

Rule of Law and Natural Disasters in India

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Abstract

In India, Kerala witnessed the worst floods of all times in 2018. It left 483 people dead and the destruction caused was more than the annual outlay of Kerala (Economic Times:2018). It left people devastated and scarred for life. Natural disasters of such magnitude violate the principle of “inter-generational equity”. The genesis of sustainable development can be traced back to the principle of “rule of law”. It is based on the fundamental requisite of equality and absence of arbitrary powers. Environmental degradation violates rule of law because it exposes people to risk of natural disasters. Rule of Law is the harbinger of environmental governance. Secretary General of UN defined rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards” (UNEP: 2015). It also forms the bulwark of SDGs. The 13th SDG of “Climate Action” aims to help the vulnerable countries to adapt to climate change and how disaster risk measures can be integrated into the national strategies (UNDP). Natural disasters not only result in the loss of life and property, it also brings forth the social and economic inequalities existing in the society. In India various vulnerabilities like caste, gender, poverty are aggravated in the wake of disasters. This calls for the integration of rule of law in disaster management. The

violation of environmental laws has the potential to undermine sustainable development which hampers 'rule of law'. In the proposed paper we try to critically evaluate the upcoming idea of environmental rule of law and appraise its evolution and application in the larger framework of Disaster Law in India.

Keywords: *Rule of law, environment, natural disasters, judiciary*

Introduction

Rule of Law is the most organic and the oldest principle of “governance”. It forms the core of the administrative law. Probably, A.V.Dicey also shelled out “rule of law” as an extension to constitutional law. It is the bedrock on which the constitutional law always falls back upon for the realisation of the glorified goals set by the constitutional law. The French Revolution gave the slogan of “liberty, equality, fraternity”, but it is “rule of law” which cemented the path for the realisation of this glorious slogan. Rule of law can be loosely understood as the dominance of law over an individual. It refers to the system in which there prevails the “supremacy of law”.

He defined rule of law as :

[It] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts ... [and], lastly,... that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the

position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.(Dicey:1961, 120)

A.V.Dicey's "rule of law" can be broken down to following propositions to maintain and ensure supremacy of law:

1. Equality before law
2. Absence of discretionary powers in the hands of the government officials;
3. Law is a codified code of conduct or based on the ancient customs and traditions recognised by the courts in the administration of justice.

Largely, rule of law is dependent on the institutions which are in charge of governance. It is the cross cutting principle across the three pillars of the State i.e. legislature, executive and judiciary. The legislature will codify and chalk new laws and ensure that it follows the constitutional principles; the executive will implement laws without practising any biases and special preferences. Finally, it is the judiciary which comes into action in case "rule of law" is violated.

What is the end of "rule of law"? Is "justice" the end of "rule of law"? Or mainly the rule of law aims at smooth functioning of the administration? Over a period of time "rule of law" has proven to be the most dynamic concept. The administration of justice can be taken as the objective of rule of law. So, today it is not just the interpretation of Constitution which should ensure observance of rule of law, but it should find its realisation in every walk of our lives. Rule of law has outgrown from being a strict legal concept to be regarded as a "philosophy of life." By saying so we mean that it is not just the legislature, executive and judiciary which will work towards "rule of law", rather it is supposed to be the guiding principle of our very

own lives. A system is made up of individuals and rule of law needs to be applied in every realm of our lives.

Purpose of the Paper

The paper investigates that how the legal system can be challenged in times of major disaster and tries to identify core values of the rule of law which should be respected and promoted, even in stressful times, and to promulgate principles that preserve the rule of law.

Environment and Rule of Law

As already stated that rule of law needs to find imprints in our lives. The Indian judiciary has declared right to wholesome environment as part of “right to life” in various judgments like *M.C.Mehta V Union of India* (1987). The rise of judicial activism is usually equated with the rise of Public Interest Litigation. However, it can also be seen as the reincarnation of “rule of law” which had started to lose its sheen in the backdrop of Emergency in 1975. Several rights were interpreted as part of “right to life”. If we concentrate on environment, the judiciary realised that the constitution has a seminal role to play in the conservation of environment. Article 48A which is a Directive Principle of State Policy provides that “the state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”, was extended to fall within the purview of Article 21 and was given enforceability of law. In 1986, the Environment Protection Act was enacted. The Act largely states Article 48A as the object of the Act. It states that it is “an Act to provide for the protection and improvement of environment and for matters connected therewith.” It further states that the Act is in furtherance of the decisions taken in the Stockholm Conference in 1972, where India as a participant agreed to undertake

appropriate actions for the protection and improvement of the environment. The Environment Act can be seen as the rise of “Environmental Rule of Law” in India.

Environmental Rule of Law was first coined by United Nations Environment Programme in 2004 at its first global session, wherein they adopted their decision on “*Advancing Justice, Governance and Law for Environmental Sustainability*”. The member states agreed that “rule of law” is fundamental for environment protection and the member states should cooperate both nationally and internationally for the promotion of rule of law to ensure good environmental governance. It stated that “*good governance and the rule of law are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.*” (UNEP)

UNEP defined “environmental rule of law” as a “state of being in which there is the presence of, respect for, and observance of environmental norms. Indeed, the ingredients of environmental rule of law and effective environmental governance are virtually coterminous” (UNEP). The definition has a very wide scope as it assigns role to everyone. The norms need to be formulated by the legislature and implemented and governed by the executive and the Judiciary will step in to decide the cases of non-observance of the norms. Above all, the biggest burden is on the people to realise the importance of environmental protection and follow the rules made for the same purpose.

The integration of the classical concept of rule of law in the environmental protection gives us the key ingredients of the “environmental rule of law”:

1. The norms, rules, laws for environmental protection shall apply equally to all;
2. There will be absence of “discretionary powers” in the hands of the authorities. Any action which can cause “environmental degradation” needs to be checked;
3. The norms shall arise from a codified law, made by the experts of the field;
4. The judiciary shall be empowered to keep redesigning and redefining the norms so as to ensure environmental protection

The last ingredient is an addition because the “environmental degradation” and “environmental protection” are ever evolving concepts and the judiciary should be free to interpret so as to suit to the ever changing times, as desperate time’s calls for desperate actions. The judiciary works under this principle. Bruce Pardy (2014) considers this as a problem. According to him this approach is the antithesis of rule of law, since rule of law is rooted in the well-defined and fixed laws. People are to be ruled by the “rule of law” and not by the subjective interpretations of those in authority or power. However, when it comes to “environmental protection”, it will be arbitrary to be guided by rigid and fixed laws. Each day a new kind of environmental degradation comes into light. It was because of this capacity to redefine that in the Taj Trapezium Case (1984) Mathura Oil Refinery and several other industries were ordered to be shut down since they were causing the yellowing of the Taj Mahal in Agra.

There cannot be and should not be a fixed definition of concepts like “sustainable development”, inter-generational equity, as fixing their domain would result into the

increased cases of violations. As a matter of fact, judiciary redefined something as fixed as “procedure established by law” to mean “due process of law” i.e. the procedure established by law must be ‘just, fair and equitable’ in Maneka Gandhi V UOI (1978). Thus environment which is changing every second cannot be governed by a static, stagnant law. The constitution is a living document and therefore the environmental law which finds its genesis in the constitution cannot be recommended to be fixed and static.

Natural Disasters and Rule of Law

India is vulnerable to multiple kinds of disasters. *More than 58.6 per cent of the landmass is prone to earthquakes of moderate to very high intensity; over 40 million hectares (12%) of its land is prone to floods and river erosion; close to 5,700 kms, out of the 7,516 kms long coastline is prone to cyclones and tsunamis; 68% of its cultivable area is vulnerable to droughts; and, its hilly areas are at risk from landslides and avalanches* (NDMA). Lately, natural disasters have become a regular phenomenon. I still recall the Bhuj Earthquake in 2001. India rose from deep slumber. It caused massive destruction and also brought forth the unpreparedness of India to natural disasters. Post Bhuj extensive emphasis was given to disaster response and the Disaster Management Act, 2005 was enacted.

Disasters do not occur in vacuum. Disasters affect everyone differently depending upon the different vulnerabilities. The different vulnerabilities are shaped by existing discriminatory socio- economic conditions. Disasters result from the combined factors of natural hazards and people’s vulnerabilities. These vulnerabilities take the form of physical exposure, socioeconomic vulnerability, and limited capacity to reduce vulnerability and disaster risk. The definition of ‘vulnerability’ provided by Blaikie

etal.(1994:11) seems to be the most appropriate one. He defines, *'by vulnerability we mean the characteristics of a person or group in terms of their capacity to anticipate, cope with, resist, and recover from the impact of a natural hazard. It involves a combination of factors that determine the degree to which someone's life and livelihood is put at risk by a discrete and identifiable event in nature or in society.'*

For instance, women are made more vulnerable to disasters through their socially constructed roles. As Elaine Enarson (2012: 4) states *'...gender shapes the social worlds within which natural events occur'*. In countries where gender discrimination is tolerated, women and girls are particularly vulnerable to natural hazards. Not only is the percentage of women and girls who die higher in these countries, but the incidence of gender-based violence—including rape, human trafficking and domestic abuse—is also known to increase exponentially during and after disasters (UNDP, 2010). Their extreme vulnerability can be made from the fact that during Tsunami in the Karakai region of Puducherry, adult female fatalities outnumbered adult male fatalities nearly 2:1 (WHO,2013)'

National Campaign for Dalit Human Rights (UCDHR) observed that “in a series of disasters, including the Gujarat earthquake (2001), tsunami (2004), Bihar floods (2007 and 2008), Assam floods over several years (particularly 2009), Andhra Pradesh and Karnataka (2009) have highlighted the degree to which, by virtue of their inherent socio-economic vulnerability, *Dalits* have been systematically excluded from relief and rehabilitation efforts. In a caste-ridden society and polity as in India, discrimination in disaster response is highly predictable; discrimination happens by default.” (UCDHR)

The socio economic vulnerabilities existing in the society are aggravated during disasters. However, the Disaster Management Act, 2005 has turned a blind eye to

these vulnerabilities. There is not even a single provision which acknowledges these vulnerabilities and merely provides for the establishment of the three tier institutions at national, regional and local levels for purposes of disaster management. This can be interpreted as violation of rule of law since it results into people getting affected differently by a same phenomenon.

The World Conference on Disaster Reduction, January 2005 in Kobe, Japan and the Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters Hyogo Framework for Action 2005-2015 duly acknowledges the existence of “vulnerabilities” and the Preamble mandates for “reducing” the vulnerabilities”. The impact of disasters is *“compounded by increasing vulnerabilities related to changing demographic, technological and socio-economic conditions, unplanned urbanization, development within high-risk zones, under-development, environmental degradation, climate variability, climate change, geological hazards, competition for scarce resources, and the impact of epidemics such as HIV/AIDS, points to a future where disasters could increasingly threaten the world’s economy, and its population and the sustainable development of developing countries.”*(UNISDR)

Integration of Rule of Law in Disaster Management

A legal framework serves three dimensional purposes i.e. risk reduction, preparedness and how to respond. A good law serves all three purposes. It has to be both preventive and punitive in nature. Now, a question arises what purpose a law can serve during and post disasters? Or whether anything like disaster law exists at all? The answer lies in the positive rights debate of law. There are two kinds of rights, positive and negative. A positive right bestows a duty upon the State to act positively to ensure that right to its citizens, like right to education or right to food etc., whereas a negative

right condemns the State to interfere in the exercise of that right of citizens like right to freedom of religion or right to freedom of speech and expression etc. The origin of this distinction lies in the Hohfeld's theory of jural relations.

In the second decade of the twentieth century, Hohfeld (1913, 1917) proposed a relational approach to rights and duties which has become one of the most influential and enduring works of American jurisprudence. In two celebrated essays published in the *Yale Law Journal* in 1913 and 1917, respectively, Hohfeld sought to remove the ambiguity and inadequacy of terminology surrounding the words "rights" and "duties". To provide greater clarity and precision in legal jargon, Hohfeld proposed a paradigmatic taxonomy that captures four different uses of word right: 1) right (in the Hohfeldian sense); 2) privilege, 3) power; and 4) immunity. He argued that a legal relation always involves two persons and that a right, privilege, power, or immunity is, by definition, linked to a correlative (duty, no- right, liability, and disability). Hohfeld displays the four relations in the following table of correlatives:

Jural Correlatives

Right	Privilege	Power	Immunity
Duty	No- right	Liability	Disability

A person with a Hohfeldian right against another person (who is under a duty) has a claim if the other does not act in accordance with the duty, while a person with a privilege may act without liability to another (who has a no- right). A person with a power is able to change a legal relation of another (who is under a liability). A person with an immunity cannot have a particular legal relation changed by another (who is under a disability).⁵ A few practical example may help to better illustrate each of Hohfeld's relations: 1) a party to a binding contract has a right to the other party's

performance; 2) since flag burning is protected speech, a person has a privilege to burn a flag; 3) the state of Massachusetts has a power to call me to jury duty; 4) I have an immunity from being called to jury duty in Rhode Island (Luca Fiorito & Massimiliano Vatiere). During and post-disasters it is the positive rights framework which remains in action. The State cannot give up on people hit by disasters. All the human rights and legal rights remain intact even in times of disasters. If we try to locate disaster law in the positive rights framework then we can say that there exists a right against disasters, i.e. it is the duty of the State to prevent the occurrence of disasters and mitigate the effects of disasters also. Thus,

The Disaster Management in India urgently needs to integrate this “right against disasters” so as to realise “rule of law”. How it can be done? Most of the disasters are the result of environmental degradation and violation of several laws. For example, the floods in Jammu and Kashmir were largely caused due to construction on flood plains. Similar case was noticed in Uttarakhand floods. Thus, the minimising of the incidents of violation should be the first step towards the integration of rule of law in disaster management. This in fact is the overlapping of the Disaster Risk Reduction and Sustainable Development. In fact, the boundaries are blurred. The judiciary should creatively interpret “Disaster Management” to integrate disaster risk reduction and addressing several vulnerabilities during and post disasters. Equality before law should acknowledge the existing vulnerabilities and should create a room to address and minimise them.

Judiciary and Rule of Law

Law is supposed to govern and control human behavior. Till now rule of law was majorly concerned with the equality of human beings in front of law. Similarly, the environmental principles like sustainable development, inter-generational equity etc.

were concerned with humans. So, the principle of inter-generational equity talks about the generations of human beings and not anybody else. But if we give it a relook then probably it is also talking about maintaining the sameness of environment in which we are living. The environment should not age like humans. The quality of air, water, forest etc should be maintained. Probably, it was this meaning which the judiciary was referring to, when it decoded the right to “wholesome” environment as part of “right to life” (Rural Litigation and Entitlement Kendra vs. State of U.P.: 1988).

In New Zealand, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, granted legal personhood to the Whanganui River and its catchment and creates a new governance framework for the river. Section 12 of the Act makes Te Awa Tupua *an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements*. Section 14 (1) states that *Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person*. Section 14 (2) makes Te Pou Tupua, a legal guardian who would take action on behalf of Te Awa Tupua and will take care of its health and wellbeing.

New Zealand drafted legislation and enacted it to provide personhood to a river. By doing so natural resources are brought within the framework of law. The “equality before law” under rule of law will now apply to natural resources also. So, as an individual is expected to respect the rights of other individual, similarly natural resources are also no more on the mercy of people. They have rights which need to be protected and in case of violation the courts can be approached to provide relief. However, as the action on behalf of a natural resource will be taken by a human being only. This clearly makes the initiative to provide personhood unnecessary. Although by making natural resources akin to human beings an emotional connect is established towards natural resources. This is somewhere rooted in the Hindu tradition of personifying nature. Nature is given the status

of God and all natural resources are given personhoods, who have all the human emotions like happiness, anger etc. So, the anger of God of Air will cause cyclone or the anger of God of Water will cause floods and so on.

In India, the Uttarakhand High Court in Mohd.Salim V State of Uttarakhand (2017) apart from banning mining in Ganga river bed also held that river Ganga and Yamuna are legal persons. The Court relied on the analogy which was applied to provide juristic personhood to deities in '*Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*'. A deity was held to be a minor and a guardian will be appointed for its management. Similarly rivers can also be declared as juristic persons. Juristic persons are created by law as and when required for human development. The guardianship model creates personhood and creates a right duty framework wherein someone is made a guardian of natural resources. The State governments are made the "*loco parentis*" of the rivers. However, this ruling was overruled by Supreme Court in State of Uttarakhand V Salim Ali (2017). The Court held that since rivers pass through various states and also countries, any one state cannot be made the guardian.

Personhood to natural resources is problem ridden because ultimately it depends on human beings for the protection of environment.

Conclusion

United Nations Environment Program in their decision on "*Advancing Justice, Governance and Law for Environmental Sustainability*" (2004) laid down following principles for an effective environmental rule of law:

- (a) Fair, clear and implementable environmental laws;
- (b) Public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public

Participation in Decision-making and Access to Justice in Environmental Matters

(Aarhus Convention) in this regard;

(c) Accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions;

(d) Clear and coordinated mandates and roles;

(e) Accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies;

(f) Recognition of the relationship between human rights and the environment; and

(g) Specific criteria for the interpretation of environmental law.(UNEP, 2004)

In the perspective of disasters it can be concluded that for the realisation of rule of law, there is an urgent need for the integration of environmental protection, vulnerability studies, and sustainable development in the disaster management. Until and unless this crucial interdependence is not addressed by law, the observance of rule of law during disasters will remain a glorified rhetoric.

Endnotes:

1. Blaikie, P., T. Cannon, I. Davis, and B. Wisner. 1994. *At Risk: Natural Hazards, People's Vulnerability and Disasters*, London: Routledge.
2. Bruce Pardy (2014), *Towards an Environmental Rule of Law*, 17 Asia Pac. J. Env'tl. L. 163
3. Dicey, 1961; *Introduction to the Study of the Law of the Constitution*, 10th edition

4. Enarson Elaine, 2012; *Women Confronting Natural Disaster: From Vulnerability to Resilience*; USA: Lynne Rienner Publishers
5. Luca Fiorito & Massimiliano Vatiro, 2009, *Beyond Legal Relations Wesley Newcomb Hohfeld's Influence on American Institutionalism*, Department of Economics University of Siena 582, Department of Economics, University of Siena.
6. M.C.Mehta V UOI; 1987 AIR 1086, 1987 SCR (1) 819
7. Maneka Gandhi V UOI; 1978 AIR 597, 1978 SCR (2) 621
8. Mohd.Salim V State of Uttarakhand; Writ Petition No. 126 of 2014
9. Rural Litigation and Entitlement Kendra vs. State of U.P., AIR 1988 SC 2187
10. State of Uttarakhand V Mohd. Salim; 2017 SCC Online SC 903
11. Taj Trapezium Case; 1987 AIR 1086, 1987 SCR (1)819
12. Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017
13. UNDP, 2010; *Gender and Disasters*,
(<http://www.undp.org/content/dam/undp/library/crisis%20prevention/disaster/7Disaster%20Risk%20Reduction%20-%20Gender.pdf>)
14. UNEP (2004), *Advancing Justice, Governance and Law for Environmental Sustainability*,https://wedocs.unep.org/bitstream/handle/20.500.11822/9969/advancing_justice_governance_law.pdf?sequence=1&isAllowed=y
15. UNISDR, 2005-2015; *The Hyogo Framework for Action 2005-2015*;
www.unisdr.org/2005/wcdr/.../Hyogo-framework-for-action-english.pdf
16. WHO, 2013; *Tsunami 2004: A Comprehensive Analysis*,
http://apps.searo.who.int/PDS_DOCS/B4998.pdf