Climate Change Litigation: A functional comparison (Germany & India)

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ABSTRACT

That anthropogenic activity is the leading cause of Climate Change (hereinafter CC) is now a collective truism of a global past, present and future. What remains to be explored though, is if this scientific fact, finds acknowledgement firstly, then adoption through law, subsequent enforceability and finally, resulting outcomes in corresponding jurisdictions. Recent cases indicate that effective CC-action, i.e., mitigation and adaptation, is not only a political but also a legal issue. This is at the heart of CC-litigation.

This article compares the legalities of two cases - from Germany and India each, and is divided into three parts, the first (I) of which outlines the research methodology of comparative law through lenses of functionalism after examining the global context(s) of cases. Part II contextualises this approach to case objects and compares them against a set of parameters. Vastly different outcomes and national contexts limit the success of such a comparison. Notwithstanding this predicament, part III adds to the growing body of literature on the subject to inform advocacy and academia.

Key words: climate change litigation, functional comparison, case studies, comparative environmental law

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Introduction

Context

Six years past the largely unanimous ratification of the Paris Agreement, emissions gap reports indicate disproportionate and inadequate CC-action by the parties [1], [2]. Against the background of continued deficits in *legislative and executive* action towards CC mitigation/adaptation, the notion that *judiciaries* could play an important role in CC-litigation is rapidly gaining attention [3], [4].

The success of *Urgenda* case at the Hague District Court (2015), subsequently upheld by the Supreme Court of Netherlands (2019) led to similar litigations in various jurisdictions [5], [6]. The continually updated Climate Change Laws of the World (CCLW) database provides empirical information from over 40 countries and documents 2096 cases presently (accessed Sept. 22, 2022) [7]. The *Global trends in climate change litigation: 2021 snapshot* substantiates such a notion and identifies 37 *'systemic mitigation'* instances *'... challenging government inaction or lack of ambition in climate goals and commitments...'*, also termed as *'Urgenda style'* cases [8, p. 5]. Political actions are known to focus on short-term goals with electoral motivations. The role of judiciaries in CC-litigation then is critical since constitutions can prevent undesirable long-term developments, especially those detrimental to CC-action [9].

This comparative research analyses CC-litigation cases in Germany & India. These cases, are/were inter alia, filed in their corresponding jurisdictions with the support of *Our Children's Trust* – a U.S. based public interest law firm, and these are [10] :

- Case A – BVerfG, *Order of the First Senate of 24 March 2021 - 1 BvR 2656/18* [11]
- Case B – *Ridhima Pandey v. Union of India & Ors. (2019) - Original Application No. 187/2017* [12]

Germany and India are two distinct jurisdictions acknowledged as federal democratic republics with a bicameral form of legislature. Both adopted constitutional democracy as the preferred system of governance in the 1950s and more recently since the 1990s, i.e., reunification in Germany and economic liberalisation in India, the two have emerged as strong bilateral partners based on common values of *Democracy* and *Rule of Law* [13]. In addition to economic and strategic partnership, developmental cooperation between the two places special focus on environmental concerns (viz. energy, waste management, sanitation etc.) [14], [15]. They are however

not bound by common legislation or convention/treaty unlike EU nation states and therefore qualify as a Type I comparison (*Junker*) [16, Ch. 2]. As we find below, the court structures too are different.

Research method

This article adopts the methodological framework of *'functional comparison'*, as proposed by doyens of Comparative Law - *Zweigert & Kötz* and discussed at length by *Prof. Dr. Kirk Junker* in the book, *Environmental Law Across Cultures* [17], [18]. *Functionalism* investigates how various legal systems solve similar problems through different means. The strength and weakness of this approach lies in the presumption that sufficient parallels exist between legal systems to an extent that, similar functions may be compared [16, Ch. 2]. Normative comparisons (Table 1 below) emerge from the evaluation of case summaries.

Junker argues, these are important to *'establish the perspective from which one may approach either culture'*. *Zweigert & Kötz* acknowledge these *'presumptions of similarity* (*sic.* and differences)':

'The proposition [*sic.* to perform a functional comparison of CC-litigation cases in Germany & India in this instance] *rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems* [*sic.* insufficient CC-action in this instance] *and solves these problems by quite different means though very often with similar results.'* [16, Ch. 2].

Within the broader framework of environmental law, this article analyses how judiciaries of two categorically similar, yet also demographically and geographically different COP-21 party nations redress CC-litigation. In doing so, this article contributes to the methodologies of *Comparative Environmental Law* in addition to the specificities of the cases. Such a selection is justified by the fact that the two nations under comparison – Germany & India – are respectively 4th & 7th largest economies and 7th & 3rd largest CO_2 emitters globally [13], [19]. Simultaneously varying pressures and levels of development (across various parameters such as HDI, PPP, per capita income etc.) are important factors among others which are contingent, multiple, and fluid.

Parameters	**Details**	**BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18**	**Ridhima Pandey v. Union of India & Ors. (2019) - Original Application No. 187/2017**	**Remarks**
Legal actors	Petitioner(s)	Multiple plaintiffs (diverse backgrounds)	Ridhima Pandey - Nine-year old	Member(s) of respective civil societies
	No of Petitioner(s)	13	1	Singular/Plural
	Defendant	The Federal Republic of Germany	…the national government (of India)	The *State*
Adjudicating body	Type of Court	Federal Constitutional Court	The National Green Tribunal of India	Different levels of adjudication
Sources of Law	Constitutions	Basic Law for the Federal Republic of Germany or *Grundgesetz für die Bundesrepublik Deutschland*	The Constitution of India	
	Statutes	Federal Climate Protection Act or *Bundesklimaschutzgesetz*	1. The National Green Tribunal Act, 2010 2. The Environment Protection Act, 1986	Different nature of statutes
	Regulations		Environment Impact Assessment, 2006	
Central issue(s)		…insufficient CC-mitigation efforts	...oblige greater action to mitigate climate change	Similar in principle
		1.) Disproportionate emissions reduction burden caused by insufficient planning (beyond 2031), resulting in violation of fundamental freedom rights	a variety of measures, including but not limited to 1.) climate change in the issues considered by environmental impact assessments 2.) preparation of a national greenhouse gas emissions inventory 3.) preparation of a national carbon budget	Different in nature
Nature of outcome		Partially successful	Subjudice	Different

Table 1: praesumptio similitudinis - Presumption of similarity (sic. and difference)

Based on the observed parallel, i.e., two *Urgenda style* cases, we hypothesize that both judiciaries may serve a common function – i.e., of *'Protection of the Environment'*. We begin by laying down and juxtaposing essentials of the common function, i.e., summaries of judgements and judicial structures of the two legal systems. This requires the application of *Comparativism* to the sources of law, which are classified as Constitutions (relevant articles), Statutes and Regulations. A system of comparison necessitates a set of parameters against which we evaluate the case orders. These are:

1. The *Right* to effective CC-protection - Constitutional provisions and *State's* standard of protection
2. Violation of *Human Rights* in the future and intergenerational justice
3. CC-litigation and the doctrine of *Separation of Powers*
4. *Locus Standi* - Legal standing to file a case

Lastly, we analyse why both systems meet the same function in different ways and summarise our findings.

Juxtaposing the essentials of comparison

Summaries of judgements and legal backgrounds

The Federal Constitutional Court of Germany or *Bundesverfassungsgericht* (hereinafter BVerfG) ordered that the constitutional complaints (made by 13 plaintiffs) are partially successful [11, Para. 142]. The BVerfG held that the *State* did not violate its constitutional duty to protect the complainants from the risks of progressing CC, but fundamental rights nevertheless stood violated [10 Para. 142]. This would be the case because the Federal Climate Protection Act or the *Bundes-Klimaschutzgesetz* (hereinafter KSG) [20] permitted a level of emissions that was likely to force a substantial emissions reduction burden in the future – *"In this respect, § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 would violate the fundamental rights of the complainants"* [11, Paras. 142, 182]. These provisions of the KSG were declared unconstitutional and the BVerfG has imposed an obligation on the legislature to adequately regulate climate protection provisions for the period beyond 2030 [11, Paras. 117, 120, 142f., 183, 184ff.].

In March 2017, 9-year-old Ridhima Pandey, through a 52-page petition for a national Carbon auditing system, moved the *National Green Tribunal* (hereinafter *NGT* or *Tribunal*), alleging inaction by the *Government/Union of India* (hereinafter *GoI* or *UoI*) towards CC-adaptation and mitigation. It made 9 specific appeals for the formulation, implementation, and monitoring of such a system, citing 29 attached annexures [21]. The *Tribunal*, in January 2019 delivered a 2-page dismissal, summarised in 3 points. The first reiterates 3 of the 9 appeals (tiered towards atmospheric CO_2 to below 350 ppm and 1°C average global temperature) as an aspirational global target. Secondly, it observed, that concerned authorities *"have to"* perform *Impact Assessment* (hereinafter IA) under the statutory law, *"which is not under challenge"* and asserted that CC *"is certainly a matter covered"* through the IA process. Thirdly, the bench deemed it unnecessary to *"issue any direction"* under sections 14 and 15 of the NGT Act, 2010 (hereinafter NGT, 2010) and found *"no reason to presume"* that international protocols (including the Paris Agreement, 2015) were not reflected in policies of the GoI or considered in the issuance of Environmental Clearances (hereinafter EC) [12].

Sources of Law

In India's environmental governance system, ECs are granted upon completion of the IA process, outlined by the Environment Impact Assessment Notification, 2006 (hereinafter EIA, 2006) [22]. It is noteworthy that this procedural regulation is issued through the MoEFCC (an executive body) as a *'notification'* in exercise of powers conferred by The Environment Protection Act (hereinafter EPA, 1986) & Rules, 1986 [23] [24]. Saldanha et. al observe, the nature of this legal instrument excludes it from discussions in the legislature [25, p. 14].

This brings the discussion to statutes. The EPA, 1986 is an *'umbrella'* legislation with the stated purpose of *'protection and improvement of the environment, prevention of hazards to human beings, other living creatures, plants and property'* [26] [23, p. 2] It provides the organisational framework of various central, and state regulatory authorities established through previous legislations [such as the Water and Air Act(s)]. The second statute, i.e., the NGT, 2010, spells administrative and jurisdictional repercussions to the case [27]. The stated purpose of this legislation is *'...to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection...'* [27, p. 1]. Sections 14 and 15, provisions under which the instant application is filed, outline a.) the Tribunal's jurisdiction i.e., *'...all civil cases where a substantial question relating to environment... is involved'* and *'...such question arises out of the implementation of the enactments'* [viz: The Water, Water Cess, Forest, Air, EP, Public Liability Insurance, Biological Diversity Act(s)] and provides b.) *'relief and compensation, restitution of property, and restitution of environment'* respectively [under Sect. 14(1), Schedule 1 and, Sect. 15(1) NGT, 2010] [21]. Lastly, provisions of Art. 253 of the Constitution of India (hereinafter CoI) grant the Parliament legislative powers (over the whole or any part of the terri-

tory of India) giving effect to India's participation in international agreements Art. 253 [28, Pt. XI]. In this instance, the EPA, 1986 was passed in light of the decisions taken at the UNCHE, 1972 held in Stockholm and India's participation therein [23, p. 2].

The BVerfG applies numerous Articles (and through interpretation, the rights they guarantee) of the *Basic Law* for the Federal Republic of Germany or *Grundgesetz für die Bundesrepublik Deutschland* (hereinafter GG) in its' judgement [29]. At the heart of the verdict is the judicial interpretation of a.) *Right to life* and b.) the *Right to property* [under Art. 2 (2), Art. 20a and, Art. 14 (1) GG] [23].

For a better understanding of the order of the BVerfG, it is important to understand the statutory law in question. Specific targets regarding climate were set out by §3(1) KSG. §4(1) KSG in conjunction with Annex 2 outlines details of the reduction quota for various sectors until the year 2030 [20], [11, Para. 4]. The legislator gave statutory force to the climate targets previously defined in 2016 BMU Climate Action Plan 2050 [30] and the 2019 BMU Climate Action Programme 2030. These programs set the long-term goal of cutting emissions by between 80% and 95% by 2050. The legislation however did not contain provisions for the year 2040 [under §3(1) KSG and §4(1) sentence 4 KSG]. It stated that for the period beyond 2031, reduction targets shall be determined by *"...means of a statutory instrument enacted pursuant to §3(6) ..."* [under §4(1) sentence 5 KSG]. Furthermore, §4(1) sentence 7 KSG stated that no subjective rights and actionable legal positions are to be established by the Act [20], [11, Para. 5].

Judicial structures and court systems

The German judicial system can be understood through a vertical and horizontal classification of its courts. The vertical classification refers to three plus one levels of adjudication starting at the *Local* level, followed by intermediate courts at the *Regional* level and thirdly, the *Higher Regional* level courts [31]. Over and above these, the highest level consists of the Federal Court(s) of Justice. Horizontal classification consists of three branches of jurisdiction and their further subdivisions [31]. These are a.) Ordinary jurisdiction (i.e., civil and criminal law), b.) Specialised jurisdiction (viz., Administration, Labour Fiscal/Finance and Social law) and c.) Constitutional jurisdiction (consisting of constitutional courts of the states or *Länder* and the Federal Constitutional Court) [32]. While Federal Court(s) (of Justice) adjudicate on matters of respective jurisdictions, Federal Constitutional Court(s) may be referred to, specifically if a constitutional issue is raised within a case, such as this one. Furthermore, the Federal Constitutional Court or the BVerfG, as the highest court of the land affords powers to strike down Acts of the Parliament, also observed in this instance.

According to the Federal Constitutional Court Act or *Bundesverfassungsgerichtsgesetz* (hereinafter BVerfGG), firstly all legal remedies must be exhausted [under §90(2) BVerfGG] by the plaintiff, unless it directly opposes a statutory law [§93(3) BVerfGG]. Jurisdiction under Art. 100(1) GG is also conceivable in case a lower court refers a law it considers unconstitutional, directly to the Constitutional Court [29], [33], [34].

Therefore, cases usually do not begin at the (Federal) Constitutional Court. In this regard, the Administrative Court Code or *Verwaltungsgerichtsordnung* (hereinafter VwGO) states that cases usually start at the Administrative Court (§45 VwGO). However, in certain special cases the Higher Administrative Court has initial jurisdiction (§47f. VwGO) and in a few exceptional cases, the Federal Administrative High Court also has first-instance jurisdiction (§50 VwGO) [33]. The jurisdiction of the BVerfG over climate lawsuits regularly arises from Art. 93(1) No.4a. GG [29].

The court structure in India has a three-tier system – the Supreme Court (SC) at the *Apex* of the judiciary, followed by 25 High Courts (HCs) (some exercising jurisdiction over multiple *states* and *union territories* that form the *UoI*) and thirdly, subordinate, or lower courts at metropolitan/district level, which are further bifurcated into civil and criminal specializations [35]. The *Green Tribunal* is a lower adjudicating body with trial and appellate jurisdiction, dedicated to the effective and expeditious disposal of civil cases related to the environment, forests, biodiversity, air, and water in India. The bench comprises of judicial and expert members providing multidisciplinary resolution. *Tribunals*, including the NGT, are specialised courts, orders of which may be subject to review directly by the SC. The *Green Tribunal* functions through the principal bench in New Delhi and circuit benches in Chennai, Bhopal, Pune, and Kolkata [36].

System of comparison

The Right to effective CC-protection - Constitutional provisions and State's standard of protection

Between 1970 – 2017, 88 countries enshrined the *'Right to healthy Environment'* and an additional 62 provided protection (to the environment), constitutionally [37, Ch. 1.1.1]. While we find that constitutional provisions offer qualitative directives and values, they are however, largely non-enforceable and open to subjective interpretation.

Although bound by the duty to protect the *Right to* a.) *Life* and b.) *Property*, BVerfG did not find the German *State* in violation, given the provisions and measures of the KSG [11, Para. 167]. The provisions of Art. 20a GG establishes a duty towards climate action and is justiciable, however, it would not entail

subjective rights, thus failing to establish standing to lodge a constitutional complaint [11, Para. 112]. The Court remained undecided, if and to what extent the *"fundamental right to an ecological minimum standard of living"*, potentially enshrined in Art. 1(1) in conjunction with Art. 20(1) GG, is protected by the *Basic Law* but stated that it would already be protected as a requirement for Art. 2(2) sentence 1 GG regarding physical and mental well-being and Art. 14(1) GG which protects a person's property [11, Para. 114]. Furthermore, the court reasoned that even if such a right existed, the legislator would not have violated it by ratifying the Paris Agreement and enacting the KSG. These would be enough to fulfil the state's duty to *"at least prevent catastrophic conditions from occurring"* [11, Para. 115].

The Court found provisions of the KSG, which offloaded substantial action legally required by Art. 20a GG to the period beyond 2030, to be in violation of the constitution. §3(1) sentence 2 KSG and §4(1) KSG in conjunction with Annex 2 would allow overly generous amounts of CO2 emissions, amounting to a violation of the comprehensively protected freedom of the *Basic Law* [11, Paras. 117, 120, 142f., 184]. Since all forms of freedom potentially involve the emission of greenhouse gases (hereinafter GHG), increased and accelerated mitigation efforts would be necessary beyond 2030 if Germany is to attain Carbon neutrality by 2050, thus unreasonably infringing upon the complainant's constitutional rights [11, Paras. 118, 120ff., 182]. In effect, the conservative emissions targets would have an irreversible impact on CC-mitigation required post-2030 [11, Para. 146].

'Protection and improvement of the environment' were adopted and acknowledged as a shared responsibility of the Indian *State & Citizens* through the 42nd constitutional amendment (1977). Art. 51A(g) CoI enlists it under *Fundamental duties* (of Citizens) and Art. 48A CoI. under *Directive Principles of State Policy* [28]. However, the deficiency of CC-specific black letter law presents a substantive challenge in the instant case, to which the petitioner submits, *'... the definition of the term "Environment"* (under Sect. 2(a) EPA, 1986) *would include climate within its scope and ambit…'*. Furthermore, Sect. 3(1) EPA, 1986 empowers the *GoI* to take measures for the protection/improvement of the *'quality of environment'*, in addition to the prevention, control and abatement of environmental pollution [21], [23]. Pandey's application petitions for a *'quantifiable targets'* or a *'Carbon budget'* and a *'climate recovery plan'*. [21].

Violation of Human Rights in the future and intergenerational justice

The BVerfG held that protection duties of the *State* must also be oriented towards the future and that duty to protect life and health would also apply to future generations. This is particularly important when vastly irreversible processes, such as GHG emissions, are in question. However, protection rights would be objective and cannot be brought forward by a plaintiff [11, Para. 146]. For a complaint, it would be sufficient grounds for a violation of fundamental freedom rights, if, *"...the provisions governing the amount of greenhouse gas emissions allowed until 2030 ..."* begin posing significant risks throughout its implementation i.e., within the complainant's lifetime. The contention that potential harm cannot be considered a violation, was rejected by the BVerfG [11, Para. 108]. Since the impact of *"anthropogenic greenhouse gas emissions is largely irreversible"*, these provisions would have an *"advance interference-like effect"* on freedom rights [11, Paras. 184, 187]. In a first for German jurisprudence, the court introduced the concept of intergenerational justice - *"…the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations…"* [11, Para. 183].

This parameter is interpreted through the *Public Trust Doctrine* (hereinafter PTD) in India. *Tribunal's* order, however, maintains reticence towards intertemporal and intergenerational aspects of CC. The petition submits that the Indian *State* is a trustee of natural resources and thus bound by the fiduciary duty to mitigate CC under the PTD, for current and future generations. In doing so, the petitioner links the intergenerational equity principle and the PTD [21]. Though instantly not exercised, rich jurisprudence on PTD in India has emerged through numerous landmark judgments [38], [39] and is seen to *'... provide(s) for a high degree of judicial scrutiny on any action of the Government…'* concerning natural resources meant for public use [40, p. 50].

CC-litigation and the doctrine of Separation of Powers

It is worth noting, that *'separation of powers'*, in the German case refers to the distinction between powers of the *judiciary* and *legislature*, while the same refers to the *judiciary* and *executive* in the Indian scenario.

The constitutional dimension lies in the claim, that provisions of the KSG infringe upon fundamental freedom rights and are hence unconstitutional. The BVerfG concluded that the scope of its' review would be limited to determining the fulfilment of constitutional protection duties by the *State*. Protection duties are subject to a wide interpretation and require a balance of different legal interests of the society [11, Para. 152]. The legislator would have a *"...significant decision-making leeway in fulfilling its duty of protection arising from fundamental rights…"* and it would be their task to implement measures to fulfil this duty [11, Para. 160 ff.]. The court stressed that Art. 20a GG sets a constitutional limit to the leeway and hence, within the scope of judicial review. This is

particularly important since long-term goals stand to be disadvantaged in the democratic political process and future generations are typically not a part of the decision-making process [11, Para. 206 ff.].

Two documents – the National Action Plan on Climate Change (NAPCC, 2008) [41] and the Intended Nationally Determined Contributions (INDCs, 2015) [42], albeit recommendatory and non-enforceable, are central to the Climate law framework in India. Tribunal's jurisdiction over CC is highlighted in two cases which addressed non-implementation of NAPCC. In the first, much like the *Pandey* case, it was argued that CC is a subject of *international* conventions and *GoI's* obligation towards CC mitigation/adaptation is beyond the purview of the 7 statutes, thus beyond the *Tribunal's* jurisdiction. The court set a precedent and held, that *national* policies concerning CC, including NAPCC 2008, were within the *Tribunal's* ambit of scrutiny [43]. The second case was dismissed upon submission of a state-APCC (SAPCC) by the state Government [44]. In acknowledging these jurisdictional limits, the *Tribunal* nevertheless brought cases under judicial spotlight, thus indirectly affecting expeditious policy formulation without overstepping its powers [45], [46]. On other occasions, as in the *HFC-23* case, *'...the NGT has exercised greater caution with policy decisions of the government…'* [47], [48]. At the next and highest level of adjudication, the SC, as the *designated guardian* of fundamental rights, affords the full scope of a constitutional review. Chaturvedi enumerates the ample constitutional provisions that uphold the doctrine of *Separation of Powers* [49]. Art. 50 CoI mandates a separation of the *judiciary* from the *executive*. Art. 13 CoI grants the *judiciary* powers to test every *legislative* action for violations of fundamental rights. Furthermore, the SC can redress the violation of fundamental rights directly under Art. 32 CoI and Art. 142 CoI grants powers to pass order(s)/decree(s) necessary for doing complete justice in any cause or matter [28].

Locus Standi - Legal standing to file a case

The BVerfG found international complainants (from Bangladesh & Nepal) fulfilling the requirements for legal standing since Germany may have a duty to protect fundamental rights (enshrined in the GG) of foreigners living abroad as well. However, the duty to protect would differ for the people residing in Germany since the *State* does not hold jurisdiction to implement corresponding protective measures [11, Para. 101]. The BVerfG found environmental associations lacking the required legal standing to file a constitutional complaint since their constitutional rights stand unaffected [11, Para. 136]. The court also added that the complainant doesn't necessarily need to be directly affected, and it is sufficient grounds for a violation even when a large group of people are affected at the same time [11, Para. 110].

Chaturvedi observes, the *Tribunal* does not enjoy the full scope of *Locus Standi* under *Public Interest Litigation* (PIL) unlike constitutional courts, i.e. The SC and 25 HCs [49]. Sect. 16 NGT, 2010 outlines the scope of its *standi* and enlists government orders against which *'Any person aggrieved'* may file an appeal [27]. The *Tribunal* has been credited with providing *'...swift, affordable, public access through the widest possible interpretation of who is an "aggrieved" party…'* [50, p. 2]. *Pandey's* legal standing as a representative, *'... of a class that amongst all Indians is most vulnerable to changes in climate in India yet are not part of the decision-making process…'* stands undisputed as evidenced by several case precedents [49]. In *Samir Mehta v. UoI* the court held, *'An "aggrieved person" is to be given a liberal interpretation …'* [51] and in *Samata v. UoI*, it extended the scope to include *'... not just any person but also an association of persons likely to be affected…'* [52].

Results

The *'favourable'* order of the BVerfG yielded *'more effective climate regulation'*, as opposed to *'one that undermines climate regulation or is likely to result in greater greenhouse gas emissions'* observed in the Indian case [8] Box 1.3. An inquiry then, of *why two judicial systems meet the same function in different ways?* is rooted in the presumption that *the two do*. As flagged at the outset, in this instance the two *in fact did not*.

Notwithstanding, the immediate challenge of such an analysis, firstly warrants a common and functional understanding of the term *CC-litigation* and through it, CC itself. However, Setzer & Vanhala warn, *'There are as many understandings of what counts as CC-litigation as there are authors writing about the phenomenon…'* [53]. Fisher terms this a *"scholarly obsession"* and Pattajoshi posits, it is *'next to impossible to formulate a checklist for classification of cases…'* (*sic.* as CC-litigation) [54], [48]. However, if judicial dispensation towards CC (through it associated action, mitigation, adaptation etc.) is under exploration, it follows that a legal understanding of CC must be relied upon. CC and its substance find meaning and acknowledgement in a legal system through law. The BVerfG, grounded in the *Basic Law*, examines the constitutionality of the provisions of KSG for such legal understanding. Inversely, India lacks a substantive, comprehensive, binding CC-legislation but there are policies addressing distinct aspects of it (*inter alia* NAPCC and INDCs). In the absence of such legislation, the *Tribunal*, empowered to hear *only* civil cases within the jurisdiction of 7 statutes, focused on mainstream *'environmental'* issues (such as the impacts of deforestation) and relegated *Pandey's* arguments about CC, leading to dismissal [55, p. 17]. Incidentally, *The Climate Change Bill, 2015* was proposed before the lower house i.e., *Lok Sabha* of the Indian Parliament as a private member's bill,

prior to the ratification of the Paris Agreement [56].

One must also consider the varying timelines of the two cases as a second factor. Although climate awareness is increasing globally, reflexivity towards CC concerns varies across jurisdictions. Accordingly, resulting enactment or absence of CC legislation is contingent upon factors such as economic, developmental, and demographic pressures, socio-political backgrounds, environmental antecedents, and politics of CC among others. Germany and India vary vastly on these counts. CC awareness to the extent of warranting a legislation is a recent phenomenon in Germany as well. The KSG, enacted in Dec 2019, was challenged in Feb 2020. Considering the increasing frequency of climate related disasters (viz. Assam floods, Uttarakhand forest fires etc.) in India, it is foreseeable that CC concerns may take centre stage in political discourse [57] [58].

Thirdly, differences between civil law and common law systems also emerge. In civil law countries, *"one would not expect authoritative interpretations of legislation from their judges. When they* [*sic.* citizens] *seek interpretation, they seek it from scholars in the field"* [16, Ch. 2.2.6]. Thus, it could seem surprising that a civil law country is one of the first with a far-reaching successful case of CC-litigation. This decision was also a novelty in Germany. Calliess, for example speaks of an *"environmental constitutional turnaround"* [59]. *Junker* also warns of biases – in that, civilists expect a general and comprehensive law but common law systems often do not work thusly [16, Ch. 2.2.4].

Fourthly, the function and level of the adjudicating body within its' legal system is pertinent. *Tribunals* differ from mainstream courts (such as the SC in India or the BVerfG in Germany), in that, they *'cannot perform the functions inherently vested in the Higher judiciary'* and *'have limited powers of, not substituting the mainstream judiciary but supplementing its work'* [60], [61]. Evidently, the NGT is not bound by the Code of Civil Procedure, 1908 and trials do not include constitutional reviews. Pattajoshi notes, the *Tribunal*, a *'creature of statute'*, does not derive its' powers from the constitution [48, p. 11]. This is primarily because its formulation/composition is based on the foundational statute – the NGT, 2010 and secondarily, due to its' jurisdiction being limited to the 7 *'environmental'* statutes.

Cumulatively, these factors limit the success of this comparison. Despite this predicament, we believe the analysis of a partially successful and an unsuccessful climate lawsuit from the Global North & South respectively, offers critical research avenues for academia and advocacy across jurisdictions.

The BVerfG is viewed as having played a rather active role considering its formerly settled case law and seems to acknowledge the dilemma of *Climate Chance*, i.e., that democratic processes tend to focus on short-term goals, but the impact of emissions permitted by laws currently, are irreversible. The Court thus applies the *Precautionary Principle* through the *Basic Law* [11, Paras. 108, 206]. By combining fundamental rights protected by the *Basic Law* with Art. 20a GG, the BVerfG created a constitutional right previously not stated explicitly in the GG [11, Paras. 117, 120, 142f., 184]. The Court observed, Art. 20a GG obliges the legislature to not only protect the climate and strive for neutrality but *"also concerns how environmental burdens are spread out between different generations"*. In this landmark judgement, the Court held *"the fundamental rights - as intertemporal guarantees of freedom - afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future"* [11, Para. 183]. With regards to CC-mitigation, critics argue that the ruling did not go far enough, considering adaptation measures alone cannot prevent the infringement of freedom caused by the impacts of CC (viz., water and food security, wars, migration etc.) in different parts of the world [62]. Calliess however criticizes the court for applying Art. 2 (1) GG as a right of defence in a roundabout way, stating it would have been dogmatically preferable to assign an actionable mandate from a protectionist dimension. Furthermore, protection duties under Art. 2 (2) and 14 (1) GG have been interpreted in a restrictive way. A review of justifiability would have provided greater effectiveness to the judicial review. Calliess acknowledges the *legislative leeway* in this context, given that CC objectives and environmental protection must be weighed against conflicting constitutional concerns. However, the court should have ensured that this *leeway* is restricted by the planetary limits – in this case, the 1.5 to 2°C target. The court should have applied the *Doctrine of Prohibition of Inadequacy* established in other decisions. The concept of duties of protection under Art. 2 (2) and 14 (1) GG should have been enforced [59]. A special focus of this essay, observed in both cases, is the *Doctrine of Separation of Powers*, which, according to some legal scholars, the BVerfG did not respect enough. Wagner concluded that the overall political tableau, with its multitude of goals and priorities, cannot be made the subject of constitutional court review. It is problematic for the court to make CC-mitigation the subject of a priority decision binding on the legislature and government. Allocations and trade-off decisions required to solve the climate problem must be made and answered for at the political level. This is of greater pertinence, given the required involvement of many actors [63]. Ruttloff & Freihoff criticize the court for referring to fundamental rights rather generally, without clearly defining the scope of protection [64]. Verheyen counters, CC-mitigation is the court's task since an enforceable legal right is affected. Legal rules are determined for the legal case at hand and considering this commonly held principle, it is unproblematic for the court to establish a new le-

gal concept [65]. Eckard & Heß criticise the court for not going far enough in its judgement - in that, the Court should have recognised that the *Basic Law* does not differentiate between defensive and protective dimensions in Art. 1 (1) sentence 2 and in Art. 2 (1) GG. They also argue that the Court, through its judicial review, should have outlined an external limiting boundary to legislative actions. Such an outlining would have been sensitive to the doctrine of *Separation of Powers* [62].

This ruling of the BVerfG, vastly successful as it may be, cannot be viewed in isolation as much as a culmination of contemporary CC-cases within German courts. In 2019, an Administrative Court in Berlin dismissed a Climate lawsuit filed against the federal government and the dismissal was justified on grounds of the plaintiff's lack of standing to bring an action. The court argued, this would require a subjective public right that protects third parties. The court held that, it is also necessary that said individual be sufficiently distinguished from the general public. The Climate Action Program 2020, as a mere political declaration of intent, is not binding and thus unenforceable. Additionally, the court argued that GHG emissions emanating from German soil are not attributable to the *State*, and hence there is no infringement of fundamental rights. CC does not affect the plaintiff individually and is experienced collectively by the public. Hence, the *right of action* to a constitutional violation is ruled out [66]. This reasoning, although more detailed, certainly has parallels with the *Tribunal's* decision. This year too, multiple climate lawsuits against various federal states (viz. Bavaria, Baden-Württemberg etc.) were collectively dismissed by the Federal Constitutional Court [67, Para. 2]. Thus, one cannot generally assume the German judiciary to be leaning towards Climate action.

The *Pandey* case stands *subjudice* before the SC and is reflective of the context within which it seeks resolution [49]. Lack of political will to legislate (on matters including CC) is not unfamiliar or unique to India. Saha observes, *'...social wants - the failure of the existing legislations to cope up with the existing situations and problems…'*, necessitated judicial activism, i.e., judicial legislation and judicial governance[68] [49]. For example, as early as 1979, with regards to prison reforms, SC Justice V.R. Krishnaiyer held, *"... courts have to make do with interpretation and carve on wood and sculpt on stone ready at hand and not wait for far away marble architecture* [*sic.* of legislation]*"* [69]. Additionally, the creative interpretation of, a.) *Right to Life (Art. 21, CoI)* includes the right to a healthy environment and b.) *Locus Standi* has evolved to include PIL [70]–[73]. The PTD too is a well-established pillar of Indian environmental jurisprudence, evidenced by numerous judgements [38], [74], [75]. Against this historical context, Rajamani & Ghosh identified potential for CC-litigation in India in 2012: *'India has an engaged and proactive civil society, an activist judiciary, a progressive body of enviro-legal jurisprudence and an unparalleled culture of public interest litigation.'* They posited, CC and its impacts were *'rapidly capturing popular imagination'* in India and that constitutional-rights-based cases (sic. related to CC) offer *'the most promise, and therefore well worth tracking.'* [76]. *Pandey's* petition stands case in point. Supportive of this view, Peel & Lin's analysis of CC-litigation in the Global South studied five Indian cases. Notwithstanding the peripheral placement of CC, they argue cases such as *Pandey* contribute to climate governance [55]. Ghosh expands the earlier set of five and adds fourteen more cases to the Indian docket. While acknowledging this potential, three main observations emerge. First, it is important not to overstate the importance of CC cases before Indian courts. Judgments, only indicative of CC-terminology/framing entering environmental litigation, are not completely reflective of how seriously parties view climate concerns. Secondly, despite reliance on international environmental law in the interpretation of statutory obligations, judgements lack robust judicial reasoning and engagement seems superficial. This is evidenced in climate claims where courts refer to international treaties (viz., the UNFCCC, Kyoto Protocol, Paris Agreement, and India's INDCs) and *'is not always accompanied by strong judicial reasoning that explains how India has violated, or is required to comply with, an international obligation.'* Thirdly, that one should not be overly optimistic. Despite a *"pro-environment"*, *"activist"* reputation, Indian courts *'are often deferential towards the executive on decisions on economic policy and infrastructure'*. While a fundamental ruling on climate protection by the SC remains conceivable, Indian courts are known for massive dockets of backlog cases. Judicial outcomes, in terms of content and enforcement, are unpredictable, and contingent upon various legal/non-legal factors [45]. Against documented implementation deficits of existing environmental laws, the role of the litigant, beyond securing a favourable outcome, extends to even monitoring the implementation of judicial decisions [46].

Discussion

Zweigert & Kötz posit *'... in law the only things which are comparable are those which fulfil the same function.'* Upon finding diametrically opposite results, as in this case, they prescribe a revaluation of the central question and parameters [16, Ch. 2]. Therefore, we find that future comparative research needs increased sensitivity to the parameters of comparison and their underlying presumptions (of similarities and differences) i.e., *praesumptio similitudinis*. While the role of judiciaries, *in this instance*, has been sufficiently covered, it must be noted, that substantially progressive as well as regressive judgements have been observed in both jurisdictions and

one must refrain from projecting these as trend. Methodological shortcomings aside, legal comparison exceeds far beyond a simplistic categorization of a better or worse approach.

While the German climate ruling is likely to be a turning point within the country, it remains to be seen how this affects the wider discussion concerning the *Separation of Powers* and jurisprudence in detail. Building on this judgement numerous constitutional complaints have been filed in different courts of Germany. Most continue to be filed against state governments, but some also sue private companies. Thus, it can be said, CC discourse within German courts may proceed in the direction of private CC-litigation in addition to public CC-litigation. Correspondingly, there seems to be a visible trend suggesting that the BVerfG will not be expanding the legal rules developed in the case but is trying to roll back. Legal creativity then must be contextualised to specific jurisdictional challenges.

For India, the lack of legislative and executive CC-action, and less than encouraging signs from the judiciary, warrants functional environmental/climate literacy, to the extent that it is firstly acknowledged, as an existential crisis… *of, by and for* the majority of India's population. Collective societal reflexivity towards environmental concerns (including CC) and resulting democratic outcomes are contingent upon this. A top-down intervention addressing a rapidly progressing CC remains awaited and whichever arm of the *State* – legislative, executive or judiciary, such intervention may emerge from, it must be examined for the ability to address bottom-up systemic challenges that plague India's environmental governance structure. Hence, over-reliance on paradigmatic policy statements or landmark judgements may not necessarily provide desired outcomes in practice. *Pandey's* contention, *'... non-implementation… has led to adverse impacts of CC…'* and the Tribunal's corresponding assertion, *'... CC is certainly a matter covered…'* provides the direction for advocacy and academic intervention, to address precisely what is appealed for – *'an accounting and inventory of each and every substantial source of GHG…'*.

The outcome of the German case is hinged upon the sectoral allocations of permissible GHG emissions over a period (outlined in the KSG). With over 25 years of practice in India, the EIA regime (notwithstanding strengths and weaknesses) provides legacy data and context for such an auditing framework. And hence, future research needs to focus on developing an aggregated, transparent, and verifiable, monitoring and auditing mechanism of not just GHG emissions but also a comprehensive set of impact parameters which are tailored to sectoral and subjective requirements. Furthermore, it is imperative that such research be interdisciplinary in nature and at the interface of Policy Studies, Law, Geographical Information Systems (GIS), Natural and Data Sciences. Lastly, effective implementation of existing environmental laws, regardless of climate framing, contribute to CC-action. This in turn, will not only aid a top-down CC-legislation, if and when it may be enacted, but also address many bottom-up challenges and critical issues outlined by Sustainable Development Goals (SDGs).

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