

RECOGNISING ENVIRONMENTAL RIGHTS AS THIRD GENERATION RIGHT: WITH SPECIFIC REFERENCE TO SOUTH ASIA & INDIA

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INTRODUCTION

“God Created the Heaven like Earth, But We Men Turn It into Hell through Our Deeds”

Man is both creature and destroyer of his surrounding conditions, which gives him physical food and affords him the opportunity for thinking-related, moral, social and physical growth. In the long and winding change for the better of the human race on this planet a stage has been reached when, through the fast increasing speed of science and technology, man has received the power to change his physical, mental and social environment in huge numbers of ways and on a never-before-seen scale. Both parts of man's the natural and the manmade, are extremely important to his well-being and to the enjoyment of basic human rights, the right to life itself.¹ It is pretty difficult to have an open and honest view of the third generation rights. Generally, all of the rights under discussion are very wide in range. “They do not set out clearly stated particular measures and steps to be taken by nations or governments, but clearly states complete and thorough goals. “As pointed in the Right to Development, development means a situation permitting everyone to enjoy to their full extent 'all' rights and freedoms. So, development has variety of parts and makes up an ideal situation that rests on a large number of true and legal elements many of which are not under the control of governments alone. Almost the same

¹ Justice Susan Glazebrook, Human Rights & The Environment , Samoa – Human Rights Environment Report FINAL Oct 2008.doc

(Available at: <https://courtsfnz.govt.nz/speechpapers/Human%20Rights%20and%20the%20Environment.pdf>, last accessed on 10th April ,2019 at 08:19pm)

apply to peace”.² Further, it is very crucial that not a single one of the rights of the third generation has to date received a clear profile.

The fact that neither the holders of these rights, nor the similar duty bearers, nor the substance of the rights, have been definitely identified cannot simply be explained as (happening by chance problems which could without any difficulty be made better by investing more legal skills and intelligence. “The guessing that must be drawn is obvious. It would be more correct to define third generation rights not as true rights, but rather as agreed goals which the international community has promised to secure. Even so, they do not lose their law-related importance. They remain important signposts which mark the paths the international community should get on in understanding and carrying out policies for the welfare of humankind as a whole. In fact, individual human rights need a general and solid basic structure on which bigger things can be built within which they can succeed. Any war threatens to lead to a total denial of individual rights by death and destruction. Although a situation where everyone enjoys all the rights by the UDHR and the two Agreements of 1966 certainly ensures peace, and in most events also development, it has come out that these macro conditions cannot be secured of from the micro of individual human rights”.³ “There is a clear need to work on both levels, beginning and building on for the proof of being right of individual rights, but attempting at the same time to secure development, and “a clean and healthful surrounding conditions on a worldwide level where the issues related to these fields of action are tackled directly in all their complex difficulty”. “It is the recognition that human rights need a friendly and willing, which may also explain other attempts which have sprung up over the last few years. They are not placed under a heading of human rights, but they are all designed to build up that solid basic structure on which bigger things can be built for security which is extremely important for individual rights to take their full presence.”

² United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21, (Available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, last accessed on 10th April , 2019 at 09:02pm)

³ *Supra* fn 1.

DEFINING THIRD GENERATION RIGHTS

“We have not inherited the world from our forefathers- we borrowed it from our children”.

I. What is Third Generation Rights?

Third-generation rights or 'solidarity' rights are the lately recognised category of human rights. This grouping has been separate than the other two categories of human rights in that its understanding is basically based not only upon both the positive and negative duties of the state, but also upon the behaviour of every single individual. Rights under this category include self-determination as well as many normative expressions whose status as human rights is debatable now. These include the right to development, the right to peace,” the right to a healthy surrounding conditions, and the right to intergenerational equity or third generation rights⁴.

The “right to a healthy surrounding conditions demands a healthy humane conditions, including clean water, air, and soil that are free from poisonous chemicals or dangers & risks that threaten human health”. The right to a healthy environment involves the responsibility of governments to -

- *“Refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment;”*
- *“Stop third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy surrounding conditions, and;”*
- *“Frame the necessary rules to accomplish the goal of right to a healthy environment”.*

The “idea related to surrounding conditions or environmental justice supports two goals. The first is to make sure that rights and responsibilities related to the use of clean air and water, good crops, etc. are distributed with greater fairness among communities, both around the world and domestically. This involves making sure of that poor and not important communities do not suffer an unfairly heavy load of the costs connected with the development of useful things, while not enjoying equal benefits from their use. The second is to reduce the overall amount of environmental damages domestically and around the world.”

⁴Kiss, A & D Shelton. 2004. International environmental law. Ardsley, NY: Transnational Publishers, p 12 .

UNCERTAINTIES OF THE THIRD GENERATION RIGHTS

All “human rights of the third generation are advanced by grave uncertainties related to their holders, the duty- bearers, and their substance”.

Holders of the Rights

“According to the document on the Right to Development, for instance, the right is vested in human beings and peoples alike, whereas the African Charter assigns it to peoples alone. As far as the right to peace is concerned, an angrily staring separation is obvious. Whereas the declaration on the Preparation of Societies for a Life in Peace talks about nations and human” beings side by side, the declaration on the Right of Peoples to Peace confines itself to admit to a right of peoples to peace only. “As already pointed out, the right to an acceptable surrounding conditions is said as a right of peoples only by the African Charter. So, the tools or objects used to do work or measure something do not maintain a consistent line. Generally, no great care is taken to specify to whom the benefits connected with the rights are given, whether to people or to everyone, well it shows that the actual effects expected of them are not connected with their particular features as rights under positive international law.”

Duty Bearers

According “to the declaration on the Right to Development, “*it is in particular states that have to work hard for development by taking the steps necessary for that purpose.*” Translated into real and clear terms this means that peoples are pitted against states, a two-part thing the legal effects of which are very hard to understand”. On “the one hand, the related suggestions or possible plans of action could mean that peoples have rights against their own governments, “which is in fact the habit/desire chased after by the declaration of Algiers, a legal text drawn up by a private group of legal educated people in 1978; or they could be understood to express the idea that poorer states have vis-a-vis other states, or the international community”. All this, however,” does not fit easily into the usual idea of international law where the international community as such has yet to find its proper location.

INTERNATIONAL LAW & ENVIRONMENTAL RIGHTS

The law formulating environmental rights into international law can be traced in “early fisheries conventions prior to the establishment of UN. The first international instrument acknowledging development and environmental rights was in 1968 however the major

instrument that linked environmental law with human rights is the declaration adopted by Stockholm Conference in 1972". Further the declaration produced at the conference contained 26 principles out of which first is the most important in linking environment to human rights". It says "*Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and wellbeing and bears a solemn responsibility to protect and improve the environment for present and future generations.*" Adding to that major advancement of Stockholm Conference was creation of United Nations Environment Programme (UNEP). Its' major role is to address environmental issues at the international juncture and to develop policies on the on-going environmental issues with the consensus of the member countries. This UNEP led to the introduction of environment impact assessment of development projects and linkage of environment with the human survival. It was in itself a larger enlargement on the environmental basis. Later on in 1982 UNGA of the World Charter for nature was adopted which again strengthened the linkage amongst environment, nature and human beings.⁵

After "10 years of Stockholm declaration UN established a commission named as World Commission on Environment and Development headed by the former prime minister of Norway, Mrs. Gro Harlem Brundtland. The distinct feature of this commission was that for the first time all the member nations were drawn to enact special laws in their constitution for the protection of environment. Nearly during this period an expert committee on Environment protection" gave the recommendation for the inclusion of 22 legal principles out of which making right to environment as a fundamental right making it as an inevitable right.⁶

"Lastly in 1989 during the international Summit on the Protection of Global Atmosphere, all the participating nation consented to adopt Hague Declaration on the Environment. The declaration established connection between environment and human right stating as preserving the environment is the fundamental duty with including it as a right under right to live in dignity in a viable global environment." As mentioned in the first para of the declaration "The right to

⁵ The Linkage Between Environment and Human Rights : Is There A Right To Environment In The International Context ?, Sodhganga Online Resource , (Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/139529/11/11_chapter%203.pdf, last accessed on 12th April ,2019 at 10:23pm)

⁶ Simon Ball & Stuart Bell, "Environmental Law", 1991, page.no.4

live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge to all States through-out the world”.

In 1990 Convention on Human Right⁷ also adopted the linkage between environment and human right. With that UNGA accepted the indivisible linkage between healthy environment and enjoyment of human rights at all. “Twenty years after Stockholm Declaration, Earth Summit took place in Rio De Janeiro in Brazil (UNCED 1992) focusing on sustainable development and preserving environment from destruction. Here in the primary agenda was to aid governments in re-evaluating the indexes of economic development and stop the nations from irreplaceable destruction of the natural resources. The Rio Declaration revolved around the anthropocentric approach making nations believe that environment protection is necessarily justified means of human protection.” Principle 1 of the Rio Declaration states “*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*”

Notwithstanding the fact that Rio Declaration was a major success in itself, it failed to establish right to environment as a substantive human right. “However it affirmed several principles mentioned under Stockholm Declaration such as State’s responsibility towards preventing environmental harm, compensation for harm due to pollution and environmental damage, correlation between environmental pollution and health, and re-enforcement of the ‘polluter pays principle’ and the precautionary principle. The only human right affirmed under the declaration is given in Principle 10 of the Rio Declaration. It provides as a procedural right in providing information,” public participation in decision making and access to administrative and judicial proceedings. It more concentrated on economic development and environment protection rather than environment and human right.

Lastly as observed the right to environment didn’t last in its’ purest form as it was created in Stockholm Conference. The picturesque was shifted from preservation of environment to sustainable development. The concept which was introduced by WCED in 1987 and later on became the topic of discussion in Rio Declaration resulting its inclusion in Rio principles. This made the right to environment on the backfoot with sustainable development on the forefront. However in further conferences it was recognised that environment harm can and does effect the enjoyment of wide range of resources directly affecting human rights. These conferences

⁷ Commission on Human Rights Resolution, 1990/41

centred on climate change. “Human rights bodies have now recognised procedural and substantive obligations of states to protect human rights and environmental harms. “Most recent development is “*The Cancun Agreements of December 2010*” of the UN Framework Convention on Climate Change have quoted the language of the Human Rights Council resolution 10/4 of 2009 that “the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights.” Global warming has implications for both human rights and fundamental justice”.⁸”

ROLE OF ICJ IN RECOGNISING ENVIRONMENTAL RIGHTS AS THIRD GENERATION RIGHT

In the 1960s two covenants were adopted creating the controversial “generation of human rights. The environmental justice or solidarity rights has been integrated in this third generation of human rights”.⁹ “These consists of rights of the community as a whole rather than the individual rights raising up the issue of redistributive justice. Under this theory environmental communitarian justice is granted on the basis of more than 100 countries who has upheld the right to safe and healthy environment in their constitution”.¹⁰ It is necessary to understand the concept behind these generations before moving further. Firstly in 1948 Declaration on Human Rights was the original and first generation of human rights. Later in 1976 second generation progressed to economic, social and cultural rights. Third generation now includes “highly complex composite rights”¹¹ such as which includes right to development, the right to a healthy and sustainable environment, the right to peace and even the right to ownership of the common heritage of mankind.¹² “And now it has been talked about introducing fourth generation of human right as “Right to information””.

⁸ *Supra* fn. 6

⁹ TOMUSCHAT, C. “Human Rights between Idealism and Realism”, Oxford University Press, 2008, page no. 54

¹⁰ KISS, A.C,”Guide to international environmental law”, Martinus Nijhoff Publishers, Leiden, 2007, page no. 237

¹¹ TOMUSCHAT, C. “Human Rights between Idealism and Realism”, Oxford University Press, 2008, p.25 .

¹² *Ibid*

Major Developments

- Major developments took place after 1990s. “Even after recognition under Stockholm Conference of linkage between environmental rights and human rights, it never became the object of contention or discussion. Later in 1992 of Rio Declaration there was a total shift from human rights to sustainable development. However further in discussions few conferences and meeting made an overturn and brought environmental rights under human rights purview”.
- One of the noteworthy development recognising the linkage was in 1994, UN Sub-Commission on the Prevention of Discrimination and Protection of the Minorities Report, also known as the Ksentini Report.¹³ The report illustrated the global issue of healthy environment and shifting of linkage to healthy and decent environment as a right. It also points out that right to environment now includes right to development, health, life etc which are included in various international norms giving international human rights bodies to make a claim against it. “
- More than half the constitutions in the world contain legal rules promising that something will definitely happen or that something will definitely work as described as the right to environment in some countries, this right has priority over most other rights.¹⁴ “This hints that human rights cannot be showed in a good way and promised that something will definitely happen or that something will definitely work as described without protection of a safe and healthy environment not only by the state but also by the international community”.¹⁵

ENVIRONMENTAL RIGHTS & INDIAN LEGAL SCENARIO

Third Generation Human Rights & Indian Constitution

The widely accepted fact about inter-connection between human right and environmental right is personality development of human beings. This personality development is only possible when human beings have conducive material comfort and healthy environment to develop

¹³ Based on , “UN. Doc. E/CN.4/Sub.2/1994/9, July 6, 1994”.

¹⁴ KISS, A.C, op. cit., p.241

¹⁵ *Supra* f.n. 14

themselves. The enforcement of these rights would therefore involve the task of courts venturing into the realm of policy. “The fact that these rights have also become constitutional as fundamental rights for which a petition in the Supreme Court under Article 32 is maintainable, has already altered the traditionally conceived contours of the constitutional doctrine of separation of powers. The judicial rhetoric declaring these rights to be constitutionally enforceable being implicit in the constitutional guarantee of rights to life and the consequent guarantee of right to human dignity masks the actual complexities which are to be confronted by the courts while actually enforcing these rights in litigations”.¹⁶

Role of Indian Judiciary & Environmental Activism

The “major contribution of the Supreme Court to human rights jurisprudence has been enlarging the scope of Article 21 relating to right to life and including within its ambit the right to safe and pollution free environment”. “A vast body of case law has been developed favouring the right to a clean and healthy environment as a fundamental right within the meaning of right to life under Article 21 of the Constitution of India.¹⁷ In many environment related cases, the Supreme Court’s decisions have been based on the internationally recognised principles such as sustainable development, polluter pays principle, precautionary principle and restitution of the environment. These principles, recognised by the Supreme Court, were subsequently incorporated into the national policy and laws relating to the environment. The Supreme Court, recognizing that “a majority of people are unable to access the justice system, put into use a very positive approach by relaxing the rule of standing and permitting ordinary people to access the Court in matters of public interest. In 1980s and 1990s a number of environmental issues came before the Supreme Court in the form of PILs”. Even though formal pleadings are not insisted upon in PILs, based on the issues involved the court may seek the assistance of an amicus curiae. It may also appoint commissioners or expert bodies to verify the facts and submit reports. “Often the expert bodies in environment cases are government agencies such as NEERI and CPCB who are asked to give recommendations for corrective action”. “Before

¹⁶ Manwendar Kumar Tiwari, Adjudication Of Second And Third Generation Of Human Rights, Live Law ,12 Oct 2017.(Available at: <https://www.livelaw.in/adjudication-second-third-generation-human-rights/>, last accessed on 14th April 2019 at 10:39pm)

¹⁷ As provided in the Article 21 of Constitution of India, 1950 ; “Protection of life and personal liberty -No person shall be deprived of his life or personal liberty except according to procedure established by law.

deciding to accept or reject such reports the Court hears the objections, if any, on the reports submitted. The Court verdicts in PILs are not self-executing”.¹⁸

Case Analysis of ARJUN GOPAL V. UOI¹⁹

Brief Facts: In this case .the issue was with relation to the order of the Court dated September 12, 2017, which lifted the suspension on permanent licenses, thereby, permitting them to exhaust their stock of fireworks in Delhi-NCR and putting such licencees to notice for “Dussehra and Diwali in 2018 restricting them to possess and sell only 50% of the quantity permitted in 2017 and that this will substantially reduce over next couple of years.

DECISION: The Hon'ble Supreme Court while reiterating the November 2016 decision suspended the temporary licenses that was issued by the police after the passing of the order dated September 12, 2017, in order to prevent further sale of the crackers in Delhi and NCR.

RATIONALE: The Court made the following observations while arriving at its decision:

- Taking into account the poor environmental conditions witnessed last year where pollution levels rose at an alarming level making Delhi the most polluted city in the world, the Court held that though, the bursting of firecrackers was not the sole cause resulting in such high degree of pollution, but it was a major contributing element for the same.
- The Court “acknowledged the efforts made by Government (Ministry of Environment, Government of India as well as Delhi Government), Media, NGOs and various other groups to create awareness amongst the general public about the ill effects of bursting of these crackers.”
- The “Court recognized the stand taken by CPCB (Central Pollution Control Board) that Sulphur in fireworks should not be permitted as Sulphur on combustion produces Sulphur Dioxide and the same is extremely harmful to health. The CPCB also stated that between 9:00 pm to midnight on Diwali day the levels of Sulphur Dioxide content in the air is dangerously high.”

¹⁸ *Supra* f.n. 16

¹⁹ Arjun Gopal vs Union of India, WRIT PETITION (CIVIL) NO. 213 OF 2017

The Court concluded that, “the order suspending the licences should be given one chance to test itself in order to find out as to whether there would be positive effect of this suspension, particularly during the Diwali period”. In considering the adverse effects of burning of crackers leading to the depreciation of the air quality deteriorates abysmally and gives rise to severe “health emergency” situations every year post Diwali in the year 2016, the Court had passed the order dated November 11, 2016 but it's the impact remains to be tested during Diwali days.” The Court held that the directions issued under the order dated September 12, 2017 passed by the Court should be made effective only from November 01, 2017 i.e. post Diwali, thus delaying its enforcement”.

CONCLUSION

“There is enough on Earth for everybody's need, but not enough for everybody's greed”

-Mahatma Gandhi

The “directly to improvement, the directly to harmony, and the directly to a sound domain are at the core of third-generation human rights. Rights and duties relating to the usage of environmental valuable things should be brought across with more important efforts, both all around and locally”. The natural equity and worldwide human rights developments are applying a rights-based procedure to go up against worldwide natural destruction and to secure environmental living spaces and the planet for who and what is to come. “To push the discussion on the linkages between human rights and the earth, issues, for example, worldwide exchange, business and globalisation the very mean of resources and energy generation should be checked”. The “problem becomes sudden and serious when in relation to the second and third generation human rights, the fixes for the violations are created by the courts at par with the one available for the violation of first generation rights, which is individual and generally coerced”. The reality is, “that there are huge number of others who are in almost the same way located as the people who approach a court for help, yet their troubles are unnoticed because their case has not been shook before the court”. “It is a fact that courts only give fixes to those, who files for justice before the court and therefore courts cannot be blamed for not dealing with before it the cause shaken 'as a whole', as the court should address the cause 'in relation to the people who approach a court for help'. However, when it comes to the law-

related review of second and third generation rights, the usual judicial craft is not enough to deal with the problem”.²⁰

In the broadest sense human rights are comprehended as rights which have a place with any person as an outcome of being human, freely of demonstrations of law. It has turned out to be normal to talk about various 'ages' of human rights. “As indicated by the present phrasing, human privileges of the original are 'adverse' human rights, or common freedoms, which order begins to swear off meddling with individual flexibility .Taking “into account the strong factual relationship between environmental degradation and the impairment of human rights, it is important to consider how these two fields interrelate within the law”. Various “constitutions of the world regard the right to a safe, healthy and ecologically balanced environment as an independent human right”.”

²⁰ Manwendar Kumar Tiwari, Adjudication Of Second And Third Generation Of Human Rights , Live Law ,12 Oct 2017.(Available at: <https://www.livelaw.in/adjudication-second-third-generation-human-rights/>, last accessed on 14th April 2019 at 10:39pm)