

RIGHT TO DEVELOPMENT AND THE CONSTITUTION

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ABSTRACT

The research paper is based upon one of the most essential right, i.e., human development, which, is a process that is intricately connected to 'freedom' and is realized when state fulfils its duties to further the fulfillment of freedom. This right, which is much neglected by most of the nations today, is the most inalienable and inherent right to an individual's human-hood. Upendra Buxi has defined the right as 'a right to remain human.' The right to Development has been enunciated and recognized in various international conventions such as the Declaration on the right to development and the Vienna Declaration and Programme of Action. As per the Declaration on the Right to Development, right to development is an "inalienable human right" to pursue growth which is essential for the realization of all other human rights. The paper, while discussing the background formulation of the right, proceeds to analyze the right in Indian context, where it has been held that the rights, justice, development and governance form the four sovereign pillars of the Indian constitution by the Supreme Court. The author further analyzes how the idea of development relates to every aspect of one's personhood such as- right to privacy and sexual freedom, right to social security and right to life under article 21. The paper critically examines the severe failure of various governments of the Indian state to even try to their fullest potential to make the fundamental right to development fully realized. Finally, the author, while discussing various challenges in realization of right to development in India, concludes the paper by giving various suggestions in order to build a strong roadmap ahead vis-à-vis the right to development.

INTRODUCTION

"Development is a participatory process of implementing all rights for all people and a reformulation defining an 'epistemic break from the ideology of developmentalism"

- Upendra Baxi

CONCEPTUALIZING RIGHT TO DEVELOPMENT

WHAT IS RIGHT TO DEVELOPMENT?

Human development is a process that is intricately connected to 'freedom' and is realized when state fulfils its duties to further the fulfillment of freedom.³⁴¹ For understanding the conception of right to development, it is indispensable to analyze the term 'development'. As per the Black's law dictionary, to 'develop' is to progress to an advanced state or condition,³⁴² wherefore the process of progressing to a more advanced state is termed as 'development'. Development is possible only when each person is able to utilize resources to their full potential in order to reach a better state of economic, cultural and social existence.

As per the Declaration on the right to Development, "*Development is the process of improvement of economic, social, cultural and political well-being of all individuals through their active, free, fair and meaningful participation in the distribution of all the benefits.*"³⁴³

Conceptualizing the right through its definition under the Declaration on right to development, there are nine rights intrinsic to the right to development which are; right to self-determination, right to sovereignty over resources, elimination of human rights violation, international peace and security, human-centered development process, indivisibility of human rights, equality of opportunity, a just international order and full realization of people's development.³⁴⁴ Right to development is not just a right to outcomes, but a 'right to process' based on equity, transparency, accountability, non-discrimination and democratic accountability³⁴⁵ and it involves a holistic realization of all the rights.

RIGHT TO DEVELOPMENT- THE INTERNATIONAL SCENARIO

The right to Development has been enunciated and recognized in various international conventions such as the Declaration on the right to development³⁴⁶ and the Vienna Declaration and Programme of Action.³⁴⁷ An open-ended intergovernmental working group under United Nations, established in 1998 analyzes the obstacles and progress in the process of realization of the right at national as well as international level and recommends

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³⁴¹ M. C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 294 (1st ed. 2000).

³⁴² H. C. BLACK, BLACK'S LAW DICTIONARY (4th ed. 1951).

³⁴³ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Apr. 12, 1986).

³⁴⁴ UPENDRA BUXI, HUMAN RIGHTS IN A POSTHUMAN WORLD, 6 (1st ed. 2007).

³⁴⁵ Report of the Independent Expert on the Right to Development, G.A. Res. 224/55, UN Doc. A/55/306 (Aug. 12, 2000).

³⁴⁶ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Apr. 12, 1986).

³⁴⁷ Vienna Declaration and Programme of Action, G.A. Res. 48/121, U.N. Doc. A/157/23, (Jul. 12, 1993).

procedural as well as substantive methods for the better assimilation of the right. It also reviews reports submitted by and to various international organizations and presents sessional reports to HRC containing its advice to the Office of UN High Commissioner for Human Rights.

As enshrined under various international conventions, the right to development is fundamentally different from the conventional idea of development which restricts it to the concepts such as economic growth, centralized planning, community development, etc. Ends of development as well as the process and means of development forms the core of international conception of the right to development that includes freedom from social deprivations, poverty and all other forms of tyrannies.

RIGHT TO DEVELOPMENT- A HUMAN RIGHT?

“Development means right to remain human, that is, the inalienable and undeniable right of being a man.”

- Upendra

Baxi³⁴⁸

Human rights are the rights held by the individuals by the virtue of being humans.³⁴⁹ They are neither derived from any divine principle nor given to us by any authority. As conceptualized under the Universal Declaration of Human Rights, human rights are not the product of social cooperation but are held by all individuals as their inherent natural rights.³⁵⁰ Human rights flow from the fundamental notion of right to human dignity, which are universally accepted and no state can dare to deny anyone of their human rights.³⁵¹ As per the Declaration on the Right to Development, right to development is an “*inalienable human right*” to pursue growth which is essential for the realization of all other human rights.³⁵² The Declaration on right to Development is based on the conceptions of justice and equity. It emphasizes the importance of individual rights including equality of opportunity, access to resources, participation and equality in sharing of benefits and distribution of resources. It has redefined development as a human right challenging the dominantly prevalent idea of

³⁴⁸ U. BUXI, FROM HUMAN RIGHTS TO THE RIGHT TO BE HUMAN: SOME HERESIES, 150 (13th ed. 1986).

³⁴⁹ Wouter Vandenhole, *The human right to development as a paradox*, 36(3) LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 377, 390 (2003).

³⁵⁰ Jack Donnelly, *The Relative Universality of Human Rights*, 29(2) THE JOHNS HOPKINS UNIVERSITY PRESS 281, 320 (2007).

³⁵¹ Burns H. Weston, *Human Rights and Nation-Building in Cross Cultural Settings*, 60(2) MAINE L. R. 318, 350 (2008).

³⁵² Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Dec. 4, 1986).

development as a collective economic conception only.³⁵³ Any human rights-based approach is centered on the concept of human dignity and social contract theory concerning all the members of a civil society. There are dissenting conceptions with respect to the status of right to development as a human right. It is often argued by scholars that while human rights are based on negative freedoms such as right to life whereby, it is prohibited to illegally kill someone, economic and social rights are based on positive action requirement in order of protection of those rights. However, these contentions can easily be repudiated as the distinction between individual and collective rights cannot be the basis of disqualifying a right from being a human right as any right can be defined as individual as well as collective right in as much as an obligation and a duty-holder can be substantially determined. Furthermore, the classification of economic rights as positive rights and human rights as negative rights is too absurd and superficial as both the rights have negative as well as positive aspects.

Human development is deeply rooted in the concept of human rights as it aims for empowerment by realizing full human potential. Justice, equity and development of human personality are the cornerstones of right to development.³⁵⁴ The right to development is not only the economic advancement but refers to the right to human dignity.³⁵⁵ Affirming social, economic and cultural security by extending access to sufficient resources is central to human development and ensuring full realization of all human rights is the essence of it.

RIGHT TO DEVELOPMENT IN THE INDIAN CONTEXT

3) RIGHT TO DEVELOPMENT UNDER THE INDIAN CONSTITUTION

“Rights, justice, development and governance form the four sovereign pillars of the Indian constitution.”³⁵⁶

Dr. Ambedkar argued that the individual development in social, economic as well as political spheres is central to our constitutional values having state as its main instrumentality. The principles of justice, equality and dignity enshrined in the preamble acknowledge the right of

³⁵³ ARJUN SENGUPTA, REFLECTIONS ON THE RIGHT TO DEVELOPMENT, 7 (12th ed. 2005).

³⁵⁴ Phillip Alston, *The Sources Of Human Rights Law: Custom, Jus Cogens, And General Principles*, 12(2) AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 286, 300 (1988).

³⁵⁵ National Legal Services Authority v. Union of India & Ors. (2014) 5 SCC 438.

³⁵⁶ Upendra Buxi, *A known but an indifferent judge: Situating Ronald Dworkin in contemporary Indian jurisprudence*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 582 (2003).

all citizens to flourish and develop his/her personality to the full potential in all respects.³⁵⁷ Article 21, along with all its pronouncements; guarantee the human right to dignity in terms of human development.³⁵⁸ Alleviating the oppression and destitution of thousands is the constitutional vision of right to development.³⁵⁹ The Indian constitution consists of a mix of justifiable rights, rights which can be enforced by a court of law and, non-justifiable rights, the ones which are non-justifiable in nature.³⁶⁰ Fundamental rights under Chapter III and the Directive Principles of the State Policy under Chapter IV of the Constitution are the two pillars of the constitution. While one forms the core framework of rights ensured to the citizens, the other is the set of guiding principles for the upcoming policies and strategies by the law makers and the government. However, the former can be enforced in a court of law whereas the latter cannot be.

The fundamental rights under the Indian Constitution are the civil and political rights which are absolute with a few exceptions. On the other hand, the directive principles are majorly the economic, social and cultural rights which are similar to the rights enshrined under the International Covenant on Economic, Social and Cultural Rights.³⁶¹ Article 43 of the Indian constitution corresponds to Article 11 of the covenant enunciating the obligation of the state to ensure '*a decent standard of life and full enjoyment of leisure and social and cultural opportunities*', and in particular the state shall endeavor to '*promote cottage industries on an individual or cooperative basis in rural areas*'.³⁶² This right is intrinsic to the conception of right to development. Additionally, right to health under the covenant,³⁶³ which has been held to be a fundamental right under the Indian constitution,³⁶⁴ is again, an inherent part of the right to development. The right to development is a composite right that insists on the parallel realization of all human rights subject to public scrutiny and criticism. The Indian Constitution stands on this pretext and gives a full assurance of the right to development

³⁵⁷ National Legal Services Auth v. Union Of India & Ors., (2014) 5 SCC 438.

³⁵⁸ Id.

³⁵⁹ AMARTYA SEN, DEVELOPMENT AS FREEDOM, 12 (1sted. 2000).

³⁶⁰ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Dec. 4, 1986).

³⁶¹ Jonah Lobe, *Justiciability of ESC Rights—the Indian Experience*, CIRCLE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Jan. 29, 2009, 10:04 AM), <http://hrlibrary.umn.edu/edumat/IHRIP/circle/justiciability.html>.

³⁶² India Const. art. 43.

³⁶³ International Covenant on Economic, Social and Cultural Rights art. 16, Dec. 3, 1996, 6 U.S.T. 377 U.N.T.S. 993.

³⁶⁴ Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516.

under the directive principles of state policy which are the guiding principles to be enforced by the law makers while implementing the fundamental rights.

RIGHT TO DEVELOPMENT AND ITS CONCOMITANTS- THE JUDICIAL PRONOUNCEMENTS

Right to Development and Privacy vis-à-vis article 21

Privacy is intrinsic to the well-being and overall development of an individual³⁶⁵ and is an inherent aspect of human development.³⁶⁶ Development is a pre-dominant part of our constitutional vision, which is not restricted to economic aspect considered in terms of the growth of the gross domestic product or industrial output.³⁶⁷ Development reflects the dignity of persons in terms of personal development or the development of personality of a human being to the fullest. Right to life and liberty³⁶⁸ is a very broad conception and incorporates the elements of liberty which is essential to ensure the dignity of a human being. The Supreme Court of India has held that right to privacy is a fundamental right as it ensures the development of human personality to its fullest. This is also constituted under the Indian constitution as “the concepts of justice social, economic and political, equality of status and of opportunity incorporated in the Preamble recognize the right of one and all of basic essentials designed to flower the citizen's personality to its fullest.”³⁶⁹

Sexuality And Right To Development

Right to dignity is an essential facet of one's development and evolution, which includes right to express oneself and “mixing and comingling with fellow human beings” in various forms.³⁷⁰ Honorable Supreme Court has reiterated that the capacity of persons for ‘individuation’ and realization of one's personal autonomy is the cornerstone of development of a human personality.³⁷¹ The role of human sexuality and sexual autonomy in the process of ‘human development’ is essential for realization of the rights of a free individual.³⁷²

³⁶⁵ R. v. Dymont, (1988) 17 S.C.C. 426.

³⁶⁶ K. S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

³⁶⁷ Upendra Buxi, *The Right To Be Human: Some Heresies*, INDIA INTERNATIONAL CENTRE QUARTERLY 13, 565 (1986).

³⁶⁸ India Const. art. 21.

³⁶⁹ Id.

³⁷⁰ In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 S.C.C. 608.

³⁷¹ M. MAHLER, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS AND INDIVIDUATION*, 45 (4th ed. 1975).

³⁷² Naz Foundation v. Govt. of NCT of Delhi, (2001) 5 S.C.C. 560.

US Supreme Court, while referring to the ‘right to be left alone’, held that ‘sexual intimacy’ forms an essential part of human existence and is central to the notion of right to development.³⁷³ Various International treaties and conventions such as Declaration on the Right to Development adopted by the World Conference on Human Rights and other human right treaties identify right to sexual orientation as one of the most important human rights.³⁷⁴ As per Article 51 of the Constitution of India, the Indian state is under an obligation to implement these internationally recognized principles into its social, political and economic infrastructure.³⁷⁵

Social Security And Development- The Aadhaar Debacle

Freedom is intrinsically attached to individual development through which human capabilities can be fully realized. One of the most crucial aspects of development of an individual is the removal of “unfreedom”, i.e., tyranny, social deprivation, dismal public facilities and intolerance of repressive classes. In essence, development is the mechanism of planned social change through redistribution and extending access to all. Right to social security is an essential concomitant of human development as recognized under article 22 of the Universal Declaration of Human Rights.³⁷⁶ Social security, expansion of human capacity and development are all inter-dependent on each other. ‘Accountability’ is another crucial aspect of development, which is essential to ensure that public power given by the people is not misappropriated in the favor of privileged class only.³⁷⁷ While upholding the constitutionality of Aadhaar Act, the apex court of India held that a welfare state has positive obligations to enact welfare schemes which ensure the adequate and proportionate distribution of resources and services to the marginalized classes.³⁷⁸ Such schemes are essential for the social as well as economic development of the deprived classes,³⁷⁹ which is the central purpose of the Aadhaar scheme.³⁸⁰

³⁷³ Paris Adult Theatre I v. Slaton, 478 U.S. 186 (1986).

³⁷⁴ Dominic Mc Goldrick, *The Development and Status of Sexual Orientation Discrimination under International Law*, 16(8) Human Rights L. R. 365, 420 (2016).

³⁷⁵ Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241; India Const. art. 51.

³⁷⁶ Universal Declaration of Human Rights, 1948, art. 12.

³⁷⁷ Upendra Baxi, *The Right To Be Human: Some Heresies*, INDIA INTERNATIONAL CENTRE QUARTERLY 13(9), (1986).

³⁷⁸ MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, 56 (7th ed. 2000).

³⁷⁹ Binoy Viswam v. Union of India & Ors., (2017) 7 S.C.C. 59.

³⁸⁰ ARUN K. THIRUVENGADAM, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS, 4 (1st ed. 2017).

Right to development also includes right to autonomy of personal choices and control over the use of one's personal information. However, such right may not be exercised on certain grounds such as national security, maintenance of law and order, implementation of positive welfare mechanisms, etc. The constitutionality of much appraised Aadhaar scheme was thus upheld by the Supreme court of India while reiterating various elements of right to development, which forms the essence of constitutional principles.³⁸¹

CHALLENGES FACED BY RIGHT TO DEVELOPMENT IN INDIA

The Directory Nature of Right to Development In India

A particular right can either be mandatory and legally-binding in nature, i.e., justifiable before a court of law, or can be merely directory, i.e., non-justifiable. The directive principles of state policies contained in the fourth part of the constitution of India, which form the foundational stone of right to development in India, are non-justifiable and merely directory in nature. Thus, state has a positive obligation of fulfilling them for the citizens but citizens cannot per se claim a right over them before a court of law. The non-justifiability of these principles was defended on the grounds of financial constraints on the state which has just gotten free from the centuries of oppression. However, it is highly debatable as to whether financial constraints can solely be the justification for depriving the citizens of the right to claim certain basic privileges and that too even after half a century has passed after independence. There is a wide difference between legally enforceable social and economic rights and merely aspiration-based rights. This difference can be illustrated by the groundbreaking example of right to education which has been made a legally enforceable right from being merely a DPSP by a constitutional amendment. Most of the other entities constituted under right to development are contained under directive principles of state policy, which are un-enforceable indirect obligations of state and thus remain mere aspirations of the citizens. This poses a major challenge in proper realization and assimilation of right to development in India.

³⁸¹ Justice K.S. Puttaswamy and another v. Union of India and others, (2012) 5 S.C.C. 560.

Implementation and realization of Right to Development in India

Rethinking the conception of development from a rights standpoint stages more complex issues associated with the notion of right to development in India. The Gandhian model of governance based on self-sufficient village economies was rejected for being too impragmatic at the time of independence for a country which was just awakened from the centuries of oppression. Instead of it, a more centralized economic model was adopted to effectuate rapid industrial development. The issue, thus, is not just the unrealized economic and social aspirations of lakhs of people but also the broader question of a larger obligation of the state to affirmatively redress the grave socio-economic inequities persisting in the Indian society today. The overall planning structure of implementing right to development in India is inclined in the favor of upper class elites, which is best illustrated by the Community Development Programme, 1952. The amenities and benefits accruing under the act are majorly provided to the few upper classes privileged ones and the destitute ones remain physically as well as socially deprived of the same.³⁸² Apart from the issues like caste, class, poverty, employment and targeted benefits from welfare schemes, gender discrimination is another critical challenge plaguing the Indian society, whereby, females have been deprived of their basic right to social, economic, physical or emotional development. As per the prominent scholars such as Alston and Donnelly, the debate surrounding the existence of such a right does not remain fierce. “While eminent jurists such as Alston confidently assert that 'as a general proposition in terms of international human rights law, the existence of such a right is a fait accompli',”³⁸³“Jack Donnelly, in an article entitled 'In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development, demolish the claim that the right to development exists.”³⁸⁴

CONCLUSION- THE ROADMAP AHEAD

The conception of right to development constitutes two components within itself. One is the static component which reflects the bare minimum development in terms of substantial civil, political, social and cultural rights whereby every individual is entitled to a sustainable

³⁸² GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS*, 28 (2nd ed. 2004).

³⁸³ P. Alston, *Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy*, 10(6) *HUMAN RIGHTS AND THE RULE OF LAW*, 260, 339 (1981).

³⁸⁴ J. Donnelly, *In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development*, 16(5) *CALIFORNIA WEST INTERNATIONAL L.J.* 350,473 (1985).

human life full of peace and dignity. The other one is the dynamic component which mandates that the extent, applicability and the nature of the right shall depend upon the existing conditions of the individuals and that of the country. This is best illustrated by the right to education part III of the Indian Constitution which also finds mention under part IV. While the guarantee under part three talks about the mandatory entitlement which is attainable as per the existing scenario of the country whereas the one in part IV lays down the principles to be directorially followed in future. The complexity of the issues involved in the case of economic and social right such as right to development makes it ambiguous to recognize the specific obligations of particular duty-holders and to hold them liable in case of breach. Enacting stupendous legislations would not be the correct approach for overcoming the nature of challenges and complexities involved. The issues demand for alternate forums and procedures rather than the complex court of law procedures for ensuring effective implementation of the obligations. Alternative dispute resolution agencies and specialized program of action for better governance of realization of the right can be quite effective in dealing with the right-based issues.

At the global level, a platform needs to be established which enables various governments and international agencies to gather and deliberate over the obstacles faced by each of them for full realization of the right at their levels. An alternative consultation mechanism, which works transparently, rather than an outside judicial authority can prove to be much more effective for considering better procedures for implementation of the right. While implementing right to development, it needs to be remembered that as per the constitution of India as well as the declaration on the right to development, an individual is central to all the constituent rights of right to development. Whether an individual right or a collective right, the ultimate beneficiary of a particular right needs to be an individual itself. Thus, the end result of the exercise of all obligations must be the overall benefit of an individual. In India, the right to development is not legislated per se but its concomitants are inherent in the Indian Constitution. The distinction amongst the different components is based upon their enforceability in a court of law. Rethinking the situations prevalent and the existing dismal conditions of the 'deprived' classes in the Indian state, the right to development needs to be recognized as a specific right, expandable to the extent of bare minimum rights that every individual deserves by the very fact of their existence in the Republic of India.