

Judicial activism vs. climate crisis

Implications of three climate judgements

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Lakshmamma of Deccan Development Society, south India - low energy use millet farming that is climate friendly @ Ashish Kothari

In the last few months, three significant judgements by courts of law, in three different continents, have created excitement amongst all those concerned about the growing climate crisis. Could they portend a growing wave of judicial action that just about might push governments and corporations into taking the steps desperately needed to avert the collapse of the earth's life-support systems?

In August 2023, on a petition filed by 16 young Americans (from 2 to 18 years old), the Montana First Judicial District Court ruled that "plaintiffs have a fundamental constitutional right to a clean and healthful environment which includes climate as part of the environmental life-support system." It directed the Montana State to undo legal provisions it had enacted, that perpetuated fossil fuel-based energy production.

In early April 2024, on a complaint filed by four women and a Swiss association of elderly women, the European Court of Human Rights observed that Article 8 of the European Convention on Human Rights (ECHR) "encompasses a right for

individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life.” It did not direct any specific action but expected the Swiss Confederation to come up with measures on climate that brought it within compliance of the ECHR, linking this to actions that available science was saying were needed.

Within three days of this, the Indian Supreme Court pronounced a verdict on a case arguing for protection of the habitat of the endangered bird, Great Indian bustard, from the impacts of mega-solar and wind projects in western India. In trying to balance the need for wildlife protection with the need for renewable energy (particularly to stave off expansion of coal mining and thermal power), it held that the Constitutional rights to life and equality before the law, included protection from the impacts of climate change. It pointed particularly to the disproportionate impacts of the climate crisis on the poor: “The inability of underserved communities to adapt to climate change or cope with its effects violates the right to life as well as the right to equality. This is better understood with the help of an example. If climate change and environmental degradation lead to acute food and water shortages in a particular area, poorer communities will suffer more than richer ones. The right to equality would undoubtedly be impacted in each of these instances.”

Three court orders in three different contexts, all pointing to one conclusion: that a stable climate, or to be shielded against the disruptive impacts of climate change, is a human right. One says this in the context of youth and children, another in the context of the elderly, and the third in the context of poorer and vulnerable sections of society in general. The Indian court’s order also brings in the imperative of another marginalized section, that of wildlife, though it does not go as far as to talk about its rights.

The judgements’ potential

These judgements have significant potential for generating actions to stave off catastrophic climate change. This is particularly so for the first two, both because they respond directly to citizen complaints regarding climate, and because they ask for action by societies from where the greatest historical (and continuing) climate change-causing emissions have taken place. In the case of Montana, the court has held that legal measures the government had brought in, which prohibited the analysis of greenhouse gases by fossil fuel energy producers in Montana, were unconstitutional and violative of “the Youth Plaintiff’s right to a clean and healthful environment”. It struck down these legal provisions. In the case of the complaint by elderly Swiss women, the European Court pointed out that the Swiss have not yet met their obligations to reduce greenhouse gases to levels required by the 2015 Paris Agreement. By implication, it directed measures that would bring Switzerland into compliance.

The Indian court's judgement is somewhat different, because its directions have more to do with conserving the Great Indian bustard and its habitat, while also enabling Renewable Energy (RE) projects to come up in/around this habitat. There is the implication that the Indian state must continue its RE programme as a part of its obligations towards tackling climate change, but no general or specific measures are listed to protect citizens' rights to a stable climate, nor any directions made to withdraw any climate-regressive policy directions the government may have taken. Nevertheless, recognition of climate as a fundamental right, combined with the observations about the importance of decentralized RE for India's poor, has the potential for further progressive actions.

In all three, the recognition of vulnerability amongst some sections of society, to the impacts of climate change, also has major potential to get governments to take up policy and programmatic actions for such sections. This could include urgent action for adapting to the health (physical and mental), livelihood, and material impacts of climate change. The link made by the courts between environmental injustice and inequality or vulnerability is itself of significance.

Pitfalls and flaws

However significant their potential is, these judgements unfortunately are also flawed or weak on many counts, which could severely limit this potential, and cause other problems that contradict their own assertion of human rights and equality.

One of the biggest flaws is that in leaving remedial actions to the state, without specifying conditions, the courts are enabling governmental and corporate actions that may themselves violate human rights and environmental standards. For instance, a significant push in the global North is to shift from fossil fuel to electric vehicles (EVs). This may reduce GHGs and other impacts of fossil fuel-dependent transportation, but it entails destructive mining for elements such as lithium, [severe human rights abuses](#), as also possible dumping of toxic wastes like used batteries ([unless very substantially recycled](#) within the north), both in the global South. Or it could entail major expansion of biofuels, at the cost of farmers and pastoralists and forest-dwelling communities whose lands get taken over. This phenomenon of 'green land-grabbing' is now widespread, in which 'finance-rich, resource-poor' countries or sections are taking over lands, forests, and waters of 'resource-rich, finance-poor' countries or sections. Without challenging their own consumption patterns, and the production-trade regimes these are dependent on, the world's rich and powerful are simply [transferring the costs of their attempt](#) to reduce ecological and social footprints, to marginalized peoples and ecosystems. This may only intensify under the pressure of court action requiring North America, Europe, and other northern nations to comply with their climate obligations.

Such consequences are not confined to what the North does in or to the South. It is also a phenomenon of 'internal' colonization by the rich and powerful within a nation. The Indian Supreme Court's judgement, for instance, implied the need to promote renewable energy over coal-based thermal power, but it did not ask any

questions about [the impacts of this shift](#). Mega-solar and wind generation parks, which do not require any environmental impact assessment and clearance process in India, are already causing displacement and dispossession of farmers and pastoralists, as also impacts on wildlife. The Indian Ministry of New and Renewable Energy has earmarked 10,000 sq km in seven states for such parks; this includes tens of thousands of acres in ecologically and culturally sensitive areas like Ladakh, Kachchh, and coastal stretches. They also do not necessarily solve the problem of unequal access to power, since such mega-projects only feed into the main grid from where power distribution would be as skewed as it is for fossil fuel energy.

Courts cannot go into the specifics of actions to be taken; as the European Court observed, tackling climate change is a complex matter and is the subject matter of concerned governments. But they can specify that any such actions should consider a range of alternatives, that these actions must not, in turn, cause ecological and human rights violations, that they must be taken with full democratic participation of impacted citizens, and that there should be an exploration of not only production and supply but also power demand and other consumption aspects relating to climate in all its dimensions. Issues of luxury demand, and gross inequities in the distribution of energy including electricity, are not mentioned by any of the courts (with the Indian Supreme Court only indirectly hinting at them). Without altering the way that society looks at energy (especially electricity), any gains made through technological changes could be easily wiped out by the rise in demand. This was one of the conclusions reached in a study on [EVs replacing fossil fuel vehicles](#) in Europe.

There is also the issue of how vulnerable sections of the population will be further marginalised in a mechanical transition relating to climate change. Millions of people will be displaced from fossil fuel-based industries and processes, and farmers may find themselves at a disadvantage if environmental regulations are suddenly placed on them. This explains the widespread antipathy to the climate narrative, for instance [amongst European farmers](#), and in trade unions or worker groups. Very few countries are working on a just transition, which retrains, empowers, and helps such people to get new, dignified livelihoods. This is also an issue of inequality, which the three court judgements have not dwelt on.

There are alternatives

None of the issues mentioned above are intractable; there are existing and potential alternative approaches that could help tackle the climate crisis urgently, without making nature and the poor scapegoats. These include technological ones like decentralised renewable energy (India, for instance, has a reported 600 GW rooftop solar potential, more than its total stated target for RE), but also socio-political ones like demand regulation and redistribution, paradigm shifts in urban and transportation planning, support to small-holder sustainable agriculture, and others. They also include citizens' efforts at proposing detailed just transition pathways, such as South Africa [Climate Justice Charter](#) produced by trade unions, feminists, ecological groups, and youth. A spate of legal and policy actions

(including court pronouncements) on the rights of nature could also contribute, for instance by ensuring that the shift to renewable energy or other climate-friendly actions does not cause damage to sensitive wildlife populations and ecosystems.

Such alternative approaches will clearly not come from within governments alone, nor can it be left to courts to direct action on them. Those taking such matters to the courts, also need to consider the unintended consequences of what they are demanding. The youth of Montana, the elderly women of Switzerland, and wildlife conservationists in India, were fully justified in taking such matters to courts when governments were not hearing them. Their actions have given us all some more manoeuvring space. But they (or other citizens) also need to go beyond and seek further directions or appropriate actions that help avoid inadvertent violations of human and ecological rights by investing in genuine alternatives.

The positive potential of these judgments will only be met with considerable additional actions by governments, civil society, businesses and others. Without this, their potential negative consequences could far outweigh the benefits. Both nature, and vulnerable sections of human societies, will then continue to pay the cost of the rich becoming, or pretending to become, more climate-friendly.

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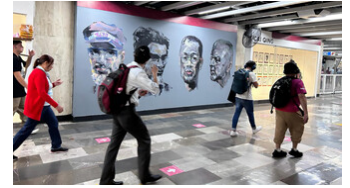
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