

**Rights of Development and Environment:
An Overview of Judicial Intervention**

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Introduction

Rights are an inseparable part of human existence. They constitute the core of the political, social, economic and cultural freedom bestowed on the individuals/citizens by the national and international bodies through various conventions and declarations. These also constitute the overall sphere of 'development', which is fundamental to the progress of a society or a nation. Individuals are entitled to rights as enshrined in their constitutions (written or unwritten) and the state remains the guardian of these rights.

However, in many a country, situations involving the conflict of fundamental rights have occurred; the state is caught in a dilemma, unable to balance the protection and implementation of different rights and compelled to protect one right over the other. These contradictory situations have led to the affected parties taking a legal recourse in solving the problem. Thus judicial intervention and activism has become an inevitable channel to ensure and balance the contradictory yet necessary rights.

Right to Development and Environment

The UN General Assembly adopted in its resolution 41/128 (December 1986) the 'right to development'. It recalls the provisions as enshrined under the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized {Article 1(1)}. It recognizes development as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from {Article 2 (3)}. States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development {Article 3 (1)} and have the duty to take steps, individually and collectively, to facilitating their full realization {Article 4(1)}; States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as

well as economic, social and cultural rights {Article 6(3)}. They should undertake such measures as access to basic resources, education, health services, food, housing, employment and the fair distribution of income {Article 8 (1)}. States are also obliged to formulate, adopt and implement policy through legislative and other measures at the national and international levels {Article 10}.

Similarly, efforts were undertaken to ensure an individual's right to environment. The United Nations Conference on Human Environment in Stockholm (1972) was one of the earliest conferences that recognized the need to protect environment. It did not explicitly proclaim it as a human right to environment, but it paved the way towards including environment as one of the prerequisites of a quality life. Important Clauses include the following: Principle 1 of the Stockholm Declaration states that it is the "fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being". According to the Principle 7 of the Stockholm Declaration, the states are required to take steps to prevent pollution of the environment by substances, which affect human health.

In its Resolution 45/94, the UN General Assembly stated that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts towards ensuring an improved environment. In the mid 1990s, the United Nations recognised the importance of the inter-linkage between human rights and the environment. The UN created the position of Special Rapporteur on Human Rights and Environment that came out with the report popularly known as the Ksentini Report. It presented a theoretical, thematic, and practical framework to address the relationship between human rights and the environment. The 1981 African Charter on Human and Peoples' Rights (ACHPR) was the first human rights treaty to recognize 'the right of all peoples to a satisfactory environment'. Art. 24 of the ACHPR entitles a right to environment, which should be satisfactory and favorable to development.

The Indian Scenario

India, post-independence, has been treading the path of development incessantly. With the opening up of its economy to the global economic players, it has ushered itself in the process of globalization, which has certainly brought about some benefits to India; nevertheless, it has also carried along various negative effects. The concepts of 'development' and 'good governance' have, for instance, made her to pursue developmental activities at a much faster pace for enhancing not only its economic growth but also to improve its human development scenario. The development, as is being pursued by the State, has been rather uneven with few sections of society experiencing affluence while others continue to remain deprived and less privileged. In this context, the first concern pertains to the active pursuit of development by the state through some of its policies that are in contrast to public welfare; the second concern relates to the excessive exploitation of the natural resources, causing enormous damage

to the ecology and environmental security. The injudicious use of natural capital in order to increase the per capita income through the so called development route has led to many uncomfortable questions regarding the State's role in abrogating the individual's right to well being. But the paradoxical situation is that the individuals are entitled to development as well as a clean and pollution free environment. The States have an obligation to ensure the protection, preservation and improvement of the environment and are required to adopt indispensable measures to put into action these objectives. But tackling poverty still remains a priority as compared to the objective of ensuring clean environment.

Coming to the environmental rights in India, the right to a clean environment is not directly referred to in the provisions of Part III which forms the Fundamental Rights chapter of the Constitution. It was specified in the Part IV of the Constitution under 'Directive Principles of the State Policy' (DPSP).

It is no exaggeration to state that the judiciary is making significant progress in reinterpreting some of the rights to include environmental protection standards. It has categorically stated that the right to life includes the right to live in a healthy environment, a pollution-free environment, and an environment in which ecological balance is protected by the state as well as individuals. The Constitution (Forty Second Amendment) Act 1976 overtly integrated environmental protection and improvement as part of State policy through the insertion of Article 48A. Similarly, Article 51A (g) imposed responsibility on every citizen "to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for all living creatures."

The Right to Life

'The right to life, under Article 21 of the Constitution, has been used in a diversified mode in India. It includes, inter alia, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood. The Supreme Court recognised several unarticulated liberties that were implied by Article 21. It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to the environment'[1]. The right to life is also enshrined in the right to livelihood (Article 41), in the Directive Principles of State Policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between the right to livelihood and the right to life in the context of environmental rights has thus been established over the years[2].

The above-mentioned provisions also apply to the right to development, which the Constitution of India has recognised through interpretation of the provisions as enshrined in it. Development encompasses not only the overall progress of the state via economic growth but also includes the provision of basic facilities to all the

individuals (human development dimension). For instance, minimum living wages (Article 43), minimum standards of living, nutrition and public health (Article 47), protection and improvement of the environment, forests and wildlife (Article 48 A) and the right to free legal aid (Article 39 A) are all part of such provisions[3]. Article 37 of the Indian Constitution declares the Part IV provisions (DPSP) as being non-justifiable and they 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.[4]

Judicial Innovation

Of late, the Indian judiciary has emerged as a dynamic institution which is playing an active role vis a vis expanding the scope and content of the individual and collective rights and ensuring justice in the socio-economic aspects apart from considering the political and cultural dimensions. The Indian Judiciary has the power to review the functioning of the legislature and executive and if need be, declare their decisions as unconstitutional as the judiciary is the highest body to interpret the Constitutional provisions. This has enabled the judiciary as a constitutional authority to ensure accountability of the other organs of the state[5]. Before delving into the aspects of judicial activism, a brief overview of the role of the state in development aspects needs to be looked into for a holistic perspective of the issue.

State, Globalisation and Development

State has a major role in promoting the process of globalisation and adopt the development models as prescribed according to the Washington consensus. Through this, the state has envisaged an accelerated level of development, even if it meant an unwarranted resource use. It is often argued that the State and individuals could be in a situation of disadvantage, if they neglect their economic development in favor of environmental protection.[6] The State finds itself in a dilemma trying to balance the equitable norms of environment and development, despite the various contradictions. But the preference has always been a distinct tilt towards development and is amply being demonstrated by the State as well as private actors, making the complementarities between development and environment much difficult to achieve.

The developmental projects in India are on the rise but not without flouting of the norms and the state allowing it in the name of development thus inflicting damages on the natural resources and the environment. Since the concept of development is closely linked to the alleviation of poverty and provision of livelihood to the population, these projects are deemed necessary for the progress of the state. The string of problems, which the policy makers in India have chosen to overlook while coming up with ambitious developmental plans, ended up in unplanned urbanization, widespread industrialization, and the construction of a series of big dams. Consequently, today India has lost half its forests, poisoned its water through unhealthy discharge methods

of water, eroded its lands and rendered millions homeless, resource-less and more impoverished. Three of India's cities have earned ranks amongst the 15 most-polluted cities in the world[7].

Judicial Intervention

The recent trend is witnessing an increase in the conflicting situations of constitutional institutions with an increased judicial intervention declaring many of the policies and legislations of the state rather inconsistent with the general well being of the population. The intervention in a wide range of issues has generated a debate about the competence and legitimacy of the judiciary in entering areas which have for long been perceived as belonging to the domain of the other organs of the state[8]. The state's control over the natural resources and its assertive legitimacy in this matter has restricted the local community participation in the decision making process. While alienating public, the state has been patronizing the industrial policies, since the latter are a major source of their political funding and fortunes. The resulting nexus evolved the process of the governmental protection towards the industrial units and their (government's) refusal to intervene in case of violation of the environmental norms by these groups. The state, along with the business houses is now aiming at accelerating the growth rate to almost 9% over the next twenty years. The Planning Commission of India, in its Vision 2020 Document, has predicted that the success would raise India to Rank 4 (from its current rank of 11) in terms of GDP by 2020. What it had failed to take into consideration is the enormous stress this would place on the natural resources of the nation. The predicted growth rate would demand a high rate of infrastructure development, which the nation can ill afford to pursue.[9] A glaring example of recent development is the land acquisition by the Tata Group (a successful business group in India) in the state of West Bengal for setting up an automobile unit. The state was more than willing to permit the acquisition of this fertile land paying the farmers a moderate amount. The state argues that the setting up the plant would enhance its credibility and this would attract more investment for development purposes.

Evolution of Environmental Law Principles

The legal aspects of the Indian Environmental law have evolved gradually over the past few decades that have given enough impetus to render justice in case of violation of the environmental rules and regulations. The judiciary, including the High Courts and the Supreme Court in particular, have played a significant role in strengthening these frameworks. There have also been occasions when the judiciary has prioritized the environment over development, when the situation demanded an immediate and specific policy structure (*M.C. Mehta vs Union of India, 1987*). Following are some of these principles and few of these are also recognized at the international level.

The Precautionary Principle

The Supreme Court of India has recognized this principle as an important component of environmental protection. The *Vellore Citizens Welfare Forum v Union of India* stands out as a distinct example of this principle. The Court reiterated that 'when there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution'.

The Polluter Pays Principle

The Supreme Court has directed that the polluter is responsible for the damages inflicted upon the environment and the Court should assess not through the claims of the disputing parties but through an examination of the gravity of the damages. It has also recognized that the fundamental objective of the government should be to prevent and control pollution (Ministry of Environment and Forests, Government of India).

Intergenerational Equity

This principle has its base in sustainable development concept, which is broadly defined as the development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The very term indicates that the needs of future generation should be considered before taking up any project that might exhaust the bulk of resources. By preserving its habitat, halting destruction of ecosystem and by not contributing to increasing global warming, we may preserve the earth's biodiversity. Future generations should benefit from our actions and efforts should be made to conserve the resources using sustainable methods. In the *State of Himachal Pradesh v. Ganesh Wood Products*, the Supreme Court invalidated the forest-based industry, recognizing the principle of inter-generational equity.[10]

Holistic Adjudication

A holistic perspective of the whole issue is now being considered by the Supreme Court to decide the environmental cases. Detailed orders are issued from time to time and different committees are appointed by the court to monitor the ground situation.[11]

Public Trust Doctrine and Policy Review

In terms of this doctrine, the state is obliged to conserve the nature in the interest of the general public. The state, as a trustee of the natural resources, is under a legal obligation and duty to protect the resources. Since the resources are for public use, they cannot be transferred to private ownership/authority.

The policies of the state have often come under the purview of the jurisdiction with regard to the environmental protection. On many occasions, the judiciary had to disregard the authenticity of the policy and decide the case as to accommodate the constitutional values. It has also stated in some cases that it is not in the public interest for the court to delve into functional area of the executive. The Court has, in the same capacity, defined and interpreted the right to livelihood, by allowing the communities to extract resources, depending on the nature of the case.

Rule of Law through PIL

To bring about social transformation and achieve social justice, the judiciary has been increasingly invoking The Directive Principles of State Policy to interpret the Fundamental Rights. Towards this end, it allows the use of Public Interest Litigation (PIL) towards securing the observance of law by the State and its agencies and ensuring social justice to one and all. This is in consonance with the Article 32 of the Constitution that confers a fundamental right to move the Supreme Court by appropriate proceedings for enforcement of fundamental rights and vests power in the Supreme Court to issue any direction, order or writ for enforcement of the fundamental rights. The use of PIL is a departure from the traditional locus standi to enable access to wider sections of the society. It states that 'any member of the public or an interest group having sufficient interest can maintain an action for redressal of such public wrong or public injury' (*Judges Transfer Case, AIR 1982, SC 194*). The Court has also taken care of the compliance factor through monitoring and periodic reports filed in the court by the government agency. PIL has touched the new vistas of protection of human rights in general and the protection of environment in particular. Without it, damage to the said categories would have gone unheard and unheeded to.[12]

Conflicting Rights: Case Studies

1. Workers' Rights and Pollution Control in Delhi

The court's order regarding the right to a clean environment has jeopardized the job security of India's poorest labourers and led to the denial of their livelihood rights. The 1995 Supreme Court in *MC Mehta v. Union of India*, ordered the closure and relocation of polluting industries in Delhi. The Court responded to the petitions for pollution remediation through a broad reading of the constitution's fundamental right to life principle; at the same time the order had adversely affected thousands of the city's poorest workers. The petitioner argued that the industries and government agencies in Delhi were not abiding by the city's zone regulations as was specified in the Delhi Master Plan. It was also found that the prohibited hazardous and small-scale industries were operating in many of these areas. The judgment directed the relocation of hazardous and small-scale industries operating in "non-conforming areas" to the metropolitan region at the periphery of the larger National Capital Region (NCR). The

ruling appeared to be as much about depopulating the city (of its urban poor) as it was about improving air and water quality.[13]

2. The Sardar Sarovar Project and Rehabilitation of the Displaced

The Sardar Sarovar Project (SSP) was an ambitious plan to build a dam across the Narmada River in the Western India. The construction of the dam, situated in Gujarat, would benefit it the most while in Madhya Pradesh and Maharashtra states, it would submerge the habitats displacing the people without adequate compensation. The Narmada Water Disputes Tribunal (NWDT) dealt with the problem of displacement and rehabilitation. The Narmada Bachao Andolan (NBA) movement was started to halt the construction of the dam and rehabilitate the displaced. The World Bank initially funded the project but withdrew after the Morse report pointed out the flaws in the project. The government of Gujarat decided to fund the project and raise the dam's height. The Court ordered in 1999 that the government could raise the dam height (Writ Petition No. 319 of 1994, order of 18 Feb 1999). The Court also concluded that the dams play a vital role in providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back (Writ Petition No.319 of 1994, order Judgment 18 October, 2000, p.46). Given the government's offer of rehabilitation of people elsewhere, the court observed that the displacement need not per se result in violation of their fundamental or other rights and the gradual assimilation of these tribals into the mainstream will ultimately benefit them (Writ Petition No.319 of 1994, order Judgment 18 October, 2000, p.48). It also observed that the precautionary principle applied only to the polluting units and not to the dams (Writ Petition No.319 of 1994, order Judgment 18 October, 2000, p.95-6). With regard to the resettlement issue, the court refused to acknowledge the importance of community resettlement in preserving the social fabric and community relations amongst the oustees, as it was not referred to by the NWDT as a right (Writ Petition No.319 of 1994, order Judgment 18 October, 2000, p.114). The court also observed that the project should be completed at the earliest and compliance should be ensured.

3. Other cases

(a) The Supreme Court refused to allow the French Nuclear Ship to reach the Gujarat shores, as the ship breaking would lead to harmful environmental effects. The state government did not object the ship arriving on its shore offering the pretext that the ship breaking activity would provide livelihood to the poor for a limited period of time, even if it means a health risk to them. Similarly around 21 ship-breaking units have been closed in Gujarat and notice sent to 11 of the units for improper waste disposal/management.

(b) The transport system operating on diesel/petroleum in Delhi had increased its pollution levels leading to serious respiratory and skin disorders and allergies. The court ordered the conversion of the system into a one operating on compressed natural

gas system. The owners frowned at first but complied with court orders eventually. The non-compliance and delaying tactics of the government too drew the wrath of the Court. The government resorted to the contempt of the court due to its inability to take action but ultimately complied with the court orders after being served a number of deadline notices. The result is that today the public feels highly indebted to the Supreme Court on whose initiative there was an improvement in the quality of air.

Judicial Activism: An Overview

Judicial Activism in India has, of late, reached significant momentum. Under the Indian Constitution, the orders of the Supreme Court are to be treated as law until the government enacts suitable legislation or change existing regulations. This is often the case in response to the petitions filed by individuals or groups, and on occasions may also be initiated by the Supreme Court itself. The Supreme Court has spurred major environmental actions, for instance, relocating polluting industries out of Delhi and replacing diesel with compressed natural gas in public transport. Thus the court has expanded the scope of the 'right to life' as enshrined in the Constitution of India to include the 'right to a clean and healthy environment'[14]. In a series of landmark judgments, the Supreme Court has filled in gaps in the legislative framework and enforcement machinery through jurisprudence.[15]

Being the highest judicial organ, the orders of the Supreme Court fall under two categories-declaratory and mandatory. The declaratory orders, without consequential directions to the state authorities, have to await the acceptance of their binding nature under Articles 141 and 144 by the state and their consequent implementation. The mandatory orders are premised on the general apathy displayed by the executive to move to action and spell out a plan of action as well as a time schedule within which compliance of court orders is expected[16].

The court has also been careful to remain within the limits of justifiability and explain the basis for its intervention in different areas of economic, social and cultural rights. Thus, not only the environment but also health and education are regarded as right to life. These aspects have enhanced its credibility especially the public perception of judiciary as the savior of the ills that are being pushed forward by the state and its agencies. For example, in the PIL relating to the protection of the forest cover, the court had to wield its contempt power to pull up recalcitrant and adamant state officers who were seen thwarting the implementation of its orders [*TN Godavaraman Tirumalapad* (1998) 3 Scale 669 and (1998) 9 SCC 672].

In the process, the courts are also facing the dilemmas of conflicting of rights. The most important contradiction has been that of environment vs. development issues. For example, the decision to order the closure of a polluting abattoir in Delhi was seen as also affecting livelihoods of butchers [*Buffalo Traders Welfare Association v Maneka Gandhi* 1994 Supp (3) SCC 448] and the decision to construct a dam across the river

Narmada to provide water for the citizens of one state as conflicting with the right to shelter of those that belonged to another [*Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664 and 7644].

Future Prospects

The Indian Judiciary has, so far, successfully safeguarded the rights of its citizens upholding the principles of justice and equality. Its directives towards environmental protection, simultaneously keeping in view the development needs, have drawn enthusiastic responses and applause from the public, which has been reeling under the corrupt practices of the state and local governmental agencies. The active role played by the judiciary in handling the conflicting situations has also thoroughly transformed its institutional capacity and credibility into a highly positive one and is being looked upon as an effective dispute settlement mechanism. The public reaction to the judicial verdicts has been highly favourable, perceiving it as a protector of the people's rights and a safeguard against state's transgression. By taking on board the citizen's concerns about an inactive or indifferent legislature or executive, the court provides the platform for the state and civil society to engage as active participants in the scheme for realisation of economic, social and cultural rights.[17]

The judiciary needs to impose positive obligations on the states to improve the well being of its citizens and be more sensitive to their needs. Of late, the legislature's waning respect for judiciary and its displeasure over the court decrees has brought about friction in their relations. The legislature's constant criticism targeting the judiciary arises out of its own follies and whimsical policies neglecting the environmental protection and promoting the industrial policies for a faster economic growth. It also feels the need to constrain the judiciary through constitutional amendments (if needed) as it perceives the latter as encroaching upon its sphere of functioning. The legislature and executive may facilitate smooth interaction between the three organs with much maturity in their approach and this goes a long way in providing the remedial measures and in avoiding conflicting institutional crisis.

As Justice Kirpal aptly says, " The higher judiciary plays a rather stalwart role owing to its unique position and power, and due to the circumstances of inefficiency within the executive and the existence of a skeletal legislative framework".[18] While the possibility of excesses by the state or administration exists in every country, resistance to it or remedy seeking mechanism to correct that, lies in the capacity and awareness of the people coupled with the existence of a sensitive and active judiciary.[19]

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