).

130 *Id.* at 62.

131 Li, *supra* note 12, at 152.

132 *Id.* at 134.

133 *Id.*

134 *Id.* at 134-35.

135 *Id.* at 165-66.

136 *Id.* at 145-46.

137 *Id.* at 145.

terminate the program.¹³⁸ The opportunity to nurture environmental PIL should not be wasted, because it comes with its benefits.

Under a PIL, a private right of action is not allowed, but many issues in climate change litigation elsewhere are circumvented because PIL allows environmental NGOs *de jure* standing in pursuing public interest goals.¹³⁹ Plaintiffs do not face as high a hurdle in litigation. In certain circumstances, the burden of proof is even shifted onto the defendant, as a way to keep check on local government.¹⁴⁰ However, the downside is the tight control that is kept on litigation. Usually, it does not result in a change in policy, rather, victims are compensated monetarily. Additionally, cases against larger and more influential polluters or law-violators are usually shelved indefinitely.¹⁴¹

While there is potential for PIL to be used as an avenue for plaintiffs to pursue climate change litigation, it is currently lacking in its impact on policy and is more effective in terms of placating those affected by climate change.¹⁴² Injunctions and punitive damages are not realistic options.¹⁴³ Unsurprisingly, what is missing are high-profile civil environmental lawsuits. As one environmental lawyer put it, the number of insignificant cases meant that it was like "using anti-aircraft guns to kill a mosquito" and that "breakthroughs can't come from nowhere."¹⁴⁴ Climate change litigation in China has seen some support and must be continued to be helped along by the academic, scientific, and legal community in China and around the world. However, it can also be encouraged by litigation elsewhere around the world.

Top-down enforcement and international efforts are critical in combating climate change; bottom-up pressure through litigation can play an important role and should not be neglected. Due to the limitations and controls on litigation in China, climate change litigation will have to be different from that in the US and India. But that does not mean that international litigation cannot assist potential plaintiffs in China. The increase in litigation elsewhere can have a positive impact in a number of ways. Political caution aside, inexperience has played a part in slowing courts down.¹⁴⁵ Litigation elsewhere can provide examples of lines of arguments for causation and redressability. Additionally, since China does not use a common law system of *stare decisis*, Chinese courts rarely publish their decisions, leaving barely a trail for future litigants.¹⁴⁶ Examples of litigation from elsewhere can be informative to potential plaintiffs in China so that subsequent plaintiffs do not have to start all over with each litigation. India has particularly good examples of extensive use of PIL.¹⁴⁷ Regardless of the recent increase in environmental litigation in China, the Chinese population is generally resistant toward litigation. Foreign examples can encourage and guide

138 Stern, *supra* note 129 at 71.

139 Li, *supra* note 12 at 148-49; Stern, *supra* note 124 at 64.

140 Stern, *supra* note 129 at 56-57.

141 Stern, *supra* note 129 at 54, 66, 69. See also Xin Sun, *Selective Enforcement of Land Regulations:*

Why Large-Scale Violators Succeed, 74 CHINA J. 66 (2015).

142 Stern, *supra* note 124, at 58.

143 *Id.* at 72.

144 *Id.* at 66.

145 *Id.* at 67.

146 Li, *supra* note 12, at 136.

147 Mate, *supra* note 58.

on how to proceed on transferrable strategies such as finding ways to meet the burden of proof for specific harms caused by a global phenomenon.

In addition, because the Chinese government is a growing power that is conscious of its image, external pressure can lead to greater commitments and top-down regulations.¹⁴⁸ Litigation elsewhere can have a direct and indirect pressure on the Chinese government. The impact can be direct in that it sends a message of a growing issue that must be dealt with. China's particular vulnerability to climate change and its current impacts also risks civil unrest that the government cannot afford, especially if potential plaintiffs see that others around the world have governments that allow for relief through the judiciary. The impact can be indirect in that it persuades foreign governments to push for a stronger international scheme or for China to make greater commitments and enforcement measures. Therefore, litigation can promote pressure both in terms of assisting in bottom-up regulation and encouraging top-down regulation.

CONCLUSION

New research warns that climate change may not happen incrementally, but in a cascade as various tipping points accelerates and triggers others, creating an irreversibly hotter world. Researchers say “[w]e may have already crossed the threshold for a cascade of inter-related tipping points.”¹⁴⁹ Solely relying on voting to change government policy in democratic systems such as the US will not be enough to guarantee that climate change is adequately curbed, especially since the lack of political will is not coming from a general lack of interest in the general population. There must be additional pressure via litigation on governments to increase their commitments. India is an example of where litigation can successfully pressure the government to increase their commitments.

Wherever it is possible, such as the second and third largest emitters (US and India), high-profile and low-profile litigation play an important role in encouraging change. High-profile litigation, even if unsuccessful, raises awareness and galvanizes grassroots movements. In addition, even if it fails in one judiciary, a similar line of reasoning may succeed in another. The wave of climate change litigation began because they inspired potential plaintiffs in other countries and advance with each attempt. Litigation in the US is especially worthwhile because it leaves detailed records that are highly studied around the world. Low-profile litigation places an appropriate burden on polluters and play a role in changing the conversation surrounding climate change. As investors increasingly pay attention, they should push for more rigorous disclosure standards, creating greater transparency that could aid in future litigation.

In China, the largest emitter by volume, litigation is much more controlled. However, there are the beginnings of environmental litigation and public interest litigation that could be a platform for climate change litigation. Litigation around the world can encourage bottom-up regulation and litigation in China by acting

¹⁴⁸ Stern, *supra* note 129, at 55.

¹⁴⁹ Fred Pearce, As Climate Change Worsens, a Cascade of Tipping Points Looms, *YALE ENV. 360* (Dec. 5, 2019), https://e360.yale.edu/features/as-climate-changes-worsens-a-cascade-of-tipping-points-looms_

as valuable examples, especially since records and litigation in China is scarce. In addition, worldwide litigation plays a part in pressuring the international community to pay attention to the issue and pressure each other to make greater commitments. Since China is an emerging world power, its leadership is increasingly mindful of its international image. Both bottom-up and top-down pressure on the Chinese government can assist in China making stronger commitments and holding them to such commitments.

Therefore, litigation should not be underestimated or rejected as a method of encouraging policy change, especially on the issue of climate change. In most circumstances, it is understandable that a cautious judiciary avoids ruling on the issue that skirt the boundaries of their power. That scientists call it a "climate emergency" is not just a political rhetoric, but a scientific fact.¹⁵⁰ However, even in a system with a cautious judiciary such as the US, many judges, such as Judge Staton in *Juliana*, are understanding and accepting that the situation is dire enough that inaction could possibly violate the constitutional rights. To give up hope when the judiciary may change its mind would be yet another lost opportunity to walk the country and world back from the brink. If the theory of cascading tipping points is true, in the moment that the effects begin to compound and the political branches are forced to take unprompted action, it would likely be too late.

150 *Id.*