

DISARTICULATION OF INDIGENOUS PEOPLE: IS JUDICIARY THE ULTIMATE SAVIOUR?!

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By way of an Introduction: An Indian Perspective

Four decades after the Constitution was brought into force, its most conspicuous feature has been the expansion of the Indian Judiciary and its pre-eminence over the other two political branches of government namely, the Legislature and the Executive. In no other country in the world has the Judiciary assumed such ascendancy as in India. In one of his last pronouncements from the Supreme Court, Chief Justice Pathak in a proud understatement thus spoke of the Indian Judiciary, “*The range of judicial review recognised in the superior Judiciary of India is perhaps the widest and most extensive known in the world of law.*”¹

To this, it may be safely added that the Indian Supreme Court is today the most powerful of all Apex Courts in the world. It has surpassed in its power even the United States Supreme Court which Lord Bryce and Tocqueville thought in their times was the most powerful of all Courts in the world.

From an institution entrusted with the task of *applying* the law in cases brought before it, the Supreme Court has recast itself into an institution which *makes* law.² In *Laxmi Kant Pandey v Union of India*;³ the Court formulated a compulsory procedure to be followed during inter-country adoption of Indian children. In *Vishakha v State of Rajasthan*,⁴ the Supreme Court laid down a twelve point elaborate “guideline” to promote gender justice in work places. In *M C. Mehta v State of Tamil Nadu*,⁵ it laid down a mechanism to ensure compliance with the Child Labour (Prohibition and Regulation) Act, 1986 In all these cases, and many more, the Judiciary *made* law in the sense of Legislature *making* it. As the general argument goes, the lawmaking role imparted by the Supreme Court is in conflict with the doctrine of separation of powers and the principle of representative democracy contained in our Constitution.⁶ Today, the Judiciary’s powers over the State are so expansive that no activity of the State is beyond judicial scrutiny as such. Of no subject can it be said that the

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1 *Union of India v. Raghubir Singh*, AIR 1989 SC 1933-1938. See also *P.S.R. Sadhanantham v. Arunachalam*, AIR 1980 SC 856-862, per Pathak J. • See M. N. Rao., Judicial Activism. 1-10 at 3 (Jour) 8 SCC (1997).

3 AIR 1987 SC 232.

4 AIR 1997 SC 3011.

5 (1996) 6 SCC 756.

6 See S.P. sathe , judicial activism in india (2001)

Court has no jurisdiction at the threshold to entertain it, provided a formal compliance of the Court's jurisdiction is made out. The only limitation it seems is the Court's own sense of propriety not to interfere on the merits of the issue.

An expansive judicial control has been achieved by the Supreme Court evolving a theory of controlling "arbitrary" actions of the State and its instrumentalities linked to a "new dimension" of the equality Article of the Constitution viz., Article 14. The author of this theory Mr. Justice P. N. Bhagwati, as he then was, propounded it first in *Royappa v. T.N.* and in four later judgements of his own with different shades of emphasis and refinement.⁴ According to this theory, Article 14 does not embody merely the theory of classification of persons and things, but is a "dynamic concept having an activist magnitude." "*Equality is antithetic to arbitrariness*" it is said, and "*in fact equality and arbitrariness are sworn enemies.*" When an act is "arbitrary," it is said "it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14." The principle of "*non-arbitrariness*" pervades Article 14 like a "*brooding omnipresence.*"

Short of such metaphoric and florid language repeated in successive cases, it is difficult to formulate "non-arbitrariness" as an aspect of equality. The original legal meaning of "arbitrary" was "determinable by the decision of Judge or Tribunal rather than defined by statute." Its modern meaning is "capricious, randomly chosen." Even in its modern sense, arbitrariness does not necessarily result in unequal treatment. The Queen in *Alice in Wonderland* acted quite capriciously when she ordered anyone's "head to be taken off who irritated her but there was no question of her acting unequally. Similarly, one can act quite "arbitrarily" to a person or body without violating any concept of equality as when permission is refused to a sole applicant on the ground that the applicant has red hair. No case of inequality also arises if all the applicants have red hair and are capriciously refused permission on the ground that they have red hair. It is only when permissions are refused capriciously on the ground that some have red hair and are granted to others because they have black hair that a question of unequal treatment arises, in which case it is the old theory of the absence of a rational reason for the distinction made that comes into operation. 'Arbitrariness' is certainly opposed to rational action but it is not necessarily opposed to equality. To act arbitrarily is merely to act irrationally. Irrational conduct does not *per se* take away any persons right to equal treatment which is all that Article 14 is really about despite its "activist magnitude."

Over time, it is not just the rights of the socially excluded that have been put up for judicial review and intervention, whole gamut of issues such as the environment, consumer affairs, property rights, the practices

of municipal corporations, educational institutions, politicians and political parties, to name a few areas, have been presented before the Courts to prescribe public policy outcomes. The widening of subject matter has caused Indian judicial activism to be celebrated as a device of engineering social change. The project seeks to ascertain the reason for this lawmaking role which the Supreme Court has been imparting, when it is in conflict with established constitutional doctrines and principles.⁷

Contextualizing the Trends in Judicial Activism in India: A Step towards “better” Governance?!

The word “govern”, according to its literal meaning, would refer to “*rule with authority*”, “*conduct the policy, actions and affairs of the state either despotically or constitutionally*”. In the Indian context, having adopted the democratic form of government, the question of despotism does not arise at all but for the temporary aberration of the 1975-77 emergency period. As Churchill pointed out, democracy may be the worst form of government except when you consider all other alternatives for governance. In the context of our country, how has our democracy worked? Are we governing ourselves effectively? If our governance was better, we would be a less corrupt country because better governance also leads perhaps to a better sense of values and better moral standards in the society in general. Of course one can raise a question whether it is better morals in a society which leads to better governance or vice versa? Corruption can be need-based or greed-based. Better governance can at least help to check need based corruption. Better governance can check greed based corruption also because punishment for the corrupt will be very effective and prompt in a better governed country.⁸ *Thus, we have to understand the*

7 I have attempted to show, with the help of celebrated cases where the Supreme Court has *made* laws, that while the Constitution guarantees fundamental rights, there are no legal rights that is, those arising out of laws made by the Legislature, to enforce the fundamental rights. As such, it is in the process of enforcing these fundamental rights, not backed by legal rights, created by statutes, that the Supreme Court makes laws i.e. while bridging the gap between fundamental rights and legal rights.

8 Concerning the constitutional mandate, it may be noted that under our Constitution, we have the Executive, Judiciary and the Legislature as the three major arms for governance. Each has to play its role and if any one of these agencies is not able to perform, then there is a danger of the others entering into the vacuum so created. For instance judicial activism we have seen in recent times can be attributed to the failure of the Executive and Legislature. Between the Executive and Legislature, we find that the role of the politicians representing the Legislature and bureaucrats representing Executive have undergone dramatic changes over the period of fifty years. There was a concept many years back that the policy making will be the responsibility of the political leadership and implementation will be that of the bureaucracy. But over the years, the situation has almost been reversed with the politicians taking direct interest in day to day administration like postings, transfers and so on and the bureaucracy hopefully left with the task of working out policy options. Though much is made of the doctrine, the fact of the matter

dynamics and diachronic of governance before we explore what could be done for better governance and how accountability and transparency can help in the process.

Judicial activism in India has been perceived in certain quarters as a success of constitutional governance, while others have sought to condemn it, often with the specific charge that the judicial activism movement has caused the judiciary to overstep the bounds of 'proper' judicial behaviour. The appearance of judicial activism in India can be functionally correlated with the emergence of Public Interest Litigation (PIL), though it would be erroneous to think of PIL and judicial activism as necessarily synonymous. Starting in the last 1970s, in a series of cases, the Supreme Court enlarged its reach and jurisdiction in two ways. One, by re-interpreting the Constitution to expand the scope and content of various fundamental rights, and two, by moderating the ancient requirement of *locus standi* (standing and interest) for access to judicial remedies and redress. As a consequence, where it was felt that there had been gross violation of fundamental rights, procedural requirements were eased to enable individuals or organisations to approach the Supreme Court and high Courts on the behalf of those unable to do so themselves - 'in the public interest'.

This widening of subject matter has caused Indian judicial activism to be celebrated as a device of engineering social change. Indeed, the very characterization of judicial activism has been linked to social transformation, as in a recent work by S.P. Sathe where he defines an activist Court in the following manner: "*A Court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist Court*". In the same breath he goes on to state that such activism "can be positive as well as negative". Since it is not always possible to have a determinate discourse on "expanding the horizon of the rights of the individual" and the arena of the 'social and economic' is also open to contest. Sathe's mode of analysis suggests that the evaluation of judicial activism lies in the juxtaposition of one's perspectives of social and economic change against the standards of the activist Court. It is perhaps this that leads Upendra Baxi to state in the preface to S.P. Sathe's book that 'Judicial activism has no permanent essence and its histories are merely chronicles of contingency.'⁹

is that in adopting the British Parliamentary system, the framers of our Constitution rejected the rigid separation of powers inherent in the American Constitution. The sole reference is to be found in a Directive Principle of State Policy, Art. 50 which directs the State to strive to ensure separation of powers between the Executive and the Judiciary, that too in the public services.

9 Sathe (2002), p. xii.

The claim that judicial activism is necessary to rescue us from bondage to the past— from having the writers of the Constitution “rule us from the grave”— defies both logic and history. The contest is between those living individuals who wish to see control of change in judicial hands and those who wish to see it in other hands. There has been no argument that either statutory or constitutional laws are not to change. The only meaningful question is: *Who* is to change them? The reiterated emphasis on change, like the reiterated emphasis on morality, argues what is not at issue and glides over what is crucially at issue: Why are *judges* the authorized instrument? The original cognitive meaning of laws— constitutional or statutory— is important, not out of deference to the dead, but because that is the agreed-upon meaning among the living, until they choose to make an open and explicit change— not have one foisted on them by the verbal sleight-of-hand of judges.¹⁰

Existing social philosophies and political alignments cannot be presupposed in discussions of long-run questions, such as constitutional interpretation. Even within the judiciary, differences in “substantive values” have been drastic over time, and by no means negligible even at a given time. The belief that a constitutional structure can be maintained while jurists with radically different visions make “substantive choices” within it seems dangerously similar to a belief that one can slide half-way down a slippery slope. The argument for judicial activism must stand or fall in general and enduring terms, not simply on whether some current political or social creed is considered so superior to competing creeds as to justify judges’ decisions in its favor. It is ultimately not a question of the relative merits of particular political or social creeds but of the long-run consequences of opening the floodgates to the generic principle of constitutional decisions based on “substantive values.” Once you have opened the floodgates, you cannot tell the water where to go.

10 *Rule of the ruler and not rule of law!!*

We seem to be going back to our old ethos of the rule of the ruler instead of the rule of the law. As a result today we find in many states that the civil servants have come to be identified with certain political leaders and their fortunes rise and fall in tandem with the rise and fall in the fortune of their political masters. This is perhaps one of the major factors that has contributed to the deterioration of the quality of governance. The first step to ensure better governance therefore would be to have the concept of the rule of law restored. The second step is to ensure that bureaucracy is depoliticised. The rule of law will be maintained if the Judiciary is able to effectively perform and ensure that the laws are implemented. In fact, though it is the function of the Legislature to legislate the law and the Executive to implement the law, many a time Judiciary has to intervene because the Executive has been failing in its duty. We had in the late 1990s the spectacle of the politicians being involved in scams and the Courts taking an active part and going to the extent of even directing the CBI and monitoring the progress of the investigations. This perhaps is a temporary phase in the governance of our country because the judicial activism becomes necessary only when the Legislature and Executive fail.

What must be rejected is precisely the general principle that judges' "substantive values" should govern constitutional decisions. Nor is anything fundamentally changed by saying that judges are only agents of general moral ideas, rather than their own personal inclinations. If the Constitution does not enact Herbert Spencer's Social Statics, neither does it enact John Stuart Mill's On Liberty or John Rawls' A Theory of Justice.

Hum Log: The Tribes¹¹

The Constitution of India does not define Scheduled Tribes as such. Article 366(25) refers to scheduled tribes as those communities who are scheduled in accordance with Article 342 of the Constitution. According to Article 342 of the Constitution, the Scheduled Tribes are the tribes or tribal communities or part of or groups within these tribes and tribal communities, which have been declared as such by the President through a public notification. The Scheduled Tribes account for 67.76 million of strength, representing 8.08 percent of the country's population¹². *Scheduled Tribes are spread across the country mainly in forest and hilly regions.*

The essential characteristics of these communities are:-

- Primitive traits
- Geographical location
- Distinct culture
- Isolated from the mainstream community at large
- Economically backward.

As per 1991 census, 42.02 percent of the Scheduled Tribes populations are main workers of whom 54.50 percent are cultivators and 32.69 per cent agricultural laborers. Thus, about 87 percent of the main workers from these communities are engaged in primary sector activities. The literacy rate of Scheduled Tribes is around 29.60 percent, as against the national average of 52 percent. More than three-quarters of Scheduled Tribes women are illiterate. These disparities are compounded by higher dropout rates in formal education resulting in disproportionately low representation in higher education.

Not surprisingly, the cumulative effect has been that the proportion of Scheduled Tribes below the poverty line is substantially higher than the national average. 51.92 percent rural and 41.4 percent urban Scheduled Tribes were still living below the poverty line.¹³ The progress over the years on the literacy front

11 Majority of the data collected is from Ministry of Tribal Affairs.

12 As per the 1991 Census.

13 The estimate of poverty made by Planning Commission for the year 1993-94.

may be seen from the following¹⁴:-

	1961	1971	1981	1991
Total literate population	24	29.4	36.2	52.2
Scheduled Tribes (STs) population	8.5	11.3	16.3	29.6
Total female population	12.9	18.6	29.8	39.3
Total Scheduled Tribes (STs) female population	3.2	4.8	8.0	18.2

There are approximately two hundred million tribal people in the entire globe, which means, about 4% of the global population. They are found in many regions of the world and majority of them are the poorest amongst poor. According to 1981 census, the population of Scheduled Tribes in the country was 5.16 crores, consisting about 7.76% of total Indian population, which means one tribesman for every 13 Indians. Among tribes, there are so many communities. The major identified tribes in country number about the 428 scheduled tribes in India though the total number of tribal communities are reported to be 642 and several of them have become extinct or merged with other communities as the tendency for fusion and fission among tribal population is a continuous process. Thus, if the sub-tribes and state tribes will be taken into consideration, the number will be many more. These 428 communities speaking 106 different languages have been so far notified as the scheduled tribes in 19 states and 6 union territories. They have their own socio-cultural and economic milieu. In fact, the largest concentration of tribal people, anywhere in the world and except perhaps Africa is in India. About 50% of the tribal population of the country is concentrated in the states of Madhya Pradesh, Chhatisgarh, Jharkhand, Bihar and Orissa. Besides, there is a sizeable tribal population in Maharashtra, Gujarat, Rajasthan and West Bengal.

Land Holdings of Tribal population¹⁵

- 1) Marginal and small holdings 62.42%
- 2) Semi-medium 20.59%
- 3) Medium 13.58%
- 4) Large Holdings 3.41% Total 100.00

¹⁴ All figures are in millions.

¹⁵ Orissa review, Feb-March 2005, *Tribal development in India - a study in human development* by Pillai Kulamani.Pg, 71-78.

So What Did the Godfather Say

The fundamental principles laid down by the first Prime Minister late Jawaharlal Nehru in this regard became the guiding force. These principles are:

1. Tribal people should develop along the lines of their own genus and we should avoid imposing any thing on them. We should try to encourage in every way, their own traditional arts and culture.
2. Tribal people's rights in land forest should be respected.
3. We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will no doubt be needed especially in the beginning. But we should avoid introducing too many outsiders in to tribal territory and,
4. We should not over administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through and not in rivalry to their own social and cultural institutions.

Little did he know, how in the future course of time, a mockery of all his principles will take the nation in a state of over 8 crore pair of eyes imploring for livelihood.

The Good Earth: Development Induced Displacement

"Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border." says Francis Deng¹⁶.

The case for arguing that development-induced displacement is clearly covered by the Principles is bolstered by Principle 6.2(c)¹⁷ which reads: *"The prohibition of arbitrary displacement includes displacement: [...] (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests [...]"*

The tribal population has been disproportionately affected. An estimated two per cent of the total Indian population has been displaced by development

16 Francis Deng is the UN Secretary General's Special Representative on Development Induced Displacement.

17 The UN Guiding Principles on Internal Displacement developed by Francis Deng. Op. Cit. 12.

projects. Of these, 40 percent are tribals although they constitute only 8 percent of the total population, as per W. Courtland Robinson¹⁸. Cernea's¹⁹ impoverishment risk and reconstruction model proposes, "The onset of impoverishment can be represented through a model of eight interlinked potential risks intrinsic to displacement."²⁰ These are:

- *Landlessness.*
- *Joblessness.*
- *Homelessness.*
- *Marginalization* (Marginalization occurs when families lose economic power and spiral on a "downward mobility" path. Many individuals cannot use their earlier acquired skills at the new location; human capital is lost or rendered inactive or obsolete.)
- *Food Insecurity.*
- *Increased Morbidity and Mortality.*
- *Loss of Access to Common Property.*
- *Social Disintegration* (The fundamental feature of forced displacement is that it causes a profound unraveling of existing patterns of social organization. The cumulative effect is that the social fabric is torn apart²¹. Others have suggested the addition of other risks such as the loss of access to public services, loss of access to schooling for school-age children, and the loss of civil rights or abuse of human rights.²²)
- *Loss of Access to Community Services.*
- *Violation of Human Rights* (The impoverishment risk and reconstruction model already has been used to analyze several situations of internal displacement. Lakshman Mahapatra applied the model to India, where he

18 W. Courtland Robinson is a Research Associate at the Center for International Emergency, Disaster and Refugee Studies at the Johns Hopkins University Bloomberg School of Public Health in Baltimore, Maryland.

19 Michael Cernea is a sociologist based at the World Bank who has researched development induced displacement and resettlement for two decades.

20 Michael Cernea, 1996, "Bridging the Research Divide: Studying Development Oustees." In Tim Alien (ed), *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa* (London: United Nations Research Institute for Social Development, Africa World Press and James Currey).

21 Descriptions of the first seven risk factors are drawn from Michael Cernea, 2000, "Risks, Safeguards and Reconstruction." The description of the eighth risk, social disintegration, is from Michael Cernea, 1996, *Public Policy Responses to Development-Induced Population Displacements* (Washington, DC: World Bank Reprint Series: Number 479).

22 Robert Muggah, 2000, "Through the Developmentalist's Looking Glass: Conflict-Induced Displacement and Involuntary Resettlement in Colombia." In *Journal of Refugee Studies* 13(2): 133-164.

estimates that as many as 25 million people have been displaced by development projects from 1947-1997.²³⁾

Cernea's impoverishment risk and reconstruction model offers a valuable tool for the assessment of the many risks inherent in development-induced displacement. Balakrishnan Rajagopal of the Massachusetts Institute of Technology has noted five "human rights challenges" that arise in relation to development-induced displacement:²⁴

Right to Development and Self-Determination

In 1986, the UN General Assembly adopted a Declaration on the Right to Development, which asserted the right of peoples to self-determination and "their inalienable right to full sovereignty over all their natural wealth and resources."²⁵ In Rajagopal's interpretation, such language makes it "clear that local communities and individuals, not states, have the right to development."²⁶

Right to Participation

If self-determination is the right to say whether development is needed or not, participation rights begin to be relevant when development begins. The right to participation is based on various articles of the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁷ More specifically, the 1991 International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries²⁸ stipulates²⁹ that indigenous and tribal peoples shall participate in the formulation, implementation and evaluation of national and regional development plans that affect them³⁰.

Right to Life and Livelihood

When security forces take Action to move people forcibly or to quell civil

23 Lakshman K. Mahapatra, 1999, "Testing the Risks and Reconstruction Model on India's Resettlement Experiences." In Michael Cernea (ed) *The Economics of Involuntary Resettlement: Questions and Challenges* (Washington, DC: World Bank).

24 Balakrishnan Rajagopal, 2000, *Human Rights and Development* (World Commission on Dams, Thematic Review V.4, Working Paper). Although Rajagopal's discussion focuses on dams, the human rights challenges apply in other types of development-induced displacement.

25 UN General Assembly, 1996, *Declaration on the Right to Development* (A/RES/41/128).

26 Rajagopal, *Human Rights and Development*, p. 5.

27 Fact Sheet No. 2 (Rev.1), *The International Bill of Human Rights* (www.unhchr.ch). 28ILO Convention 169

29 Article 7

30 Cited in Sarah C. Aird, 2001, "China's Three Gorges: The Impact of Dam Construction on Emerging Human Rights," *Human Rights Brief* 24, Winter 2001.

dissent against development projects, this may constitute a direct threat to the right to life, which is protected in the UDHR³¹ and the ICCPR³². The right to livelihood is threatened by the loss of home and the means to make a living when people are displaced from habitual residences and traditional homelands. The rights to own property and not to be arbitrarily deprived of this property as well as the right to work are spelled out in the UDHR³³.

Rights of Vulnerable Groups

Growing evidence shows that, development projects disproportionately affect groups that are vulnerable to begin with, particularly indigenous groups and women. Human rights of vulnerable groups are protected generically in the International Bill of Human Rights. The ILO Convention 169 spells out protections for indigenous groups.

Right to Remedy

The right to remedy is asserted in the UDHR³⁴ and in the ICCPR³⁵. As Rajagopal notes, “they need a quick and efficacious remedy that can halt ongoing violations and prevent future ones. The right to remedy is therefore crucial...to all development projects.”³⁶ Put more broadly, “A right without a remedy is no right at all.”

There are more than 4850 indigenous communities in India, most of whom are hunters-gatherers, shifting cultivators, fisher folks, small peasants etc. they are mostly defenseless people who are at the same time socially oppressed and economically exploited. When they are displaced, they are so engrossed in fending for themselves that they find it impossible to protect themselves and their culture.

Even though India has a large number of internally displaced persons, there is no legislation that specifically deals with them. The Judiciary is virtually handicapped in the matters of the internally displaced persons. The role of the various NGO's as well in protecting the legal rights of the displaced persons has not borne much fruit. Thus they remain legally deprived. Needless to mention, what would be the image of India in the mind of international community. We may later build up the argument from instances of aggravation of plight of tribals, how India stands far behind the ILO convention and international commitments to Human Rights and Displacement.

31 Article 3

32 Article 6

33 Articles 17 and 23, respectively

34 Article 8

35 Article 2

36 Rajagopal, Human Rights and Development, p. 11.

Judiciary in Jungles

Perhaps no judiciary in the world has devoted as much time, effort and innovativeness in protecting our forests as the Supreme Court of India has for the last eight years. In doing so it reinterpreted the Forest (Conservation) Act, 1980, created new institutions and structures and conferred additional powers on the existing ones. It has been a process of continuous involvement of the Apex Court in forest management assuming the nature of *continuing mandamus*.

The Herculean task of the Apex Court has been carried out through its intervention in the following two cases:

- The *T. N. Godavarman Thirumulkpad v. Union of India* and ors (Writ Petition 202 of 1995), concerning implementation of the Forest Conservation Act, 1980.
- The *Centre for Environmental Law (CEL) v. Union of India* and ors. (Writ Petition 337 of 1995) concerning the issue of settlement of rights in National Parks and Sanctuaries and other issues under the Wild Life (Protection) Act, 1972.

These cases are being heard since then as part of what is known as the continuing mandamus, whereby Courts rather than passing final judgements, keep passing orders and directions with a view of monitoring the functioning of the executive. *“There is currently very little information about this case, its orders and how they effect the region. Any intervention first needs to begin with the awareness. The legal complexities need to be demystified, creating the space and possibility for simple but factual communication on the issue as well as public debates on concerns and solutions. These tasks though daunting are certainly achievable”*, say Ritwick Dutta and Kanchi Kohli.³⁷

Intersections between Ruralisation and Poverty: A Global Landscape

The second half of the twentieth century was marked by mass migration of people from rural to urban areas and this mass migration will continue for the foreseeable future. Hundreds of millions of people have moved or are moving from country to city. This reflects the hardship of rural life and the judgement of people that their aspiration to improve their well-being and that of their families will be best attained by moving to the city. The majority of the world's population still lives in rural areas. However, within five years for the first time the numbers

37 Ritwick Dutta is an advocate in the Supreme Court. Kanchi Kohli is based in New Delhi and a member of the Kalpavriksh Environmental Action Group. They jointly coordinate Forest Case Update, a newsletter service

of city dwellers and rural dwellers will be equal and after that the proportion of the world's population living in rural areas will decline rapidly.

Percentage of population living in rural areas³⁸

	1950	2000	2030
Africa	85.3	62.8	47.1
Asia	82.6	62.5	45.9
Europe	47.6	26.6	19.5
Latin America and the Carribean	58.1	24.6	16.0
Oceania	38.4	25.9	22.7
World	70.2	52.8	38.8

The world's population will continue to grow in the coming decades but most of those additional people will live in cities. There will be relatively small growth in the world's rural population, an estimated ninety-five million between 2000 and 2030.³⁹ As this mass migration from country to city continues and swells, those who remain in the country are becoming increasingly isolated and marginalised in political and economic terms.

Mass migration from rural areas is changing the nature of the rural population:

- because the search for work and income is a principal driver of migration, more men tend to migrate than women, leaving a disproportionate share of the rural population female and with lesser income;
- because rural families tend to have more children than urban families, the numbers of children in rural areas continues to grow and so family income needs continue to grow; and
- because of adult male migration to cities, the child to adult ratio in rural areas is growing significantly.

Indigenous, cultural and ethnic minority groups tend to remain where they are because of traditional links with community, place and land. This is especially significant in Latin America where the rural population is already less than a quarter of the total population and will decline to a sixth by 2030.

38 Derived from United Nations Population Division *World Urbanisation Prospects: The 2001 Revision* 20 March 2002 UN document ESA/P/WP.173 Table A.2.

39 United Nations Population Division *World Urbanisation Prospects: The 2001 Revision* 20 March 2002 UN document ESA/P/WP.173 Table A.4.

Indigenous peoples and cultural minorities want to preserve their traditional ways of life and for them, this is best done on their traditional lands. These groups are usually excluded from the institutions and systems of the dominant culture and society. Their exclusion is exacerbated by rural isolation. Rural people as a whole have lower enjoyment of human rights than many urban people. This is associated with isolation and poverty.

Poverty itself is a human rights violation. Rural poverty is endemic in most countries. Most of the poor are rural and will be so for several decades. Their income, spending and employment usually concentrate on staple food. They have little land, schooling or other assets, and face many interlocking barriers to progress. Poverty and hunger have fallen massively, mainly due to rural and agricultural development, especially between 1975 and 1990. Yet this improvement, and parallel progress in agricultural production, have stalled during the last decade, and many rural regions have been excluded. Rural-urban poverty gaps have not declined globally.⁴⁰

Certainly some rural dwellers are relatively rich but the great majority of the people are poor and almost a third are desperately poor. Worldwide, 1.2 billion people are “dollar poor”, that is, they consume less than a dollar a day. Of those seventy-five per cent live and work in rural areas. It is projected that, even with the massive migration to cities, in 2025, sixty per cent of the dollar poor will still be rural.⁴¹ Poverty affects not only those dependent on a cash income but also those in the subsistence economy. Where there is good soil, good water and fair distribution of access to land, rural people may escape malnutrition through subsistence farming. Too often, however, concentrations of land ownership and the use of land for export crops leave families without adequate food even in agriculturally rich areas. Others, who depend on fishing for subsistence, are affected by pollution of the seas and lakes and the exhaustion of fishing stocks by commercial exploitation.

Poverty in turn produces or exacerbates other human rights violations. Poverty affects women more than men. Women have less access to land, credit, technology, education, health care and skilled work.⁴² The endemic rural poverty in many countries is exacerbated or even caused by inequitable distribution and control of land. Brazil provides a stark example of this. The concentration of land tenure in Brazil is among the highest in the world. Fewer than fifty thousand landowners have estates more than one thousand hectares, controlling more

40 International Fund for Agricultural Development *Rural Poverty Report 2001* OUP Oxford 2001 p 15.

41 *Ibid.*, p. 15.

42 *Ibid.*

than fifty per cent of all agricultural land. Close to one per cent of rural landowners hold roughly forty per cent of agricultural land. There are nearly 4.8 million landless families in the country. These are people who live as renters, sharecroppers, squatters, or who hold rural properties smaller than five hectares.⁴³ Rural poverty declined globally between 1980 and 2000 but the decline was uneven. In some regions and in some countries there was little or no decline. In other regions and countries, rural poverty declined at a slower rate than urban poverty and so the urban-rural poverty gap increased. Rural-urban gaps remain wide in Latin America in spite of some falls in both urban and rural poverty. Faster falls in rural poverty occurred in Asia, especially though not exclusively in East Asia, but the gaps have increased since 1985, especially in China. Most of Africa, except Ethiopia and Uganda, has seen little poverty reduction over the last twenty years but the rural to urban gap has decreased. The rate of poverty reduction has slowed since the late 1980s and, in East and South East Asia, especially since the economic crisis of 1998.

Sharp rises in poverty, especially in farming areas, have occurred in ten transitional countries since the late 1980s. Overall there has been no global correction since the late 1970s of the urban biases that sentence rural people to more widespread and deeper poverty, illiteracy and ill-health.⁴⁴ These many, varied dimensions of rural experience form a *consistent, inter-related pattern of human rights violation* that is difficult to escape. They do not occur in isolation from each other. They constitute a web of mutually reinforcing disadvantages for rural people. Remoteness makes it difficult to access services which in turn affects education and health, which in turn affects employment and productive ability and so produce or sustain poverty. Poor nutrition leads to poor health and so to difficulty in receiving education and entering employment. Poverty prevents access to communications and other technology that could overcome the disadvantages of distance and the relative lack of services. It also drives migration, especially of adult workers and especially of adult male workers, that leaves families without necessary support and exposes the migrant workers themselves to other forms of human rights violation. Rural people often seem to be trapped no matter what they do.

It is high time we delineated trajectories of the globalization of law and map the changing contours of legal pluralism using empirical material on World Bank financed infrastructure and biodiversity projects in India. The role of international institutions, social movements and NGOs, which challenge the

43 Centro de Judico Global 'Agrarian reform and rural violence' *Human rights in Brazil 2000* www.mstbrazil.org/humanRights.html.

44 IFAD *op cit* p38.

monopoly of the state over the production of law and the definition of the common good, is analysed with reference to conflicts over privatization of natural resources, struggles against forced displacement and loss of livelihood as well as the complaints on behalf of indigenous communities before the World Bank Inspection Panel. It is argued that despite scattered sovereignties in the new architecture of global governance, the state remains a central albeit contested terrain. Its pivotal role in selectively transposing conditionalities, law and policies into the national arena as well as its strategies to avoid accountability are foregrounded against the attempts by civil society actors to use national and international legal platforms to enforce compliance with environmental and human rights standards.

Land Rights: A Crucial Component of ESC rights?

Land rights, particularly in the context of developing countries, are inextricably linked with the right to food, the right to work and a host of other human rights. In many instances, the right to land is bound up with a community's identity, its livelihood and thus its very survival. For farmers, peasants and fisherfolk, land is a vital component of a particular way of life. For this reason, peasants and poor farmers are generally opposed to the conversion of vast tracts of land for commercial mono-cropping, such as for sugar, tobacco, rubber, palm oil, etc. Fisherfolk are usually opposed to large infrastructure and commercial projects along rivers, lakes and coasts because of pollution, dispossession of land, limitations on access to traditional livelihood and other disruptive changes that threaten their survival.

In India recently thousands of subsistence farmers, traditional fisherfolk, workers, women's groups and villagers protested *en masse* against the World Trade Organization's policies. The protests were partly sparked off by the suicides of 450 peasant farmers in the states of Andhra Pradesh and Karnataka. In India, more than 600 million people-70% of the population-are desperately poor and depend directly on the land and environment for survival. *"It is the life resource of the majority of our people whose subsistence directly depends on the water, forests and the land. It is about justice. "*

For the urban poor on the other hand, land is more than simply living space. In most instances, the urban poor live in communities that have been settled for a substantial period of time. Development of the community includes access to a means of livelihood, to education, to health care, all of which stand to be disrupted in cases of eviction. It is not difficult to see why historically land rights have been a flash point and landlessness invariably a cause of social unrest.

Feudal exploitation, the process of colonization and the passing of natural resources to state control, encroachments by private commercial interests and now globalization—these are the main historical factors that have defined contemporary conflicts involving land and land rights. It is perhaps the historical importance of land that has made the question of the rights to land a very broad and complex subject matter. The Muslim rebellion in the Philippines, the Palestinians' struggle for the return of their homeland, the Zapatista movement in Mexico and many other conflicts that are very much part of today's news, involve land. Indeed, issues of access to land and land security continue to have an impact on a very significant part of the world's population who still depend on land access and security for their subsistence and livelihood.

“For the billions of the world's rural poor, land security must be seen as a necessary precondition for the realization of other internationally protected human rights.”⁵ Despite this, land rights issues have rarely been addressed from an international human rights perspective. This is in part due to the fact that land issues are very complex. Land rights do not just pertain to the right of ownership. They also refer to access, use, possession and occupation of land, and security of such use, possession or tenure. Local and national landowning and land use systems vary considerably from country to country and, frequently, within countries. As a result, identifying and reaching agreement on principles and standards that can usefully be applied across borders and systems have proved to be very difficult.

The rural poor face a keen need for information directly relevant to their livelihoods—information such as market prices for their crops, alternative cropping or pest control options, the availability of government assistance or training programs, or opportunities for developing new products or markets for environmental goods, from local crafts to ecotourism. Agriculture-related information is often one of the most immediate needs, since small-scale agriculture is so important to household incomes in rural areas. Information on current crop prices, fertilizer and pesticide costs, and the availability of improved seeds and low-cost improvements in farm technology can help guide the purchases of farm inputs and equipment, or help farmers successfully obtain credit.

Without information of this type, poor families find it harder to take advantage of new opportunities for generating income and increasing their assets. Numerous organizations, from multilateral agencies to local NGOs, are trying to improve access to livelihood-related information. One such effort is the farmer field schools developed by the UN Food and Agriculture Organization (FAO)

as part of an Integrated Pest Management project in Indonesia. Using a participatory learning approach aimed at incorporating local knowledge and experience, these farmer field schools are yielding lessons that are being applied to information activities on sustainable livelihoods in other sectors, such as community forestry (Chapman et al. 2003:5).

Securing and Enforcing Property Rights

Clearly defined property rights, and confidence that these rights can be efficiently defended against interlopers, are fundamental to governance systems built on the rule of law. As mentioned earlier, appropriate property rights regimes are also central to encouraging the poor to invest in their land or in resource management in ways that bring economic development and poverty reduction. However, in many developing economies, corruption, excessive regulation, and complicated property registration procedures significantly burden citizens, especially the poor.

In Guayaquil, Ecuador, for example, it has been three decades since the passage of land reform laws, and most households are aware of their property rights and the importance of securing title to land. But the majority of these poor households are incapable of navigating the legal labyrinth—including long delays and high costs—surrounding the land titling process. In theory, the process costs about \$350, or as much as three months of a typical worker's salary. In practice, the actual cost is closer to \$750—a prohibitive sum for most poor families (Moser 2004:42-44). A similar situation exists in Peru, where land registration processes to secure property rights requires land holders to engage with 14 different agencies involved in conferring a single title (Narayan 2002:54).

In several countries, poor people's associations and cooperatives are working with local authorities and financial institutions to address the need for secure land tenure rights and housing. In Mumbai, India, a slum-dwellers' organization has been able to acquire land, housing, and basic infrastructure services for its members. In the Philippines, a scavengers' association whose members live on a 15-hectare municipal dump in Quezon City has helped mobilize member savings to acquire legal rights to land through land purchase. And in Guatemala, 50,000 squatters have formed cooperatives, acquired land through legal means, and are now repaying long-term loans (Narayan 2002:66). Meanwhile, Ghana's land registration law specifically provides for registration of customary land rights, and pilot projects are now underway to build capacity among traditional-land administrators to improve record-keeping and land registries (Bruce 2005).

By Way of an Epilogue

The link between environmental issues and human rights is rarely appreciated. Yet the fact is that environmental damage is often worst in countries and in areas with human rights abuse. Law and policy relating to environmental protection has to meet two distinct yet interrelated objectives. The first is to ensure the conservation and protecting the environment and the second is safeguarding the genuine interest of disarticulated indigenous people in the ambits of their rights. In order to meet the above twin requirements law and policies have to gear themselves to develop mechanisms that prove to be instrumental in gaining 'grounds' literally as well as figuratively when tribes are the foci.

The Government rarely takes International Environmental Conventions seriously. Very little debate takes place and no proper preparation for the meetings is held. Unfortunately, India has till date not meaningfully participated in the drafting of the existing international laws or set the international agendas for which protocols are required.

Amidst the hue and cry, the best possible solution to the problem dealt with in the paper is Community Forestry. People's involvement in the forests along with a partnership with continuous monitoring agencies in a tailored approach is bound to adjust the dynamics of the conflict. Apart from the subsistence and economic benefits to the communities, the kind of forest management proposed shall, in the course of time, essentially improve upon the issue of forest conservation. Community forestry is not a panacea, but in most of the cases, and especially in Indian context, it appears to be necessary from the point of view of conservation as well as social justice. What is required is a diversified, farsighted, concrete and persevered approach in order to behold a country of blooming flowers sprawling everywhere spreading fragrance of social justice. After all, Robert Frost referred to a forest when he said:

*The woods are lovely, dark and deep,
And I have promises to keep,
And miles to go before I sleep
And miles to go before I sleep.*