

Climate Change and Renewable Energy Consumption Obligations: Response of the Indian Judiciary

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Abstract:

*Climate change accounts for many of the natural disasters in India. Despite India being one of the top five greenhouse gas emitters in the world, policy and legal framework have not so far considered the issue of climate change in perspective. The constitution of India guarantees fundamental rights to its people through Article 21 and the article covers innumerable rights under its grab including right to health, pollution free air and water, sanitation rights, right to food, clean environment etc. India has ratified United Nations Convention on Climate Change (UNFCCC) and the Kyoto Protocol and has now obligations under the Paris Agreement to cut greenhouse gas emissions intensity of its gross domestic product 33% to 35% by 2030.² India's target is laudable and ambitious in this regard. The judiciary in India has assumed its primary responsibility towards the individuals to safeguard their interest relating to environmental protection by combating climate change. There are remarkable judgments passed by the higher courts and the Green Tribunal relating to climate change. In *Abhimanyu Rathore v State of H. P*³ considering the Kedarnath and Srinagar tragedies the court has pointed out the ecological destruction due to climate change and declared that every citizen has the right to potable drinking water and breath pollution free air. There were also circumstance when the court has ruled in favour of development at the cost of environmental damage that is in the Sardar Sarovar dam project where a dam project with the reservoir level height up to 455 height was permitted by the Supreme Court, The Indian judiciary has wide powers to protect and safeguard the environment and contributed considerably towards the development of environmental jurisprudence in India. This paper is an attempt to analyse the judicial response towards renewable energy obligations and the paper will delve into the various aspects of the same and find out the recent trends.*

Keywords: Climate Change, Renewable Energy Consumption, UNFCCC, Green Tribunal

International Developments towards Climate Change

With Stockholm Declaration raised an international consciousness regarding the impact of environmental pollution on environment and natural resources and it was followed by the Rio Declaration of 1992, widely known as the Earth Summit. The Earth Summit marked the beginning of the first convention on Climate Change viz the UNFCCC which was signed by 150 countries in Rio in 1992. At the UNFCCC world nations agreed to reduce Carbon Gas Emission levels in the interest of human safety despite the absence of scientific certainty.⁴ Annex 1 countries are a total of 12 nations belonging to Organization of Economic Cooperation and Development (OECD) from the Central and Eastern Europe and such nations were expected to reduce emissions to 1990 levels by 2000. The Kyoto Protocol which is based on the principles of UNFCCC operationalises the Convention and binds the developed nations to abide by individual Green House Gas emissions through the principle of 'Common but

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² Discussion Paper Series: India's Climate Change Strategy, Centre for Science and Environment <https://cdn.cseindia.org/userfiles/On-the-road-to-OP26-factsheet.pdf> (last visited Jan. 10, 2022).

³ *Abhimanyu Rathore v. State of H.P* [2014] 5202 SCC OnLine HP

⁴ United Nations: Climate Change https://unfccc.int/kyoto_protocol (last visited Jan. 1, 2022).

differentiated responsibility and respective capabilities.’⁵ The first commitment period of the protocol was 2008-2012.

In 2012 protocol went through an amendment in Doha called as the Doha Amendment for the Second commitment period i.e., 2012-2020. Further the Conference of Parties 21 (COP 21) was entered in Paris in 2005 replaced the Kyoto Protocol since the protocol could not become a success due to the non-participation of countries like USA and China. Though the Paris agreement saw the exit by USA later in 2021 the US President Joe Biden re-entered the agreement. Further in 2021 COP 26 was held in Glasgow with the aim of accelerating action towards the goals of Paris Agreement and UNFCCC. 197 member nations participated in the Conference and agreed to limit global warming to 1 degree Celsius over pre-industrial levels. It also focused on accelerating phasing out of coal and use of electric vehicles, curtailing deforestation, encouraging investment in renewables etc.⁶

India and Climate Change Obligations

In 2006 a broad policy framework was laid down called the National Environment Policy, 2006 with a view to promoting sustainable development by addressing climate change and promoting economic growth. There is National Action Plan on Climate Change (NAPCC) carried out through eight missions and also State Action Plans (SAP) to mainstream climate change concerns in the planning process of the state. Besides there is Energy Conservation Act to encourage efficient use of energy, National Electricity Policy (NEP) for enhancing energy access and renewable sources of energy. There is Clean Energy Fund (LEF) to promote clean energy initiatives, International Solar Alliance (ISA) launched by India and France. There are many other initiatives like the Bharat Stage Emission Norms. Renewable Energy Certificate (REC), Renewable Purchase Obligations (RPO) etc.

India has given its commitment to UNFCCC to reduce emission intensity of its GDP by 33 to 35 percent by 2030 from 2005 level and to achieve about 40 percent cumulative electric power installed capacity from non-fossil-based energy resources by 2030.⁷ Electricity Act, 2003 is the first legislation which has set up a framework for renewable power at the national level in India. The Act has set up renewable energy targets through to achieve 175 GW of renewable energy by 2022 including the solar energy capacity of 100 GW.⁸ It imposes a responsibility upon the obligated entities including the Discoms to purchase a percentage of their total power requirement from renewable sources and accordingly SERCs came up with their RPO targets. Since renewable energy potential differ from state-to-state CERC introduced REC mechanism, which is a tradeable certificate proof that 1 MWh of electricity has been injected or deemed to have been injected. This mechanism allows to build deficits in REC purchase obligations of the renewable energy poor states in meeting their RPO targets.⁹

Judicial Initiatives and Climate Change

It can be seen that the Indian judiciary has also taken major steps to provide support for the use of renewable energy and it is evidenced through the decisions of the higher courts in India. In

⁵ *Id.*

⁶ United Nations: Climate Action (Nov. 5, 2022) <https://www.un.org/en/climatechange/cop26> (last visited Jan. 1, 2022).

⁷ Government of India (Nov. 5, 2022) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847812> (last visited Jan. 11, 2022).

⁸ PRS Legislative Research, Action plan for achievement of 175 GW renewable energy target (Nov. 5, 2022) <https://prsindia.org/policy/report-summaries/action-plan-for-achievement-of-175-gw-renewable-energy-target> (last visited Jan. 22, 2022).

⁹ Government of India, Ministry of New and Renewable Energy, (Nov. 5, 2022) <https://mnre.gov.in/solar/rpo/>

Indian Wind Power Association v. Gujarat Electricity Commission & ors.¹⁰ The decision of the Gujarat Electricity Regulatory Commission to waive the RPO obligation of the Discom was objected by the Appellate Tribunal on Electricity Laws (APTEL). The Discom contended that they couldn't meet the RPO targets since the wind energy generation in the state was not adequate as compared to previous years due to the unwillingness of the wind power generators to sell wind energy at a preferential tariff. APTEL differentiated the current scenario wherein the Discom have not made any efforts to enter into a Power Purchase Agreement (PPA) with developers to that of situations wherein the targets can be revised if they seem to be unrealistic at the beginning of every financial year or non-fulfilment of target due to the occurrence of *force majeure* like natural calamities which is beyond the control of the Discom. In its decision the APTEL has also decided not to allow GERC's decision to allow adjustment of excess purchase of solar RPO by Discom against the fulfilment of its non-solar RPO since it defeats the purpose of designating separate RPO's for solar and non-solar sources.

Later, in Indian Wind Energy Association & ors. v. APERC & ors.¹¹ APTEL held that Discoms should prepare a plan for RE purchase as part of its tariff petitions to the SERC and that RPO monitoring must be done periodically and power to relax and exempt RPO has to be done judiciously under exceptional circumstances. It was observed that SERC can carry forward the RPO obligations in case of non-availability of REC and in case of non-compliance SERC must impose penalties on the Discom. This judgment has further strengthened the obligations of Discoms towards renewable energy purchase.

In Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission¹² the Supreme Court has made applicable Renewable Purchase Obligations to Captive Power Plants (CPP). The court has also upheld the Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010. The decision is a positive step towards strengthening renewable energy market. The court has made it clear that no matter the energy is consumed from a captive power plant or purchased from a distribution licensee, RPO can be imposed and the fact that no license is required for a captive power plant for establishment, operation and maintenance does not hold ground for the power plant to be not bound by the regulatory jurisdiction of the state commission.

The above stance was followed by the Maharashtra Regulatory Commission with respect to a CPP in Maharashtra in the case of JSW Steel Ltd. v. Maharashtra Energy Development Agency¹³ with respect to a fossil fuel-based cogeneration power plant. As per MERC (RPO, its compliance and Implementation of REC Framework) Regulations, 2010 captive users have the option of depositing the amount equivalent to the REC floor price of the shortfall units and further on year to year basis to meet its RPO, but the Tariff Policy of 2016 has removed this exemption through MERC (RPO, its compliance and Implementation of REC Framework) Regulations, 2016 and hence, the fossil based co-generation units are subjected to RPO obligations from the Financial year 2016-17 onwards and such units were given time till March 2020 to meet the cumulative RPO targets.

¹⁰ Indian Wind Power Association v. Gujarat Electricity Commission & ors. REVIEW PETITION NO. 18 OF 2015 & IA NO. 251 OF 2015 IN IA NO.187 OF 2015 IN APPEAL NO. 21 OF 2014

¹¹ Indian Wind Energy Association & ors. v. APERC & ors.
<https://aperc.gov.in/admin/upload/OrderOPNo5of2017.pdf>

¹² Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission Civil Appeal No. 4417 of 2015

¹³ JSW Steel Ltd. v. Maharashtra Energy Development Agency Case no. 335 of 2019

Conclusion

Thus, it can be concluded that the judiciary has taken up steps in the right direction for the use of renewable energy in India. At the same time there are also decisions like *K. Ranjitsinh & ors. v. Union of India & ors.*¹⁴ which poses a dilemma as to whether protection of environment has to be given predominance over having solar energy. *K. Ranjitsinh & Others vs Union of India & Others*¹⁵ the Supreme Court of India delivered a judgment in protection of Great Indian Bustard and Lesser Florican which species is close to extinction by ordering that the overhead lines which causes a hazard to the bird must be replaced by underground powerlines and till then divertors shall be hung from the powerlines. In the case a petition for protection of Great Indian Bustard ('GIB' for short) and the Lesser Florican, which is on the verge of extinction and the existence of overhead power lines is stated to have become a hazard due to which the said species of birds on collision are getting killed. This decision poses a great challenge to the solar companies to operate their business due to the fact that laying of underground power lines is expensive and will also lead to a tariff hike.

¹⁴ *K. Ranjitsinh & ors. v. Union of India & ors.* 2021 WRIT PETITION (CIVIL) NO.838 OF 2019

¹⁵ WRIT PETITION (CIVIL) NO.838 OF 2019.