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Emerging Trends for Justice in Globalized World

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A B S T R A C T

Since the 1980s, globalization has fundamentally transformed relationships between nation states as well as the terrain of domestic political, constitutional, and regulatory frameworks that govern economic and development policies, particularly in developing nations. As part of this global trend, developing nations have shifted from statist-socialist policies toward economic liberalization, privatization, and development policies in line with the broader globalization of the world economy. International institutions and organizations, including the World Bank and International Monetary Fund (IMF), have played a central role in pressuring shifts toward economic reforms aimed at liberalization and privatization, and in directly funding development projects. These shifts have also helped reshape and influence lawyering and legal practice, constitutional and policy norms, and constitutional adjudication on these issues.

Globalization has affected justice delivery mechanisms of nations around the world. It touches and spreads the legal developments and debates which are going on in one part of the world to another part of the world. The best example of this is the development of laws and concepts relating to Human Rights, Competition law, Intellectual Property Rights, Cyber laws, Media laws etc. in recent times. Globalization has affected the way these laws have taken shape in different countries around the world. The provisions of the laws enacted in one country have a bearing on provisions enacted in another country. This is because of the simple fact that Globalization has linked the economies of nations which otherwise have no territorial or geographical connection. This project is a brief discussion on how Globalization has impacted the administration of justice or Justice System or laws in India and around the world.

Keywords: Globalization, Technological, Governance, Investment

1 INTRODUCTION

Globalization, be it technological or political or economic, has brought about a revolution in international trade with increasing participation and involvement of countries & greater access to domestic economies.The last decade has been a mini-revolution in legal service sector with the best legal impact on corporate legal arena. Activities in project financing, intellectual property protection, environmental protection, competition law, corporate taxation, infrastructure contract, corporate governance and investment law were practically obscure before the 90's. The number of law firms capable of managing such work was also very limited. Even though globalization is not new, but in the purview of legal services, it is now gaining momentum due to the growth of the Internet, automation of legal processes, developments in data security and emerging technology tools. It is clear that need of professional service has been tremendous in the legal service sector.

“We’re in the middle of three giant accelerations,” Friedman said. Changes involving markets, the Earth’s climate, and technology are reshaping social and economic life in powerful ways and putting a premium on “learning faster, and governing and operating smarter,” across the globe, he said. “Technology is now accelerating at a pace the average human cannot keep up with,” Friedman added, emphasizing a key theme of his talk.

Contemporary globalization assumes many forms, where legal and judicial globalization plays a major role. Legal globalization consists of many 'things.' It signifies the modernization of the metropolitan legal profession, lending it a competitive edge in the world markets for legal services. Legal globalization also refers to new law reform agenda shaping the course of the three 'Ds' of economic globalization: de-nationalization, disinvestment, and deregulation. Prominent on this agenda remain the shaping of new regulatory institutions, processes, and cultures; increased emphasis on alternate dispute resolution; simplification of investment and commercial law; and tendency towards accelerated growth of 'flexible labour markets.' Law reform, especially the efficiency of the administration of justice, becomes more visibly the instrument of the new economic policy. A process curiously named as 'far globalization' generates some important legal changes such as

the employment guarantee scheme act, the more vigorous enforcement of child labour laws, regime of protection of consumer rights, and of the right to information. Legal globalization, overall, serves and promotes the needs of the new globalizing middle classes of India.

2 GLOBALIZATION: ITS JURISPRUDENCE AND THEORY

Globalization is fundamentally transforming economic and social relations, but its impact has yet to be fully realized in jurisprudence and political theory.

In Aristotle's time, the conditions he set for justice (allocation of social goods and this "share in the constitution") were met only within a *polis*, or polity, and not across polities. The world has changed remarkably since then, and the single word best capturing the essence of that change is globalization. Each of the dimensions of globalization such as inter-connectedness[1], economic deregulation[2], internationalization[3] and homogenization[4], to name only the most salient contributes to an understanding of how globalization is changing social relations. However, it is the essenceof globalization, the compression of space[5] that underlies the transformative impact of globalization on both global social relations and the possibility of global justice. This compression intensifies social relations regardless of territorial boundaries and, indeed, transcends territory itself. Through globalization, we are interconnected irrespective of time and space, to a degree never before seen in human history.

Such compression does more than simply facilitate inter- national business, networking, and information sharing: It changes the way space enters into social relationships, with consequent changes at all levels of human experience. Most fundamentally, globalization intensifies our awareness of the world as a whole. Geographic constraints on social and cultural arrangements recede, and people become increasingly aware they are receding. In real terms, boundaries becomemore porous we know more about what happens beyond our boundaries, we travel more easily beyond our boundaries, our actions affect others beyond our boundaries in more pronounced ways, we are aware of these effects, and we have new and more profound opportunities to engage in commerce beyond our boundaries. This phenomenon has a whole range of social, economic, political, legal, and cultural effects, widely catalogued and widely (and justly) debated.

As Walzer puts it, justice as a formal concept requires that a society's "substantive life is lived in a certain way that is, in a way faithful to the shared understandings of its members."[6] In other words, justice requires a shared understanding of social goods. Only political communities have such shared understandings, and the preeminent example is the nation-state[7]. It is only within nations that justice makes sense, and it is only within nations that justice is necessary, indeed, even possible.

In David Miller's words:

> "Although in the contemporary world there are clearly forms of interaction and cooperation occurring at the global level the international economy provides the most obvious examples, but there are also many forms of political cooperation, ranging from defence treaties through to environmental protection agreements these are not sufficient to constitute a global community. They do not by themselves create either a shared sense of identity or a common ethos. And above all there is no common institutional structure that would justify us in describing unequal outcomes as forms of unequal treatment."[8]

Accordingly, this conception of justice offers a specific kind of challenge to the possibility of global justice; namely, that global justice requires a kind of global relationship— Nagel calls it sovereignty; others call it society or community that we simply do not have, and perhaps cannot have at the level of global interaction. But that is precisely where globalization must be considered.

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[1] This transnationalization is also reflected in the increasing number of cross-border networks formed by non- State actors such as corporations, civic associations, scientific bodies, and individuals. See generally Jessica T. Mathews, Power Shift, FOREIGN AFF., Jan.–Feb. 1997, at 50, 50–51 (1997)

[2] There is broad consensus that economic de-regulation is one of the principal engines of globalization, though commentators differ widely in their evaluation of the consequences of this fact. The resulting increase in the number of transactions involving goods, services, labor, and capital crossing national boundaries promotes a degree of economic interconnectedness resembling, at least to some commentators, a single market spanning the globe. See, e.g., PETER DICKEN, GLOBAL SHIFT: TRANSFORMING THE WORLD ECONOMY (3d ed. 1998) (documenting the shift to a global pattern of production).

[3] Internationalization describes the shift in power from States to international systems and institutions. See Franz Nuscheler, Global Governance, Development, and Peace, in GLOBAL TRENDS AND GLOBAL GOVERNANCE 156, 157

[4] Globalization is often characterized as homogenization, the unification or harmonization of cultural forms. See Jan Aart Scholte, What is 'Global' about Globalization?, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUC- TION TO THE GLOBALIZATION DEBATE 84, 84

[5] 10. The paradigmatic definition of globalization, drawn from political geography and sociology, asserts that among all the many definitions of globalization there is one common element: a fundamental change in the spatial dimensions of human interaction.DAVID HARVEY, THE CONDI- TION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1990)

[6] MICHAEL WALZER SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY, at p 313.

[7] DAVID MILLER, ON NATIONALITY 68-73

[8] David Miller, Justice and Global Inequality, in INEQUALITY, GLOBALIZATION, AND WORLD POLITICS 190

3 GLOBALIZATION AND THE GLOBAL CIRCUMSTANCES OF JUSTICE

As the most influential justice theorist of the twentieth century, John Rawls and his work are a natural point of departure for considering justice theory for the twenty-first century. In A Theory of Justice, Rawls selects a particular level of social relationships, the nation-State, and conceives of it "for the time being" as a closed system separate from other nation States.[9] It is within this set of social relationships that the need for and possibility of justice arises. Rawls discusses this phenomenon through an inquiry into what he calls "the circumstances of justice."[10]The circumstances of justice are those conditions of our situation that make cooperation both possible and necessary. Where they obtain, and they lead to such cooperation, justice is relevant, and where they do not, justice is not.

The circumstances of justice can be divided into two categories.

The first category consists of three objective circumstances: a moderate scarcity of resources; a shared geographical territory; and a capacity to help or harm each other. In other words: there is not enough to go around for everything we each want to do; we are all going to be looking for these resources in the same places; and we have the capacity to unite to defeat one another's goals, or work together to achieve many of them.

The second category is subjective and includes two circumstances: people are mutually disinterested; and they have conflicting claims. In other words, we are not generally altruistic: We want what we want, and to get it, we go after what each other has.

Because of these five circumstances, we are led to cooperate as the rational means toward achieving our individual ends. This, in essence, is society, which Rawls defines as a cooperative venture for mutual advantage. As a consequence of the circumstances of justice, we are led to form a variety of social arrangements through which we hope to cooperate in the furtherance of our mutual welfare. We need, however, principles by which to choose among the various possible social arrangements, principles that will guide the distribution of the fruits of this venture, and these are the principles of justice.

It is in this sense that society precedes justice. It is our need to cooperate, as a response to the circumstances of justice, which leads us to form and consider a variety of social arrangements for mutual advantage. "Justice," as Rawls famously writes, is the "first virtue" of such social institutions. Absent the circumstances of justice, cooperation, and the development of social mechanisms for the allocation of the fruits of cooperation, there is simply nothing for justice to do.Applying these circumstances to the question of global justice and global social relations, one sees that globalizationin particular through its characteristic transnationalization and interdependence is bringing about the same circumstances of justice at the global level that Rawls described at the domestic level. To begin with, there is of course the same basic scarcity of resources at the global level, and through globalization people are increasingly competing for these resources on a global scale in a shared territory: our planet. That they are mutually disinterested and assert conflicting claims over these resources does not need to be argued.

Globalization's many facets are together pushing us toward increased cooperation at the meta-state level. Returning to Rawls's account of the circumstances of justice, the rational human response to these circumstances is to enter into systems of social cooperation for mutual advantage. Through this cooperation we create "society," in particular the "basic structure" i.e., the institutions we employ to allocate resources and opportunities, and which thereby directly affect our life prospects.

4 RAWLS AND GLOBAL JUSTICE AS FAIRNESS

Globalization, including the global economy and the emergence of global regulation, allows us to definitively move beyond Rawls's limitation of Justice as Fairness to domestic society to a more concrete conception of a global Justice as Fairness. Simply put, global economic interdependence makes it impossible for any domestic society to completely deliver and safeguard for its citizens the conditions necessary for just allocations of social goods. Instead, Justice as Fairness should be constructed with interdependent societies in mind, and then evaluated as it applies generally to global issues of social justice. The fact of economic interdependence among the world's societies is a key element in establishing the possibility of any contractarian argument for international distributive obligations. A primary motivating force behind the need for justice, according to Rawls, is that some mechanism is neededto allocate the advantages that arise from social cooperation. One can argue, therefore, that wherever social cooperation has created some wealth or advantage which otherwise would not exist, the social predicate exists for the application of justice. As Charles Beitz puts it in his seminal study of political philosophy and international law:

> "The requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social

[9]Rawls is often cited as the leading contemporary theorist against the possibility of global justice. However, it is critical to note that in his principal work, A Theory of Justice,JOHN RAWLS, A THEORY OF JUSTICE (1979)

[10]JOHN RAWLS, A THEORY OF JUSTICE (1979) at 126 -130

activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place."

Trade and international economic relations satisfy this condition because they lead to increases in individual and national wealth through the operation of comparative advantage and principles of efficiency in general. As the international trade regulatory system has grown in scope and institutional capacity with the creation of the WTO, the gains from such social cooperation increase, as does the institutional capacity for allocative decision-making and enforcement of resulting norms. One might say, therefore, that at a minimum, international economic relations in the contemporary global system satisfy the minimum requisites for a consideration of the claims of justice, which would apply to the allocation of the social goods that are the subject of the treaty in question. In this sense, international economic relations and international economic law can be said to involve the creation of benefits from social cooperation. The need to allocate such benefits raises precisely the same sort of issues raised in domestic society when such benefits stand to be allocated. Therefore, even if there is a justifiable distinction between domestic and international society for some purposes, with regard to the applicability of justice theory, the same basic predicate is present in both.

5 RETHINKING BOUNDARIES AND THE ROLE OF THE STATE

The developments in globalization discussed here are challenging and transforming traditional political and legal concepts that have hitherto organized social relations at an international level in particular, the role of States and the nature of boundaries. Historically, the dominant view of the role of the State in international relations has been as a sovereign actor acting in its unitary self-interest. Beginning with the post war human rights movement and intensifying through globalization, social processes and, increasingly, regulation are occurring on a Trans boundary networked basis. These dynamics have been challenging and transforming this understanding of the State as actor on the international stage, to the State as agent in the sense of one who acts on behalf of another, in an increasingly rich multipolar and networked environment. That "other" consists of the range of individuals, groups, and national communities that States represent on the international level.These changes have implications throughout domestic and international politics and social relations as they have been conventionally understood. Because of globalization, the very notion of what is "national" and what is "international" or "global" is undergoing a change, as even "national" institutions can now be sometimes understood more accurately as horizontally integrated components of a transnationalsystem, than as vertically accountable components of a traditional "State."[11] Globalization emphasizes the arbitrariness of many contemporary territoriallybased allocative principles such as citizenship, because it allows us to be aware of the plight of others as never before, forcing us to ask whether the traditional way of allocating rights, opportunities, and resources is really adequate in a globalizing world.[12]

Global community demands a new view of the role of the State, in which the State no longer holds a monopoly on the delivery of basic public goods, but rather, as the guarantor of last resort, plays a central role in their delivery. It is increasingly common to understand the State as co-existent with a variety of cross-border networks. Indeed it has been argued that one key shift in the role of the State in globalization is as manager of these networks.

6 GLOBALIZATION ACCORDING TO FRIEDMAN

The Lexus and the Olive Tree was Friedman's first globalization book and offered globalization as the new framework to understand the post-Cold War era. Friedman observed that after World War II, the Cold War was used as the framework for understanding and shaping the world. Friedman's books argue that globalization should be used as the frame to understand the post-Cold War era and that this era was different, both politically and technologically, from the prior era. Friedman's first book pointed to the increasingly powerful role of the individual as a result of technological developments.[13]The "Lexus" in the book's title referred to the car and was a metaphor for the fact that technological developments have spread rapidly and many more individuals around the world now compete to own a Lexus and to build its equivalent. The "olive tree" in the book illustrated the point that at the same time they are "going global," individuals also remain rooted to physical geography because it anchors individuals, locates them in the world, and provides a sense of home, self-esteem, and belonging. But the "olive tree" can also be a source of conflict as individuals and groups fight over specific olive trees. Friedman argued that one of the challenges of globalization was to find the right balance between these two forces. Friedman also identified a number of factors that he

[11]Saskia Sassen, The State and Economic Globalization: Any Implications for International Law?, 1 CHI. J. INT'L L.109, 110 (2000) (". . . the [transnational] system also lies, to a far higher degree than is usually recognized, inside particular components of national states.").

[12]Thomas W. Pogge, An Egalitarian Law of Peoples, 23 PHIL. & PUB. AFF. 195 (1993)

[13] THE LEXUS AND THE OLIVE TREE, According to this book, the globalization system is built around three overlapping balances: between national states, between nation states and global markets, and between individuals and nation states

believed would help determine which companies and countries would be the winners and losers in the new area ofglobalization.

Friedman's second globalization book is entitled *The World is Flat*. In the first chapter, which is entitled "While I was Sleeping," Friedman observed that while he was busy writing about 9-11 and terrorism, globalization exploded and entered into phase 3.0, in which the world was no longer just small, but was tiny. This is what Friedman meant by the term flat-individuals (and companies and governments) around the world are now able to interact with one another horizontally with lightning speed and connect with one another in ways that were unimaginable just a few years ago. Friedman identified ten forces that had contributed to this "flattening" of the world. Although many of these flatteners had been around for years, Friedman argued that as a result of several convergences, these flattening forces had acquired added power at the beginning of the twenty first century. The first convergence he referred to was the fact that the ten flatteners had created a new global web-enabled platform that allowed multiple forms of collaboration. Friedman called the second convergence "horizontalization" and stated that the ten flatteners "begat the convergence of a set of business factors and skills that would get the most out of the flat world," including a more horizontal chain of command that allowed for greater value creation. The third convergence he cited was the scale of the global community now contributing innovations. He argued that in the future, the new players, the new playing field, and the habits for horizontal collaboration would be the most important forces shaping global economics and politics.

Friedman's concluded about this new flatter, Globalization 3.0 world as the world moves from a primarily vertical command-and-control system for creating value to a more horizontal connect-and-collaborate value-creation model, societies will find themselves facing profound changes and that there will be a "great sorting out."

7 THE UNFLATNESS OF INDIA'S LEGAL SYSTEM

Friedman's awe over India makes perfect sense given what the country has accomplished during its sixty years of independence. However, even within the most thriving of democratic societies problems exist. In addition to the challenges of poverty, underdevelopment, illiteracy, and population growth, India confronts other issues. Corruption and bribery of politicians, police abuse, nonperformance by and incompetence among bureaucrats, and an inadequate infrastructure are just a smattering of troubles that burden the Indian State. As serious of a problem, if not more so, is the inefficiency of the country's judicial system. The courts in India are thought to be the most crowded of any in the world. In the Indian Supreme Court alone there are about 20,000 cases pending. The total number of cases pending in all of the state high courts is roughly three million.And, nationwide there are twenty-four million cases pending in the lower courts, two-thirds of which are criminal cases. Relating to this last point, the government's own Law Commission in 2004 reported that seventy percent of those who are jailed languish as "undertrials" who have yet to face prosecution in court.[14]Indeed, there have been studies that examined the causes and impact of judicial delays on Indian society. The explanations are somewhat cross-cutting, but there is general agreement that while the wealthy may have the resources to endure the seemingly never-ending legal process, most ordinary and poorer Indians do not.

Furthermore, among many Indians there is a sad, fatalistic attitude towards the courts. It is true that court rulings are generally viewed as legitimate and that the supreme court and state high courts, in particular, are accorded a great deal of respect and admiration by both elites and the mass populace.[15] But there remains deep frustration in the length of time it takes to receive a judgment, not to mention the anxiety over whether the judgment will be executed. It would be unfair to expect Friedman to examine the problems plaguing India's courts in detail.A delay-ridden, slowmoving legal system could well chill the interest foreign investors have towards India.

8 GLOBALIZATION AND THE TERRAIN OF FUNDAMENTAL RIGHTS IN INDIA

As India's economy underwent major transformation in the 1990s and early 2000s, the Supreme Court's approach to the interpretation of fundamental rights and application of rights-based scrutiny also fundamentally changed. In cases involving major rights-based challenges to economic liberalization, privatization, and development policies in the post1991 era, the Court redefined and adjudicated the scope and meaning of the core fundamental rights contained in Article 14 (equality before the law), Article 19 (speech, assembly, and other freedoms), and Article 21 (life and liberty) of the Indian Constitution. The Court dramatically expanded the scope of these rights in the post-Emergency era to create a new arsenal of rights-based frameworks of scrutiny, along with a new regime of public interest litigation aimed at correcting human rights and governance failures. However, as this Part illustrates, since the 1990s the Court has reinterpreted and arguably restricted the scope of these rights, and modified the nature of rights-based scrutiny in the realm of globalization policies.

[14] LAW COMM'N OF INDIA, 189TH REPORT ON REVISION OF COURT FEES STRUCTURE 34 (2004), available at http://lawcommissionofindia.nic.in/reports.htm (follow hyperlink to 189th report); Bibek Debroy, Losing a World Record FAR E. ECON. REv., Feb. 14, 2002, at 23; Judge Me Not, supra note 114, at 32 (noting that, as of 2006, the undertrial population was 180,000).

[15] MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 482-83 (1984).

In the early 1990s, the Congress government of P.V. Narasimha Rao launched the New Economic Policy, in which the government initiated new liberalization policies[16]. This included the introduction of policies aimed at deregulation, liberalization of government licensing regimes, and a shift toward privatization of government owned enterprises.[17] Following the adoption of the New Economic Policy, the Supreme Court provided greater clarity in articulating the scope of judicial review under Article 14 and Article 21 in a series of decisions involving challenges to privatization of the telecom sector, the privatization and disinvestment of the industrial and mining sector, and other cases. In most of these cases, the Court upheld and endorsed the government's policies of economic liberalization. Since the 1990s, and well into the twenty-first century, the Supreme Court of India has effectively redefined the scope and terrain of the fundamental rights in a series of decisions involving challenges to government liberalization and privatization, and development policies. In calibrating this new "globalization rights infrastructure" and attendant modes of scrutiny for globalization policies, this article explores three main facets of the Court's decision-making and role.

First, the Court has redefined and carefully limited its own role in the domain of globalization policies based on the justices own conceptions of the proper role of the Court, and their own understanding of the norms and values that should be advanced in adjudicating globalization cases. In embracing these particular role conceptions, the Court has effectively redefined the normative structure and discourse of globalization by privileging certain norms and values in its adjudication, including norms of transparency, competitiveness, regulatory independence, and high growth models of development.

Second, the Court's new globalization rights framework has effectively meant the creation of new "asymmetrical rights terrains" wherein the rights of certain interests and stakeholders (including private corporate interests) are privileged above others (labor, farmers, villagers). The Court has thus restricted the scope of the fundamental rights so as to limit their promise to laborers, farmers, and others whose rights have been infringed or diminished by globalization policies, while enhancing the rights of certain entities including private corporate interests challenging unfair privatizationand disinvestment policies. This broader trend includes weakened recognition of the rights of laborers in challenging privatization and disinvestment policies, and the rights of farmers and villagers in challenging large scale development projects.

Third, the Court has fundamentally redefined its own role as an adjudicator and governance institution in the realm of privatization and development policies. This project argues that these fundamental shifts in the Court's approach to rights-based adjudication and in its institutional role in globalization policy provide a lens into broader shifts in the Court's role and jurisprudence in the twenty-first century.

9 – GLOBALIZATION AND DEVELOPMENT POLICY: THE COURT'S ROLE IN RESHAPING RIGHTS, DEVELOPMENT STRUCTURES, AND NARRATIVES

As India shifted toward economic liberalization in the early 1990s, the Central and State Governments also expanded investment in large-scale development projects aimed at expanding energy resources and building a resources infrastructure to support high-growth economic development. Major examples of this included the construction of hydroelectric plants, including the *Narmada and Tehri Dams*, as well the exploration and development of India's forests and undeveloped lands for mining and logging. As noted above, following the post-Emergency era, the Court dramatically expanded the scope of rights and the permissible scope of court intervention in public interest litigation cases involving state governance failures, human rights violations, and other forms of state and private illegality, including bail undertrials, prison violence, and bonded labor cases. Building on the right to life in Article 21 and read together with directive principles setting forth state obligations to protect the environment, the Court also recognized rights to clean air and water and developed a robust body of environmental jurisprudence and principles aimed at taking on widespread environmental degradation.[18] Through environmental public interest litigation, the Court sought to take on underenforcement of, and noncompliance with, a set of new environmental laws aimed at protecting the environment, including India's water, air, and natural resources, including rivers and forests.

A. Redefining Rights and the Scope of Judicial Review in Development

With respect to India's natural resources, forest development, and accommodation of tribal rights, India's national development policies have posed a direct challenge to the framework of fundamental rights and environmental jurisprudence established by the Supreme Court. As in the liberalization context, the Court has carved out a highly deferential and limited standard of review for large-scale development projects. However, in contrast to the Court's deployment of rights as structuring principles in the review of economic policy, the Court in the development context has deployed rights as "substantive-normative principles" to guide the Court's assessment of development policies and

[16] SURESH TENDULKAR & T.A. BHAVANI, UNDERSTANDING REFORMS: POST-1991 INDIA 1–5 (2007).

[17] David B. H. Denoon, Cycles in Indian Economic Liberalization, 1966–1996, 31 COMP. POL. 43, 52–55 (1988).

[18] SHYAM DIVAN AND ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 41–42 (2001); SATHE

programs. In reality, these substantive-normative principles inform a highly deferential standard of review that assesses (and largely validates) projects in line with programmatic goals of national development. At the same time, the Court has also created an "asymmetrical rights terrain" in the area of development by selectively privileging certain rights and interests.

This "asymmetrical rights terrain" in development can be traced to the Court's embrace of an international law conception of the right to development, which the Court has deployed so as to effectively subsume other individual rights. As Balakrishnan Rajagopal observes, informed by the growing influence and spread of Washington consensus-style neoliberalism, developed and developing nations have framed their understanding of the right to development not as a justiciable, negative right, but rather in terms of the broader programmatic goals of economic development and growth.[19] However, this national goal-oriented conception of the right elides the actual contestation over the meaning of the right todevelopment in international law discourse.[20] The UN's 1968 Declaration on the Right to Development (Declaration) defined the right to development as an "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized.[21] Consequently, as Rajagopal argues, the Declaration suggests that individuals, communities, and social movements also have the right to development as distinct from state and national development interests.

In contrast to its decisions involving economic liberalization and privatization, which were based largely on rights-based principles and scrutiny grounded in Article 14 and 19, the Court's decisions indevelopment cases focused on the rights contained in Article 21, rights related to sustainable development and ecology, and tribal rights. Similar to the liberalization and privatization context, the Court has embraced an understanding of rights that is based on a fundamental asymmetry between development interests and the rights of farmers and villagers who are displaced by development. The Court has largely privileged the interests of the government and the private sector in the name of advancing a vision of national development, while largely diminishing the individual rights of farmers, villagers, and tribes. In *Narmada Bachao Andolan v. Union of India* (2000), the Supreme Court of India adjudicated the legality of the actions of the Central and State governments relating both to environmental clearances and mitigation and resettlement of displaced persons resulting from the construction of the Sardar Sarovar Dam on the Narmada River. [22] Although the Court had originally stayed construction on the project in earlier orders, the Court's 2000 decision represented a strong endorsement and validation of the project from a constitutional and legal perspective. The petitioners in Narmada challenged the terms of the Award issued by the Narmada Water Disputes Tribunal's decision of August 16, 1978, which stipulated what the height of the dam should be, provided "directions regarding submergence, land acquisition and rehabilitation of the displaced persons," and "defined the meaning of the land, oustee and family," and allocation of the water between the four main states (Madhya Pradesh, Gujarat, Rajasthan, and Maharashtra).

In upholding the project and providing further guidelines for mitigation and resettling of those displaced by the construction of the dam project, the Court praised the benefits and virtues of the dam project in terms of energy production, provision of water, and national development. The Court relied on the following main rationales in its decision. First, the Court held that the petitioners' claims were barred by laches as they had failed to bring the challenge much earlier following the government's clearance of the project in 1987. Second, in recognizing constitutional and statutory authorization for the project, the Court applied a highly deferential standard of review in determining whether the Government had conducted its environmental clearance review processes in line with statutory requirements. In contrast, Justice Bharucha's dissenting opinion held that Article 21 required that the government complete a more robust environmental clearance and review process prior to continuing construction on the dam. Third, the Court upheld the Government's resettlement and rehabilitation policies for those displaced by submergence.In addition, the Court's decision effectively embraced a restricted conception of the right to life under Article 21, despite the Court's earlier jurisprudence suggesting that Article 21protections were quite robust.

B. <u>Contesting Development Rights and Narratives at the Frontier</u>

Despite the strong endorsement of the merits of development in the Narmada and Tehri Dam cases, the Court has not always spoken with a unified voice. This is illustrated by the Court's decision in *Samatha v. State of A.P. (1997).*[23] In that decision, the Court held that under the

[19] RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, supra note 3, at 220–23 (citing G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986)).

[20]Tomer Broude, Development Disputes in International Trade, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW, 32 (Yong-Shik Lee et al., eds., 2011) (discussing different conceptions of development in international law).

[21] Furthermore, Rajagopal argues that the Declaration "implies the full realization of the right of peoples to self-determination and 'their inalienable right to full sovereignty over all their natural wealth and resources.'" RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, at 221.

[22] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 644, 675–86.

[23] Samatha, v. State of Andhra Pradesh, (1997) 8 SCC 191

Fifth Schedule of the Indian Constitution and the Andhra Pradesh Scheduled Areas and Land Transfer Regulation Act of 1959, no land or mining leases in tribal areas could be transferred to non-tribals. The Court's decision was a win for tribal self-governance, as the decision held that only the "State Mineral Development Corporation or a cooperative of the tribal people could take up mining activity and that too in compliance with the Forest Conservation Act and the Environment Protection Act".[24] The Court's decision was a strong win for tribal rights, but was also noteworthy for its discussion of development.

In sharp contrast to the discussion of the right to development in the Jayal case, the Court in Samatha suggested that the right to development also must be interpreted in light of the socialist character of India's constitution. The Court thus held that development required attention to the promotion and protection of social and economic rights of the poor, of the dalits (or "scheduled castes"), and of tribes in light of the protections contained in the directive principles in Articles 38, 39, and 46, which should inform interpretation of Article 21. Additionally, the Court held that the object of the Fifth and Sixth Schedules of the Constitution was "not only to prevent acquisition, holding, or disposal of the land in Scheduled Areas by the non-tribals from the tribals or alienation of such land among non-tribals inter se but also to ensure that the tribals remain in possession and enjoyment of the lands in Scheduled areas for their economic empowerment, social status and dignity of their person." In other recent decisions, the Court challenged in part the dominant pro-development narratives that have informed its decisions in the Narmada and Tehri Dam cases. For example, in *Nandini Sundar v. State of Chattisgarh (2011)*, the Court held that the state government's establishment of the Salwa Judum, an army that included child soldiers recruited to fight Naxalite rebels, violated Articles 14 and 21 of the Constitution. In reaching this decision, the Court cited some of the negative consequences of globalization and development in India and suggested that globalization policies had directly led to the rise of violent agitation movements like the Naxalite movement.[25] Still, while the Court in Sundar embraced a critical posture toward globalization in India, the discourse of this judgment has not translated into a broad judicial attack on globalization policies generally.

10 NEW TYPES OF CRIMINALITY IN GLOBALIZATION AND RELATED LEGAL ISSUES

German jurist Savigny says that the law is the spirit of community, which means that the provisions of the law must meet the needs of the community and address its problems. The change in the norms and customs of the peoples lead to changed needs and problems. The multinational companies play various roles in creating international business ethical rules and regulations through pressurizing sates in order to bring changes in its legal systems and legislation for more economic interests. As for the nature of the crime itself, the phenomenon of globalization has reflected its impact in the field of organized crimes and made crimes with extra serious nature. Consequently, as extraordinary openness in trade, finance, travel and communication has created economic growth and well-being, it has also given rise to huge chances for criminals to make their business prosper. The new types of crimes are well organized and the criminals use the latest developed techniques to commit it, such as computers, network systems, information systems, internet and technology of communications. The character of crime has revolutionized considerably in a single generation. Just decades ago, crime was organized in a hierarchy of operations. It was "industrial" in that it included the division of labour and the specialization of operations. This composition extended worldwide, as organized crime emulated the global business. Globalization has not only changed the nature of crimes, but also changed its types and forms, the nature of criminal and victims and venue. Moreover, the means of modern crimes in the age of globalization became more developed than before, and the national legislation is paralyzed in dealing with those types of crimes. According to Findlay, the globalization of the market has introduced more and new forms of opportunity for criminals.

The new types of criminality are described by the American legal scholar Sutherland as "crimes of powerful persons", he says that such crimes are committed by the respectable and powerful persons, such as white collar crimes. Opportunities for new crimes are created by demographic change, economic reform, globalization and technological advancement, but because of globalization "criminals have taken advantage of transitioning and more open economies to establish front companies and quasi-legitimate businesses that facilitate smuggling, money laundering, financial fraud, intellectual property piracy, and other illicit venture.

11 CRIMINAL JURISDICTION IN THE AGE OF GLOBALIZATION - A LEGAL ISSUE

Virtually every criminal justice system today overlaps, interacts, and intermingles with other criminal justice systems. The traditional model of a single nation-state possessing exclusive authority to criminally sanction those within its borders is being challenged from below by sub-

[24] Asha Krishnakumar, The 'Samata Judgment', FRONTLINE (Sept. 2004), http://www.frontline.in/static/html/fl2119/stories/20040924006001200.htm

[25] Nandini Sundar v. State of Chattisgarh, (2011) 7 SCC 547

state demands for communal autonomy and from above by international and global assertions of criminal jurisdiction. It is no surprise that control over criminal justice has become a significant jurisdictional battleground between nation-states and their sub-state and supra-state challengers, for criminal jurisdiction is still considered the sine qua non of state sovereignty.

Opposed to the Sovereignist position are the Internationalist and Pluralist points of view, which maintain that international and subnational entities, respectively, can and should play a vital role in criminal justice. Internationalists extol the importance of strong supra-national criminal justice institutions both those that aim to keep national justice systems in conformity with human rights norms, such as the regional human rights courts, and those that directly prosecute and adjudicate the most serious violations of international criminal law, such as the ICC. For Internationalists, there are universal norms that demand or at least recommend international enforcement mechanisms. From the other end, Pluralists endorse the legitimacy of sub-national community-based criminal justice, especially by and for indigenous peoples and other traditionally marginalized minority groups. Pluralists emphasize that some subnational communities have long traditions of self-governance and can articulate and enforce communal norms more effectively for themselves than the state structures in which they live. Nation-states will continue to be the primary jurisdictional agents of criminal justice, the principal legislators, enforcers, and adjudicators of criminal law for the foreseeable future. But sub-state and suprastate challenges to that jurisdiction are not going away, and criminal justice officials and legal commentators must come to grips with the reality of partially autonomous criminal justice regimes at the substate and supra-state levels. The current fights among Sovereignists, Internationalists, and Pluralists are not going to end in decisive victory for any one vision of criminal jurisdiction. A Bounded Pluralism approach, however, offers a way forward that honors nation-state values while allowing for supra-national and sub-national assertions of jurisdiction.

12 CONCLUSION

Globalization policies have fundamentally altered the relationship of the state vis-à-vis the citizens in India. Despite the Supreme Court's creation of a robust and expansive rights infrastructure in the immediate post-Emergency era, the Court has constrained and limited the scope of fundamental rights and rights-based judicial scrutiny of globalization policies in the post-1991 era. This project has discussed that the Court's approach to judicial review reflects a unique model of adjudication in which high courts play an active role in shaping the meaning of rights, regulatory structure and norms, and the legal-constitutional discourse of globalization. In reshaping the terrain of rights in the post-liberalization era, the Court's role and jurisprudence in adjudicating globalization cases will continue to have profound consequences for the future of human rights and environmental protection in India. Major shifts in the Court's jurisprudential approach and institutional role present both structural and normative challenges for the cause of human rights, social justice, and environmental protection in India. Structurally, the Court's creation of asymmetrical rights terrains threatens to weaken the potential role that courts can play in vindicating and safeguarding the rights of workers, villagers, the urban and rural poor, and tribal populations most affected by transformational changes in India's economy and development of its natural resources. Indeed, both government and court-led governance structures have largely excluded channels for those who have been displaced by globalization to block and resist large-scale development projects. In embracing a conception of the right to development that is based on national and centralized planning goals, the Supreme Court's development jurisprudence limits the possibility of recognizing meaningful countervailing rights that can be deployed in opposition to state-led development policies and projects. The Court's reframing of rights narratives in globalization cases threatens to weaken its potential as an oppositional actor in resisting state development imperatives, and with it, the possibility of a more humane jurisprudence of globalization rights.

If global community is emerging, at least in a limited form, then we need a global public law to structure it. This is the transformative challenge for international law and legal theory today: to move from the public law of inter-state relations, to the public law of a global community of persons.

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