

The Case for Great Indian Bustard and Right Against Climate Change

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The case that set out with protection of the Great Indian Bustards¹ and the Lesser Florican before the Supreme Court of India was posed with an interesting and a significant question of environmental jurisprudence. The question which being of two conflicting obligations under the umbrella of environmental conservation, being the duty to ensure protection and preservation of ecology against the duty to fulfil international commitments towards promoting sustainable development and climate change. This dilemma set the stage for recognition by the Supreme Court of India, the right against adverse effects of climate change.

The Court noted that this was an interface between conservation of endangered species such as the Great Indian Bustard and imperative of protection from the adverse effects of climate change. Unlike the conventional challenge of economic growth versus protection of environment, the Court had to decide between safeguarding biodiversity and mitigating the impact of climate change.

To fulfill its international obligations under the Stockholm Declaration, the Government of India brought about the Constitution (Forty-second Amendment) Act, 1976 which incorporated Article 48-A and 51-A(g) in the Constitution. Article 48A directs the State to endeavour to protect the environment and to safeguard the forests and wildlife of the country whereas Article 51A(g) casts a duty upon every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. In *Shri Sachidanand Pandey v. State of West Bengal*², the Supreme Court pointed out that whenever a problem of ecology is

¹ GIB

² AIR 1987 SC 1109

brought before the Court, the Court is bound to bear in mind Article 48-A and 51-A(g) of the Constitution. In the present case, this was also juxtaposed directly with Article 51 of the Constitution, casting a duty on the State to respect its international and treaty obligations.

Briefly, the State has the constitutional responsibility to ensure the protection of endangered species such as the GIB. The State of Rajasthan is home to majority population of GIB which typically occupies arid regions. In 2018, the International Union for Conservation of Nature (IUCN) classified the GIB as "critically endangered" species. In view of the dwindling population of the GIB, invoking Article 32 of the Constitution, a writ petition was preferred before the Supreme Court seeking directions for conservation of the species. One such prayer sought a direction to put an immediate embargo on the sanction of new projects and renewal of existing projects and dismantling power lines, wind turbines and solar panels in and around the critical habitat. However, in the present case, such responsibility of conservation of GIB was conflicting with the imminent requirement of shifting to increased production of solar energy to ensure cleaner sources of energy. This requirement also stemmed from the need to fulfill the international commitment of taking definitive actions against the adverse impact of climate change wherein the idea of One Sun One World One Grid was initiated by India for climate collaboration through solar energy generation.

Vide an order dated 19th April 2021, the Court directed that all low voltage overhead powerlines and certain high voltage powerlines existing in the priority and potential habitats of GIB shall be converted to underground powerlines. It was further directed that in future, all low voltage powerlines to be laid in the priority and potential habitats of GIB shall be laid underground. The Court also set up a committee for assessing the feasibility of laying high voltage

underground powerlines. This scheme ensured the prevalence of environmental rule of law.

It was, however, at this stage that the Ministry of Power, Ministry of New and Renewable Energy and the Ministry of Environment, Forests and Climate Change informed the Court that such direction negatively affected the transition away from fossil fuels and India has made international commitments under the Paris Agreement signed in 2015³ for transitioning to non-fossil fuels and reduction of emission, reducing carbon footprint and increasing dependency on solar energy.

To understand the competing interests coherently and to arrive at a resolution which ensures sustainable development, the Court undertook the exercise of understanding Climate Change, its impact and the role of Government in ensuring the minimization of impact of climate change.

As per the United Nations Framework Convention on Climate Change, "climate change means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."⁴

Additionally, the UNFCCC also defines "adverse effects of climate change". "Adverse effects of climate change" means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare."⁵

³ Under the United Nations Framework Convention on Climate Change

⁴ Article 1(2) UNFCCC, 1992

⁵ Article 1(1) UNFCCC, 1992

The UNFCCC is aimed at stabilizing greenhouse gas emissions in the atmosphere and prevent human induced harm to the environment. India's commitment to the Paris Agreement included achievement of 50 percent cumulative electric power installed capacity from non-fossil fuel based energy resources by 2030.⁶ The Government emphasized before the Court that the shift to renewable sources of energy was not a strategic goal but a fundamental necessity.

The Court noted the three-fold requirement for India to shift to solar power on urgent basis viz., (i) increased demand for energy, accounting for 25% of global energy demand growth for the next two decades, (ii) increasing air pollution which necessitates shifting to cleaner energy resources and (iii) depleting groundwater levels and annual rainfall because, solar energy does not strain ground water supplies.

It was in this backdrop, that the Court held that without a clean environment, the right to health and therefore right to life is inconceivable and thus, in the absence of right against climate change, the right to life cannot be fully realized. Further, as the traditional communities living in the lap of nature are more severally impacted from any destruction to the environment, it creates a divide between them and urban population which may not be so immediately affected by the peril of climate change. Thus, climate change also impinges on the constitutional guarantee of the right to equality. This step is aimed at ensuring that the states are compelled to prioritize environmental protection and sustainable development. The Court held thus:

"24. Despite a plethora of decisions on the right to a clean environment, some decisions which recognise climate change as a serious threat, and national policies which seek to combat climate change, it is yet to be articulated that the people have a right against the adverse effects of

⁶ See UNFCCC, India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030). <https://unfccc.int/sites/default/files/NDC/202208/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf>

climate change. This is perhaps because this right and the right to a clean environment are two sides of the same coin. As the havoc caused by climate change increases year by year, it becomes necessary to articulate this as a distinct right. It is recognised by Articles 14 and 21.

....

....”

27. The right to equality under Article 14 and the right to life under Article 21 must be appreciated in the context of the decisions of this Court, the actions and commitments of the state on the national and international level, and scientific consensus on climate change and its adverse effects. From these, it emerges that there is a right to be free from the adverse effects of climate change. It is important to note that while giving effect to this right, courts must be alive to other rights of affected communities such as the right against displacement and allied rights. Different constitutional rights must be carefully considered before a decision is reached in a particular case.”

Thus, in a pathbreaking judgment, the Supreme Court recognized the right against the adverse effects of climate change as a fundamental right. In so many words the Court said that there is a right to be free from the adverse effects of climate change. Albeit without going into the contours, the Court however further held that when conflicted, that different constitutional rights must be considered on a case-to-case basis.

The Court placed reliance upon the judgment of the Dutch Supreme Court which highlighted the obligation of State to adopt more ambitious climate policies and at the same time recognized that right to life and right to family life cannot be fully provided and enjoyed without clean environment.

In an endeavour to balance competing interests, the Court noted other factors involved for the reduction of population of GIB such as habitat loss, predators, loss of prey, low fecundity and fragmentation. It considered that underground

cables may cause environmental issues for other species and result in forest fires and other fires.

But while adjudicating on the dynamic interplay of rights what was left remiss if to examine the rights of nature. Though the Supreme Court has recognized environmental rule of law as the platform that provides underpinning the four pillars of sustainable development— economic, social, environmental, and peace in *Hanuman Laxman Aroskar*⁷ the Court in the present case, did not recognize the rights of nature which forms an integral part of environmental rule of law. The First World Congress on Environmental Rule of Law held by IUCN and UNEP⁸ in April 2016 was a significant step forward in strengthening the foundation of environmental justice through environmental rule of law. The Declaration⁹ enshrined 13 substantive principles for promoting the same, one of the significant ones of which was as follows:

*"...Right to Nature and Rights of Nature- Each human and other living being has a right to the conservation, protection, and restoration of the health and integrity of ecosystems. **Nature has the inherent right to exist, thrive, and evolve.**"¹⁰*

While the Court laid emphasis on the rights against the adverse impact of climate change, the conflict between this right and the inherent right of nature seems undecided. The Court viewed the imminent need to move towards cleaner energy sources in the backdrop of India's international treaty obligations and requirement of reduction in fossil fuel consumption. However, there has not been an examination of the fact that loss of habitat and ecology in itself poses threat of climate change. The supposed harmonious decision of a fine balance, viewed with lens of only a specie

⁷ Hanuman Laxman Aroskar v. Union of India (2019) 15 SCC 401

⁸ The IUCN World Congress on Environmental Law, having met in Rio de Janeiro (Brazil) from 26 to 29 April 2016. IUCN World Declaration on the Environmental Rule of Law was adopted at the IUCN 1st World Congress on Environmental Law, co-organised by the IUCN World Commission on Environmental Law, the United Nations Environment Programme, the Organization of American States, the International Association of Judges, and other key partners, in April 2016 in Rio de Janeiro, (Brazil). It was finalized by the Steering Committee of the IUCN World Commission on Environmental Law on 12 February, 2017.

⁹ IUCN World Declaration on the Environmental Rule of Law

¹⁰ Principle 2, IUCN World Declaration on the Environmental Rule of Law

specific habitat loss, if repeated may result in large scale loss of ecology. Although the Court has not dwelled into technicalities viewing it as a policy matter, the Court has unconsciously opined that greater sanctity be attached to the fulfilment of international treaty obligations than protection of indigenous wildlife. This may be a flawed interpretation of environmental justice.

Moreover, in the vast landscape of India, recognition of right against the adverse impact of climate change may lead to manifold challenges. The writ Court, approached with a violation of this right may face the predicament of enforcement of such right. Climate change has today posed environmental threats in the form of floods, smog, droughts, landslides and other environmental hazards becoming common throughout the year. Environment is the responsibility of state. With recognition of right against the adverse impact of climate change as a fundamental right, one cannot help but imagine that floodgates of litigation this may open and the administrative apathy in providing any effective resolution.