

Revisiting Urbanization and the Right to Environment under Article 21 of the Constitution of India

Dr Shampa Dev*

Dr Avishek Chakraborty**

* Associate Professor at School of Law, CHRIST (Deemed to be University)

** Assistant Professor at School of Law, CHRIST (Deemed to be University)

Abstract

Many doctrines like the Public Trust Doctrine, the doctrine of *Parens Patriae*, and principles like the Polluter Pays Principle, the Precautionary Principle, the absolute liability principle etc. have been invoked for the protection of environment. The courts have reiterated time and again a Right to a Clean and Healthy Environment. The rule of *locus standi* has been diluted for the sake of environment concerns. Public Interest Litigations can be filed. Statutes have been enacted, yet the right to a clean and healthy environment seems elusive. The depleting ground water levels, the Amazon fire, the Aarey land acquisition matter, the Varthur lake and Bellandur lake fire, Delhi Pollution are just few of the many nightmares of the urban world.

This paper seeks to conceptually examine this right in the context of these problems of the urban world. It makes a jurisprudential analysis of the right. It traces the origins of the right. It also grapples with the question of property and ownership of natural resources that constitutes the environment. In so doing it elaborates on the naturalist theory of perceiving the right as a freedom to enjoy the natural resources albeit responsibly largely drawing from the works of Grotius, Pufendorf and Locke and concludes that in the freedom of enjoyment of nature's bounty the law is carving a right duty relationship and has failed to clearly define the boundaries of the right. It has failed to articulate the right effectively. It argues that this third generation right lacks enforceability and is a weak right.

Keywords

Right to a Clean and Healthy Environment, Hohfeldian analysis of right to environment, Urbanization, Sustainable Development Goals, Environment Sustainability

Introduction

The Millennium Development Goals list 'Ensure Environment Sustainability' at Goal 7. Environment management, for all the attention it has attracted from policy makers and academicians, is still an elusive concept. The judiciary has contributed by endorsing various doctrines like the Public Trust Doctrine, the doctrine of *Parens Patriae*, and principles like the Polluter Pays Principle, the Precautionary Principle, the absolute liability principle etc. The courts have emphasized time and again on a Right to a Clean and

Healthy Environment. The term sustainable development as the key to growth has been reiterated. But the term being vague, the nuances undefined, with no compulsion on the State for sustainable development in all its activities, makes the enforcement weak. Development has always taken priority over environment in State planning for infrastructure growth.

To understand the elusiveness and to think of a remedy for the same, this paper seeks to attain a conceptual clarity on the nature of the right. For so doing it discusses the three generations of rights in the context of a right to clean and healthy environment. It next delves into a Hohfeldian analysis of the right. It further looks into the origins of the right in the judicial framework and suggests that though worded in the form of a right and placed in the third generation right, it can be understood and implemented better if it is appreciated as a freedom to enjoy the environment, that carries with it a responsibility.

The Problems of the Urban World

Destruction and over-exploitation of the environment is a common concern of the urban world. Bangalore has witnessed numerous such cases. Bellandur and Varthur lake catching fire, drying up of lakes, Residential buildings erected on dried lakes, plans for metro resulting in chopping down of innumerable trees, rising temperatures due to loss of green cover, have caused the environmentalists and even citizens much cause for worry. Mumbai recently objected to huge felling of trees in the Aarey Milk Colony in favour of a metro shed. The Perumatty Grampanchayat case left us bothered about the allocation of underground water amongst stakeholders. The choking of Delhi during the start of the winter is known to one and all. The recent Amazon fires and the fire in Australia tells that something needs to be done urgently and in the right earnest.

Hence the issues that arise is –

1. Do humans have property in natural resources?
2. If so what is the nature of the right?

The Generations of Right

The first generation rights mainly comprises of the civil and political rights. They generally are the declarations of the freedoms available to humans and serve as a restraint on the State from interfering with the fundamental freedoms. These feature in the Constitutions of almost all countries and in India it is primarily written down as the fundamental rights. The second generation rights are the socio economic and cultural rights that evolved out of the various welfare movements across the world. These revolutionary struggles for welfare movements against the capitalist, tolerated and even legitimized exploitation of the working class. Hence the demand for not just abstention of the State, in the fundamental freedoms of its citizens, but positive intervention of the State towards equitable distribution of resources and proper allocation of values and capabilities involved. These are found in the Constitution of India, worded as the directive principles of state policy and are non justiciable as the Constitution makers thought it fit given the scarce resources with the State at the time of making the Constitution. The third generation rights are essentially the solidarity rights or collective rights that for its realization depends on the collective efforts

of the State and the people. Interestingly, the right¹ to participate in and benefit from “the common heritage of mankind” (shared Earth and space resources; scientific, technical, and other information and progress; and cultural traditions, sites, and monuments), fall under this category.

A right to a clean and healthy environment is also a part of the third-generation of rights. Unlike the first-generation rights it cannot be realized by a mere declaration of its existence by the law. Unlike the second-generation rights, this cannot be realized by making provisions for the same. Being solidarity rights or collective rights they are majorly aspirational and fall low on the justiciability claim. Such third generation rights can only be realized on concerted efforts of all social forces at the international and at the individual levels.

Hohfeldian definition

A right as Hohfeld describes it as a claim a person has to an action or forbearance on the part of another that is directed in his favour by the command of the law. Such other person is the duty bearer and the first person is the right holder. Such a right is enforceable by the first party at his will. The duty bearer is commanded by society to act or forbear for the benefit of right holder, either immediately or in the future, otherwise he will be penalised by the society for the disobedience.

The court has time and again reiterated a right to clean and healthy environment in several cases. However, the court has failed to clearly set out a duty on another. A right without a duty laid down is meaningless. It is generally perceived that the state is the duty bearer in such cases. This stems from the fact that the right has been read under Article 21 of the Constitution of India. For a meaningful right to life, it follows that one must have a right to clean and healthy environment.

It is pertinent to look into another concept that Hohfeld explains i.e. privilege. Privilege means that a person is free or at a liberty to conduct himself in a certain manner he pleases; when his conduct is not regulated for the benefit of another by the command of society, and when he is not threatened by any penalty for disobedience. In such cases the other person has a no right to interfere in the exercise of freedom by the first. This will be discussed in detail in section V.

Characteristics of Right

The five basic characteristics of a right are – there must be a right holder, an act of forbearance, the res or the object of the right, a duty bearer and the right must be enforceable. For a meaningful right all these aspects must be present. Analysing the right to environment from this perspective, it seems to lack in two main components. The lack of a duty bearer and the enforceability element.

Is there a Property in Natural resources?

Are natural resources properties that can be owned? As the commonly accepted propositions go sea and air are *res communes*, meaning they belong to the community. Likewise, airwaves, fossil fuels, trees, gem

¹ <https://www.britannica.com/topic/human-rights/Liberte-civil-and-political-rights#ref742089>

stones etc. belong to the community. Wild animals, abandoned objects are *res nullius* and belong to no one. The Sun, Moon and stars are so beyond reach that a property in them may be meaningless in the present day or they may be incapable of being owned.

Thomists have answered the question positively. As the narration goes that God gave to Adam the world. By implication he may use the world for his survival. Man has to draw his sustenance from without...hence by implication he may use other creatures for his benefit and even kill them. It has an implicit permission to the use of natural resources available. For how else can humans survive, if not by breathing in air, drinking water and have food from nature? Thomist's claim that all resources are for people to use. They belong to mankind.

But even though there is a permission implicit to use the natural resources available for his benefit, natural rights theories assert that man is not born for himself alone. God expects humans to enjoy the nature and be a fit member of the society. Hence he is bound to conduct himself in a manner that a) does not allow God's creations to perish and b) to contribute what he can to human society. Hence human consumption and property acquisition of earth's resources is a consequence of prior obligation and is not a matter of right.

Another group of theorists explore the role of conventions. They insist that the right to consume natural resources is not an open ended right that will allow unlimited consumption. Only that consumption is appropriate that which is necessary to sustain life – original use right. And hence agreements between people arose and other interests were recognised. For eg. that whoever takes first will have a right or whoever spends labour would have a right.

Ownership of...

Thereon arose the idea of ownership in natural resources. Grotius and Hobbes conceived property as conventional and rooted in natural rights. One could take to the extent required for the purpose of survival/need. Locke elaborated on taking from nature provided we leave enough and as good for other. That implies a restriction on the quantity and the degrading the quality of the resource.

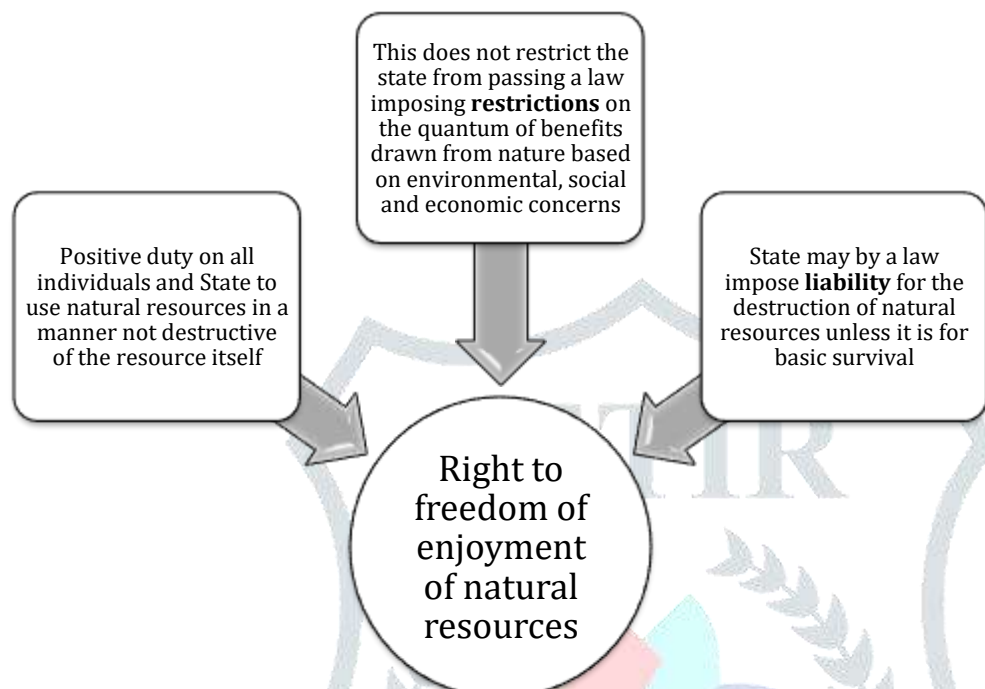
Management of...

Having discussed the problems and the jurisprudential difficulties of reading a third generation right under a first generation right, it is seen that considerable difficulties are faced. There is a necessity to have a proper legal framework that will address the issues arising out of the weak right.

Jurisprudentially a right duty framework in right to environment does not seem to address all the problems. Whether there should be collective controls of the right? How can such collective controls be enforced are some questions that have not been answered.

The natural rights domain sees right to enjoyment of natural resources as a freedom. This paper suggests that the subject can be best handled by reading it as a part of Article 19. Right to freedom of enjoyment of natural resources. A legally recognised collective interest of humankind in the preservation and protection of environment. There can be reasonable restrictions on the right. These could be laid down in the interest of environmental, social, economic considerations etc. These could be extrinsic to the rights and not emanating from the right itself.

Pufendorf states that every man must do his best to cultivate and preserve sociality. Natural laws are those that teach humans how to conduct himself to become a useful member in one's society. Property expresses man's right to dominate the world. Sociability in urban setting is a must. As Locke suggests – it expresses man's privilege to use the world for preservation and enjoyment.



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