

## RIGHT TO DEVELOPMENT AND THE CONSTITUTION

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### Abstract

The research paper is based upon one of the most essential right, i.e., *human development*, which, is a process that is intricately connected to ‘freedom’ and is realized when state fulfils its duties to further the fulfillment of freedom. This right, which is much neglected by most of the nations today, is an inalienable and inherent right of human-hood. Upendra Buxi has defined the right as ‘*a right to remain human.*’ The right to Development has been enunciated and recognized in various international conventions such as the *Declaration on the right to development* and the *Vienna Declaration and Programme of Action*. As per the Declaration on the Right to Development, right to development is an “*inalienable human right*” to pursue growth which is inherent to the realization of all other human rights. The paper, while discussing the background formulation of the right, proceeds to analyze the right in Indian context, where the settled law is that the rights, justice, development and governance form the four sovereign pillars of the Indian constitution. The author further analyzes how the concept of development relates to all the aspects of one’s personhood such as- right to privacy, right to social security, and right to sexual autonomy. The paper critically examines the severe failure of various Indian governments to even try to their fullest potential to affirmatively make the right to development fully realized. Finally, the author, while discussing various challenges in realization of right to development in India, concludes the paper by giving various suggestions in order to build a strong roadmap ahead vis-à-vis the right to development.

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*“Development is a participatory process of implementing all rights for all people and a reformulation defining an ‘epistemic break from the ideology of developmentalism’”*

- Upendra Buxi

## I. CONCEPTUALIZING RIGHT TO DEVELOPMENT

### A. What is Right To Development?

Development of a human may be defined as a process that is intricately connected to ‘freedom’ and is realized when state fulfils its duties to further the fulfillment of freedom.<sup>1</sup> To understand the concept of right to development, it is essential to analyze the term ‘development’. According to the Black’s law dictionary, to ‘develop’ is to progress to an advanced state or condition,<sup>2</sup> wherefore the process of progressing to a more advanced state is termed as ‘development’. Development is possible only when each person is able to utilize resources to their full potential in order to reach a better state of economic, social or cultural existence.

Under the right to development declaration, *“Development is the process of improvement of economic, social, cultural and political well-being of all individuals through their active, free, fair and meaningful participation in the distribution of all the benefits.”*<sup>3</sup> Conceptualizing the right through its definition under this declaration, there are nine rights intrinsic to the principle right to development

which are; right to self-determination, right to sovereignty over resources, elimination of human rights violation, international peace and security, human-centered development process, indivisibility of human rights, equality in every opportunity, a just international order and absolute realization of people’s development.<sup>4</sup> Right to development is not merely a right to outcomes, but a ‘*right to process*’ based on equity, transparency, accountability, non-discrimination and democratic accountability<sup>5</sup> and it involves a holistic realization of all the rights.

### B. Right To Development - The International Scenario

The right to Development has been enunciated and recognized in various international conventions such as the Declaration on the right to development<sup>6</sup> and the Vienna Declaration and Programme of Action.<sup>7</sup> An open-ended intergovernmental working group under United Nations, established in 1998 analyzes the obstacles and progress in the full implementation of the right at national as well as international level and recommends

<sup>1</sup> M. C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 294 (1<sup>st</sup> ed. 2000).

<sup>2</sup> H. C. BLACK, BLACK'S LAW DICTIONARY (4<sup>th</sup> ed. 1951).

<sup>3</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Apr. 12, 1986).

<sup>4</sup> UPENDRA BUXI, HUMAN RIGHTS IN A POSTHUMAN WORLD, 6 (1<sup>st</sup> ed. 2007).

<sup>5</sup> Report of the Independent Expert on the Right to Development, G.A. Res. 224/55, UN Doc. A/55/306 (Aug. 12, 2000).

<sup>6</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Apr. 12, 1986).

<sup>7</sup> Vienna Declaration and Programme of Action, G.A. Res. 48/121, U.N. Doc. A/157/23, (Jul. 12, 1993).

procedural as well as substantive methods for the better assimilation of the right. It also reviews reports submitted by and to various international organizations and presents sessional reports to HRC containing its advice to the United Nations Human Rights High Commissioner office.

As already declared under various international conventions, the right to development is fundamentally separate from the conventional idea of development which restricts it to the notions such as economic growth, centralized planning, community development, etc. Ends of development, process and the means of development form the cornerstone of international concept of right to development, which includes freedom from social deprivations, poverty and all other kinds of absolute tyrannies.

### C. Right to Development- A Human Right?

*“Development means right to remain human, that is, the inalienable and undeniable right of being a man.”*

- Upendra Baxi<sup>8</sup>

Human rights are the rights held by the individuals by the virtue of being humans.<sup>9</sup> They are neither derived from any divine principle nor given to us by any authority. As conceptualized under the Universal Declaration of

Human Rights, human rights are not the product of social cooperation but are held by all individuals as their inherent natural rights.<sup>10</sup> Human rights flow from the fundamental notion of right to human dignity, which are universally accepted and no state can dare to deny anyone of their human rights.<sup>11</sup>

As per the Declaration on the Right to Development, this right is an “*inalienable human right*” to pursue growth which is essential to fully realize all the other human rights.<sup>12</sup> The right to Development declaration is based on the conceptions of justice and equity. It emphasizes the essentiality of certain inherent rights including equality of opportunity, access to resources, participation and equality in sharing of benefits or distribution of resources. It has redefined development as a human right challenging the dominantly prevalent idea of development as a collective economic conception only.<sup>13</sup>

Any human rights-based approach is centered on the notion of the dignity of an individual and social contract theory concerning all the members of a civil society. There are dissenting views with respect to the current scope of right to development as a human right. It is often argued by scholars that while human rights are based on negative freedoms such as

<sup>8</sup> U. BUXI, FROM HUMAN RIGHTS TO THE RIGHT TO BE HUMAN: SOME HERESIES, 150 (13<sup>th</sup> ed. 1986).

<sup>9</sup> Wouter Vandenhoe, *The human right to development as a paradox*, 36(3) LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 377, 390 (2003).

<sup>10</sup> Jack Donnelly, *The Relative Universality of Human Rights*, 29(2) THE JOHNS HOPKINS UNIVERSITY PRESS 281, 320 (2007).

<sup>11</sup> Burns H. Weston, *Human Rights and Nation-Building in Cross Cultural Settings*, 60(2) MAINE L. R. 318, 350 (2008).

<sup>12</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Dec. 4, 1986).

<sup>13</sup> ARJUN SENGUPTA, REFLECTIONS ON THE RIGHT TO DEVELOPMENT, 7 (12<sup>th</sup> ed. 2005).

right to life whereby, it is prohibited to illegally kill someone, economic and social rights are based on positive action requirement in order of protection of those rights.

There are dissenting arguments with respect to the scope of right to development as a human right. It is often argued by scholars that while human rights are based on negative freedoms such as right to life whereby, it is prohibited to illegally kill someone, economic and social rights are based on positive action requirement in order of protection of those rights. The argument is further emphasized by reasoning that since right to development is a collective right and requires positive economic measures of the government; it is disqualified from getting a status of a human right and is merely an economic right.

However, these contentions can easily be repudiated as the distinction between individual and collective rights cannot be the basis of disqualifying a right from being a human right as any right can be defined as individual as well as collective right in as much as an obligation and a duty-holder can be substantially determined. Furthermore, the classification of financial rights as positive rights and human rights as negative rights is too absurd and superficial as both the rights have negative as well as positive aspects.

The concept of human development is intrinsically linked to the idea of human rights as it aims for empowerment by realizing full human potential. Justice, equity and development of 'person' are the cornerstones

of right to development.<sup>14</sup> The right to development is not only the economic advancement but is deeply rooted with individual dignity.<sup>15</sup> Affirming economic and social security by extending access to sufficient resources is important for human development and ensuring full attainment of human rights is the essence of it.

## II. RIGHT TO DEVELOPMENT IN THE INDIAN CONTEXT

### A. Right to Development Under The Indian Constitution

*"Rights, justice, development and governance form the four sovereign foundations of the constitution of India."*<sup>16</sup>

Dr. Ambedkar was of the view that individual development in social, economic and political spheres is central to Indian constitutional values having state as its main instrumentality. The concepts of dignity, equality and equality setted out in the preamble acknowledge the right of all citizens to flourish and develop his/her personality fully in all respects.<sup>17</sup> Article 21, along with all its pronouncements; guarantee the human right of individual dignity in relation to the human

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<sup>14</sup> Phillip Alston, *The Sources Of Human Rights Law: Custom, Jus Cogens, And General Principles*, 12(2) AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 286, 300 (1988).

<sup>15</sup> National Legal Services Authority v. Union of India & Ors. (2014) 5 SCC 438.

<sup>16</sup> Upendra Buxi, *A known but an indifferent judge: Situating Ronald Dworkin in contemporary Indian jurisprudence*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 582 (2003).

<sup>17</sup> National Legal Services Auth v. Union Of India & Ors., (2014) 5 SCC 438.

development.<sup>18</sup> Alleviating the oppression and destitution of thousands is the vision of the constitution in terms of the right to development.<sup>19</sup>

The constitution of India consists of plethora of justifiable rights, rights which can be enforced by a court of law and, non-justifiable rights, the ones which are non-justifiable in nature.<sup>20</sup> Fundamental rights mentioned in Chapter III and Directive Principles of State Policy under Chapter IV are the two central points of the constitution. While one forms the core framework of rights ensured to the citizens, the other is the set of guiding principles for the upcoming policies and strategies by the law makers and the government. However, the former can be enforced in a court of law while the DPSPs cannot be. Fundamental rights are essentially civil and political rights and are thus, absolute with a few exceptions. On the contrary, the principles of state policy are majorly the “directive” economic and social rights that are similar to the rights enshrined under the International Covenant on Economic, Social and Cultural Rights.<sup>21</sup>

Article 43 of the constitution of India corresponds to Article 11 of ICESCR

enunciating the obligation of the state to ensure “a decent standard of life and full enjoyment of leisure and social and cultural opportunities”, and in particular the state shall endeavor to ‘promote cottage industries on an individual or cooperative basis in rural areas’.<sup>22</sup> This right is intrinsic to the conception of right to development. Additionally, right to health under the covenant,<sup>23</sup> which is a fundamental right in India,<sup>24</sup> is again, an inherent part of the right to development.

The right to development is a composite right that insists on the parallel fulfillment of each and every human rights subject to public scrutiny and criticism. The Constitution of India stands on this pretext and gives full assurance of the right to development under the DPSPs which are the guiding principles to be enforced by the law makers while implementing the fundamental rights.

## **B. RIGHT TO DEVELOPMENT AND ITS CONCOMITANTS - THE JUDICIAL PRO- NOUNCEMENTS**

### **B.1. Right to Development and Privacy vis-à-vis article 21**

Privacy is central to the well-being and overall development of an individual<sup>25</sup> and is an

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<sup>18</sup> Id.

<sup>19</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM, 12 (1<sup>st</sup>ed. 2000).

<sup>20</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/35/721 (Dec. 4, 1986).

<sup>21</sup> Jonah Lobe, *Justiciability of ESC Rights—the Indian Experience*, CIRCLE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Jan. 29, 2009, 10:04 AM), <http://hrlibrary.umn.edu/edumat/IHRIP/circle/justiciability.html>.

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<sup>22</sup> India Const. art. 43.

<sup>23</sup> International Covenant on Economic, Social and Cultural Rights art. 16, Dec. 3, 1996, 6 U.S.T. 377 U.N.T.S. 993.

<sup>24</sup> Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516.

<sup>25</sup> *R. v. Dyment*, (1988) 17 S.C.C. 426.

inherent aspect of human development.<sup>26</sup> Development is a pre-dominant limb of the constitutional vision, which is not restricted to economic aspect considered in terms of the growth of the gross domestic product or industrial output.<sup>27</sup> Development reflects individual and personal dignity of humans in terms of personal development. Right to life as well as personal liberty<sup>28</sup> is a very broad conception and incorporates those elements of liberty that are essential to ensure the dignity of a human being.

The Indian Supreme court has settled the law that the right to privacy is essentially a fundamental right since it is central to the full development of human personality. This is also constituted under the constitution as the Preamble recognizes the right of each and every person to basic essentials “designed to fully flower citizens’ personality.”<sup>29</sup>

### **B.2. Sexuality And Right To Development**

Right to dignity is one of the most important facet of one’s development and evolution of the person, which includes right to express oneself and “mixing and homogenizing with neighboring human beings” in various forms.<sup>30</sup> Honorable Supreme Court has reiterated that the capacity of persons to ‘*individuation*’ and realization of one’s personal autonomy is

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<sup>26</sup> K. S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

<sup>27</sup> Upendra Buxi, *The Right To Be Human: Some Heresies*, INDIA INTERNATIONAL CENTRE QUARTERLY 13, 565 (1986).

<sup>28</sup> India Const. art. 21.

<sup>29</sup> Id.

<sup>30</sup> In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 S.C.C. 608.

essential for the development of a human personality.<sup>31</sup> The position of human sexuality and sexual autonomy in ‘human development’ is essential for optimum and absolute attainment of the rights of a free individual.<sup>32</sup>

The United States Supreme Court, while referring to the ‘right to be left alone’, held that ‘sexual intimacy’ forms the foundation of human existence and is essential the notion of right to development.<sup>33</sup> Various International treaties and conventions such as Declaration on the Right to Development adopted by the World Conference on Human Rights and other human right treaties identify right to sexual autonomy and sexual orientation as one of the most important human rights.<sup>34</sup> As per Article 51 of the Constitution of India, the Indian state has the duty to implement these internationally recognized principles into its social and economic infrastructure.<sup>35</sup>

### **B.3. Social Security And Development- The Aadhaar Debacle**

Freedom is intrinsically attached to individual development through which human capabilities can be fully attained. Removal of “unfreedom”, i.e., of tyranny, social

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<sup>31</sup> M. MAHLER, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS AND INDIVIDUATION*, 45 (4<sup>th</sup> ed. 1975).

<sup>32</sup> Naz Foundation v. Govt. of NCT of Delhi, (2001) 5 S.C.C. 560.

<sup>33</sup> Paris Adult Theatre I v. Slaton, 478 U.S. 186 (1986).

<sup>34</sup> Dominic Mc Goldrick, *The Development and Status of Sexual Orientation Discrimination under International Law*, 16(8) Human Rights L. R. 365, 420 (2016).

<sup>35</sup> Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241; India Const. art. 51.

deprivation, dismal public facilities and intolerance of repressive classes is identified to be important for development of an individual. In essence, development is the mechanism of planned social change through redistribution and extending access to all.

Right to social security is an essential concomitant of human development as recognized under article 22 of the UDHR.<sup>36</sup> Social security, expansion of human capacity and development are all inter-dependent on each other. 'Accountability' is another crucial aspect of development, which is important to ensure that public power surrendered by the people is not misappropriated in the favor of privileged class only.<sup>37</sup> While sustaining the constitutional validity of The Aadhaar Act, the Apex court laid down that a welfare state has positive obligations to enact welfare schemes which ensure the adequate and proportionate distribution of resources and services to the marginalized classes.<sup>38</sup> Such schemes are essential for the social and economic development of deprived classes,<sup>39</sup> which is the central purpose of the Aadhaar scheme.<sup>40</sup>

Right to development also includes right to autonomy of personal choices and full autonomy over the use of one's personal

information. However, such right may be reasonably restricted on certain grounds such as national security, maintenance of law and order, implementation of positive welfare mechanisms, etc. The constitutional validity of the much appraised Aadhaar scheme was thus upheld by the Indian apex court while reiterating various elements of right to development, which form an essential pillar of the constitutional principles.<sup>41</sup>

### C. CHALLENGES FACED BY RIGHT TO DEVELOPMENT IN INDIA

#### C.1. *The Directory Nature Of Right To Development In India*

A particular right can either be mandatory and legally-binding in nature, i.e., justifiable before a court of law, or can be merely directory, i.e., non-justifiable. The principles of state policies, which are directive in nature, contained in the fourth part of the constitution and form the foundational stone of right to development in India, are non-justifiable and merely directory in nature. Thus, the Indian state is under an affirmative duty of fulfilling them for the citizens but citizens cannot per se claim a right over them before a court of law.

During the framing of the constitution, the non-justifiability of these principles was emphasized because of the financial constraints on the state which has just gotten free from the centuries of oppression. However, it is highly debatable whether the financial constraints can be the sole

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<sup>36</sup> Universal Declaration of Human Rights, 1948, art. 12.

<sup>37</sup> Upendra Baxi, *The Right To Be Human: Some Heresies*, INDIA INTERNATIONAL CENTRE QUARTERLY 13(9), (1986).

<sup>38</sup> MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, 56 (7<sup>th</sup> ed. 2000).

<sup>39</sup> Binoy Viswam v. Union of India &Ors., (2017) 7 S.C.C. 59.

<sup>40</sup> ARUN K. THIRUVENGADAM, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS, 4 (1<sup>st</sup> ed. 2017).

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<sup>41</sup> Justice K.S. Puttaswamy and another v. Union of India and others, (2012) 5 S.C.C. 560.

justification for depriving crores of citizens of their fundamental right to claim basic necessities from the state; even after seven long decades of the independence.

There seems to be a mammoth difference between legally enforceable socio-economic rights and merely aspiration-based rights. This difference can be best exemplified by the ground-breaking example of the right to education, which has been made a legally-enforceable fundamental right from being merely a DPSP through an amendment to the constitution. Most of the other entities constituted under right to development are contained under the part four, i.e., the directive principles of state policy, which are unenforceable, indirect obligations of the state and thus remain mere hopes of the citizens. This poses a major challenge in proper realization and assimilation of right to development in India.

### ***C.2. Implementation and realization of Right to Development in India***

Rethinking the conception of development from a rights standpoint stages more complex issues linked with the idea of right to development in India. The Gandhian model of governance, which was based on self-sufficient village economies was rejected for being too impragmatic at the time of independence for a country which was just awakened from the centuries of oppression. Instead of it, a more centralized economic model was adopted to effectuate rapid industrial development. The issue, thus, is not

just the unrealized economic and social aspirations of lakhs of people but also the broader question of a larger obligation of the state to affirmatively redress the grave socio-economic inequities persisting in the Indian society today.

Although the country was in a complex state at the time of independence, it remains a disturbing fact that state has yet not been able to make every citizen economically and socially self-sufficient. While there are numerous acts and legislations for social reconstruction and development, their implementation and actual realization remains a distant dream. One of the best illustrations of the same is the Untouchability (Offences) Act which have made practice of untouchability in any form a punishable offence. However, just like other legislations, there was nothing affirmatively done by any authority to concretely implement the provisions of the act or to punish those who get engaged in the criminalized practices. The challenge is furthered by certain other substantive and inherent loopholes in the legislative provisions itself. Equality is the most basic principle recognized by the Indian constitution yet grave inequalities persist in most of the part of the country as major part of the lower caste are employed in agriculture or in the most marginalized spheres such as scavenging, sweeping, flaying etc.

The overall planning structure of implementing right to development in India is inclined in the favor of upper class elites, which is best illustrated by the Community



Development Programme, 1952. The amenities and benefits accruing as per the act are majorly provided to the few upper class privileged ones and the destitute ones remain physically and socially deprived of the same.<sup>42</sup> Along with the issues like caste, class, poverty, employment and targeted benefits from welfare schemes, gender discrimination is another critical challenge plaguing the Indian society, whereby, females have been abrogated of their fundamental right to social, economical, physical or emotional development.

Right to Development is neither a constitutional nor a statutory right in India as only after a basic understanding of the right to development can one comprehend that the right has been ensured through various instrumentalities of laws and pronouncements of the Apex Court of India. Although the right to development is otherwise being incorporated and being ensured in India, the absence of an explicit status of the right brings a fundamental right or even a statutory right creates a complex challenge to a great extent as it makes a non-enforceable entity.

In the opinion of various prominent scholars such as Alston and Donnelly, the debate surrounding the scope of any such right does not remain fierce. "While eminent jurists such as Alston confidently assert that 'as a general proposition in terms of international human rights law, the existence of such a right is a fait

<sup>42</sup> GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS*, 28 (2<sup>nd</sup> ed. 2004).

accompli',"<sup>43</sup> Jack Donnelly, in an article entitled 'In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development', demolishes the claim that the right to development exists."<sup>44</sup>

### III. CONCLUSION- THE ROADMAP AHEAD

The conception of right to development constitutes two components within itself. One is the static component which reflects the bare minimum development in terms of substantial civil, political, social and cultural rights whereby every individual is entitled to a sustainable human life full of peace and dignity. The other one is the dynamic component which mandates that the extent, applicability and the nature of the right shall depend upon the existing conditions of the individuals and that of the country. This is best illustrated by the right to education part III of the Indian Constitution which also finds mention under part IV. While the guarantee under part three talks about the mandatory entitlement which is attainable as per the existing scenario of the country whereas the one in part IV lays down the principles to be directorially followed in future.

The complexity of the issues involved in the case of economic and social right such as right to development makes it ambiguous to

<sup>43</sup> P. Alston, *Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy*, 10(6) HUMAN RIGHTS AND THE RULE OF LAW, 260, 339 (1981).

<sup>44</sup> J. Donnelly, *In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development*, 16(5) CALIFORNIA WEST INTERNATIONAL L.J. 350,473 (1985).

recognize the specific obligations of particular duty-holders and to hold them liable in case of breach. Enacting stupendous legislations would not be the correct approach for overcoming the nature of challenges and complexities involved. The issues demand for alternate forums and procedures rather than the complex court of law procedures for ensuring effective implementation of the obligations. Alternative dispute resolution agencies and specialized program of action for better governance of realization of the right can be quite effective in dealing with the right-based issues.

At the global level, a platform needs to be established which enables various governments and international agencies to gather and deliberate over the obstacles faced by each of them for full realization of the right at their levels. An alternative consultation mechanism, which works transparently, rather than an outside judicial authority can prove to be much more effective for considering better procedures for implementation of the right. While implementing right to development, it needs to be remembered that as per the constitution of India as well as the declaration on the right to development, an individual is central to all the constituent rights of right to development. Whether an individual right or a collective right, the ultimate beneficiary of a particular right needs to be an individual itself. Thus, the end result of the exercise of all obligations must be the overall benefit of an individual.

In India, the right to development is not legislated per se but its concomitants are inherent in the Indian Constitution. The distinction amongst the different components is based upon their enforceability in a court of law. Rethinking the situations prevalent and the existing dismal conditions of the 'deprived' classes in the Indian state, the right to development needs to be recognized as a specific right, expandable to the extent of bare minimum rights that every individual deserves by the very fact of their existence in the Republic of India.