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Globalization, Rights, and Judicial Review in the Supreme Court of India

Manoj Mate

GLOBALIZATION, RIGHTS, AND JUDICIAL REVIEW IN THE SUPREME COURT OF INDIA

Manoj Mate[†]

Abstract: This article examines the broader and evolving role of the Supreme Court of India in an era of globalization by examining the Court's decision-making in rights-based challenges to economic liberalization, privatization, and development policies over the past three decades. While the Court has been mostly deferential in its review of these policies and projects, it has in many cases been active and instrumental in remaking and reshaping regulatory frameworks, bureaucratic structures, accountability norms, and in redefining the terrain of fundamental rights that non-governmental organizations (NGOs) and other litigants have invoked in challenges to these policies. This article argues that the Court has deployed rights as "structuring principles" in order to evaluate and review liberalization and privatization policies, based on constitutional or statutory illegality, arbitrariness or unreasonableness, or corruption, and framed rights as "substantive-normative principles" to assess development policies. This article argues that the Court's particular approach to rights-based judicial review has resulted in the creation of "asymmetrical rights terrains" that privilege the rights and interests of private commercial and industrial stakeholders and government officials and agencies, above the rights and interests of labor, villagers, farmers, and tribes. The article concludes by suggesting 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.

I. INTRODUCTION

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.[1] 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.[2] International institutions and organizations, including the World Bank and

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[†] Associate Professor of Law, Whittier Law School, Professor (by courtesy) of Political Science, Whittier College. J.D., Harvard Law School, B.A., M.A., Ph.D., University of California, Berkeley.

[1] For scholarship on globalization, see generally JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); Barbara Harriss-White et al., *Globalisation, Economic Citizenship and India's Inclusive Developmentalism*, *in* CITIZENSHIP AS CULTURAL FLOW: STRUCTURE, AGENCY AND POWER (Subrata K. Mitra ed., 2012); Judith White, *Globalization, Divestment, and Human Rights in Burma,* 14 J. CORP. CITIZENSHIP 47, 47–65 (2005).

[2] *See* Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 NYU J. INT'L L. & POL. 243, 255–62 (2000); Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOB. LEGAL STUD. 425, 445 (1999).

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.[3] These shifts have also helped reshape and influence lawyering and legal practice, constitutional and policy norms, and constitutional adjudication on these issues.[4]

Internationally, there has been a resurgence of critical legal scholarship regarding the impact of globalization on human rights and constitutional adjudication.[5] While there has been significant opposition to these policies within the political sphere in countries like India, much of the contestation and challenge to these policies has also been through court-based litigation. Indeed, because these policy shifts have often been executive-led and effectuated with limited policy debates in Parliament, opposition parties, grassroots groups and non-governmental organizations (NGOs) have had no choice but to use the courts as the primary forum for challenging and mobilizing oppositional support against globalization policies of the government.[6] While a significant body of scholarship across many disciplines has analyzed the spread of economic liberalization and privatization policies globally, as well as challenges to these development policies from the perspective of human rights,[7] less attention has been given to the primary role that constitutional courts and high courts play in reshaping the terrain of rights and regulatory structures.[8]

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[3] *See generally* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD-WORLD RESISTANCE (2003) [hereinafter RAJAGOPAL, INTERNATIONAL LAW FROM BELOW]; Shalini Randeria, *Globalization of Law: Environmental Justice, World Bank, NGOs and the Cunning State in India* 51 CURRENT SOC. 305 (2003).

[4] *See, e.g.*, GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., 2002); Terence C. Halliday and Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447 (2006).

[5] *See, e.g.*, UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2002); Surya Deva*, Human Rights Realization in an Era of Globalization: The Indian Experience*, 12 BUFFALO HUM. RTS. L. REV. 93 (2006); Upendra Baxi, *Access to Justice in a Globalized Economy: Some Reflections*, *in* INDIAN LAW INSTITUTE GOLDEN JUBILEE 1956–2006, 27 (2007); Judith Resnick, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162 (2013).

[6] *See* Ashutosh Varshney, *Mass politics or Elite Politics? India's Economic Reforms in Comparative Perspective*, 2 J. POL'Y REFORM 301 (1998); Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institution of Accountability*, U.N. Doc. PP/DGHR/23 (Jan. 23, 2006), 22–29.

[7] For recent scholarship on the intersection of globalization and human rights, see generally RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 3; Surya Deva*, Human Rights Realization in an Era of Globalization: The Indian Experience*, 12 BUFF. HUM. RTS. L. REV. 93 (2006).

[8] For an example of work that does explore how law and courts shape the regulatory context in India, see Chiranjib Sen & Anil Suraj, *The Role of Legal Process in the Redesign of Indian Government-Business Relations* (Ctr. on Democracy, Dev., and the Rule of Law, Working Paper No. 102, 2009), http://iis-db.stanford.edu/pubs/22692/No_102_SenSuraj_Legal_Process_India_91909.pdf.

This article analyzes the role that the Supreme Court of India has played in adjudicating constitutional challenges to India's globalization policies. Specifically, it examines how the Court, through its decisions, has reconstituted and reshaped constitutional and regulatory frameworks governing economic liberalization and privatization policy and development policy in India. Part II examines broader shifts in the Supreme Court's fundamental rights jurisprudence from the post-Emergency period to the post-liberalization era.[9] Part III analyzes how the Court has redefined the scope and terrain of rights and judicial review and helped reshape and reconstitute regulatory frameworks in the areas of liberalization and privatization. Part IV examines how the Court has redefined the scope of rights and judicial review in development decisions, and how its decisions have reshaped development narratives and created new development governance structures that impact the terrain of rights. Part V concludes by considering the implications of the Court's approach to adjudicating globalization policies for the future of rights advocacy and litigation in India.

II. 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 post-1991 era, the Court redefined and adjudicated the scope and meaning of the core fundamental rights contained in Article 14 (equality before the law),[10] Article 19 (speech, assembly, and other freedoms),[11] and Article 21 (life and

[9] The Emergency period refers to the period of Emergency rule under Indira Gandhi from 1975 to 1977. Gandhi declared Emergency in 1975, citing both internal and external reasons as justifications. During this period, the government enacted a series of constitutional amendments and laws that curbed judicial power and repressed rights and freedoms. *See generally* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 391–94 (1999).

[10] Article 14 provides: "Equality before law-- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." INDIA CONST. art. 14.

[11] Article 19, § 1 provides: (1) All citizens shall have the right –
(a) to freedom of speech and expression;
(b) to assembly peaceable and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) to acquire, hold, and dispose of private property (repealed by 44th Amendment)
(g) to practise any profession, or to carry on any occupation, trade or business." *Id.* art. 19.

liberty) of the Indian Constitution.[12] 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.[13] 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.

A. The Birth of Fundamental Rights in the Post-Emergency Era

Following the conclusion of Indira Gandhi's Emergency regime in 1977 and the election of the Janata party regime in 1977, the Supreme Court of India launched a new activism and expanded the scope of the fundamental rights contained in Articles 14, 19, and 21.[14] In *Maneka Gandhi v. Union of India* (1978), the Court held that the rights contained in each of these Articles were inter-related; in subsequent decisions, the Court suggested that these rights were inviolable basic features of the Constitution.[15] The Indian Supreme Court's interpretation of the scope of judicial review under Article 14's equality guarantee, read together with the rights in Article 19 and 21, reflects the particular normative worldviews of judges regarding both their institutional role in judicial review of government economic policy, as well as their broader understandings of the proper role of government in economic policy.[16]

In reinterpreting the scope of these rights provisions, the Court also constructed new and more robust standards of rights-based scrutiny. In the landmark decision *Maneka Gandhi v. Union of India* (1978), the Court

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[12] Article 21 provides: "No person shall be deprived of life or personal liberty except according to procedure established by law." *Id.* art. 21.

[13] *See* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 128 (1985) [hereinafter Baxi, *Taking Suffering Seriously*].

[14] *See generally* UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS (1980); Baxi, *Taking Suffering Seriously*, *supra* note 13, at 128; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 110–22 (2002).

[15] Justice Chandrachud's lead opinion in *Minerva Mills v. Union of India* suggested that Articles 14, 19, and 21 constituted a "golden triangle" of rights that were part of the basic features of the Constitution. Minerva Mills v. Union of India, (1981) 1 SCR 206, 255. *See also* I.R. Coelho v. State of T.N. (1999) 7 SCC 580, 581–83 (reaffirming that the golden triangle of Article 14, 19 and 21 is part of the basic structure)

[16] *See* Baxi, *Taking Suffering Seriously*, *supra* note 13, at 128 (1985); SATHE, *supra* note 14, at 165–66 (2002); Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 262–86 (Diana Kapiszewski et al. eds., 2013); Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175, 179–209 (2010).

rejected its earlier decision in *Gopalan* by effectively reading in substantive due process into the term "procedure established by law" in Article 21, and recognized a new standard of non-arbitrariness review based on Article 14 and Article 21.[17] Under this new interpretive approach, the Court began to recognize a wide range of fundamental rights based on both the right to life and liberty and the rights contained in Article 19.[18] In addition, the Court held that the rights contained in Articles 19 and 21 were not mutually exclusive and that deprivation of these rights would be reviewed under the standard of reasonableness under Article 19.[19]

In recognizing a new doctrine of non-arbitrariness, the Court in *Maneka Gandhi* radically altered the scope of the right to equality under Article 14, which had previously been thought to only guarantee equality and equal protection under the law.[20] Reading Article 21 together with Article 14, the Court held that the procedures referenced in Article 21's protection of life and liberty must be "right and just and fair and not arbitrary, fanciful or oppressive."[21] Under this new standard of "non-arbitrariness" review based on Article 14 and 21, the Court could now subject government policies and actions infringing on fundamental rights to a higher level of scrutiny.[22] The Court reiterated and applied this non-arbitrariness standard in later cases like *Ajay Hasia v. Khalid M. Sehravadi*,

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[17] Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 283; A.K. Gopalan v. State of Madras, [1950] SCR 88; P. Jain, *The Supreme Court and Fundamental Rights*, *in* FIFTY YEARS OF THE SUPREME COURT OF INDIA 1, 23–26 (S.K. Verma & Kusum eds., 2000). In drafting Article 21, the Constituent Assembly adopted the language "No person shall be deprived of life or personal liberty except according to procedure established by law" in order to avoid the possibility of judicially created doctrines of substantive due process and judicial activism in challenging government policies. However, by expansively interpreting Articles 14 and 21 together, the Court in Maneka effectively introduced substantive due process into the Indian Constitution. *See* Manoj Mate, *The Origins of Due Process in India*: *The Role of Borrowing in Personal Liberty and Preventive Detention Cases* , 28 BERKELEY J. INT'L L. 216 (2010) [hereinafter Mate, *The Origins of Due Process in India*].

[18] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (recognizing broad scope of the right to life and liberty under a substantive due process conception of Article 21. *See also* Hussainara Khatoon v. State of Bihar, (1979) SC 1377; Francis Mullin v. Administrator Union Territory of Delhi, (1981) 1 SCC 608, 618 (recognizing the right to life); M.C. Mehta v. Union of India, (1987) 4 SCC 463 (right to clean air); Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 (right to shelter); CERC v Union of India, (1995) 3 SCC 42 (right to health); Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 (right to personal liberty includes right to be free of torture).

[19] Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 284–86.

[20] *See* B.N. Srikrishna, *Skinning a Cat*, 8 SCC(J) 3 (2005), http://www.ebc india.com/lawyer/articles/2005_8_3.htm.

[21] Mate, *The Origins of Due Process in India*, *supra* note 17, at 247 (citing Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 673).

[22] *See* Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 283–84 (holding that equality is antithetical to arbitrariness and articulating a new standard of non-arbitrariness review based on the right to equality in Article 14).

R.D. Shetty v. International Airports Authority, and *D.S. Nakara v. Union of India*, where the Court applied robust rights-based scrutiny in its review of government policies under arbitrariness review.[23]

Building on this expanded interpretation of these rights provisions, the Court also expanded the scope of its role through the development of public interest litigation (PIL), wherein the Court expanded standing for third parties to file public interest suits to challenge government policies, governance failures, and human rights violations.[24] In the post-Emergency years, the Court gradually expanded its role in governance, environmental policy, and human rights cases through PIL.[25] In the process, it not only recognized a broad array of fundamental rights, but also increasingly expanded its assertiveness in challenging the Central Government in key domains, including judicial appointments, corruption, and environmental governance.[26] But as reflected in subsequent cases, the Court has been selective in wielding Article 14's non-arbitrariness review, fashioning a variant of the "double standard" approach whereby economic and social policies of the government receive lower, rational-basis type judicial review.[27]

While the Supreme Court of India was building an expansive infrastructure of fundamental rights in the late 1970s and early 1980s, it also signaled a distinctly lower and more limited standard of review in the area of economic and social policy. During the 1980s, the Supreme Court of India was highly deferential to the government in cases involving challenges to government economic policies. This is illustrated by the Court's decision in *R.K. Garg v. Union of India* (1981), which involved a challenge to the Gandhi regime's enactment of the Bearer Bonds Act.[28] In *R.K. Garg*, the

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[23] *See* R.D. Shetty v. International Airports Authority, (1979) SCC 489 (applying doctrine of nonarbitrariness inherent in Articles 14, 19, and 21 to the Bombay Municipal Corporation's International Airport Authority's failure to comply with its own stated standards of eligibility in a notice for tenders for restaurant/snack bars in Bombay Airport; Ajay Hasia v. Khalid M. Sehravadi, (1981) 1 SCC 722; D.S. Nakara v. Union of India, (1983) 1 SCC 305, 319.

[24] *See* SATHE, *supra* note 14, at 205–19. For a discussion on how the Indonesian Constitutional Court, under the leadership of chief Justice Asshiddiqie, similarly expanded the Indonesian standing doctrine to encompass third-parties, such as taxpayers and consumers, and to human rights NGOs, see Stefanus Hendrianto, *The Rise and fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia,* 25 WASH. INT'L L.J. 490, 517–20 (2016).

[25] *See id.*

[26] *See* Baxi, *Taking Suffering Seriously*, *supra* note 13, at 127–28; Manoj Mate, *The Rise of Judicial Governance*, 33 B.U. INT'L L.J. 169, 186–96 (2014).

[27] *See, e.g.*, In re Special Courts Bill, (1979) 2 SCR 476 (upholding constitutionality of Special Courts to try emergency offenses in advisory opinion).

[28] *See* R.K. Garg v. Union of India, (1981) 4 SCC 675.

Court upheld the Special Bearer Bonds (Immunities and Exemptions) Ordinance Act enacted by the Gandhi Congress regime. This legislation was enacted by the Executive (Prime Minister Indira Gandhi and the Council of Ministers) within the Congressional government as an ordinance to deal with the problem of "black money" (money that had been earned without being officially reported for tax purposes), and was later passed as an Act by Parliament. The Act granted immunity from prosecution under the Income Tax Act to individuals who purchased these bonds with black money, and forbid any investigation into the source of this money.[29]

While endorsing the underlying policy merits of the Bearer Bonds Act, the Court in *R.K. Garg* held that the Act's separate treatment of black money investors did not violate Article 14 on the grounds that the classification had a rational basis in supporting the government's efforts to channel black money back into the productive sector to promote economic growth.[30] Additionally, the majority held that the Court could not challenge the morality of particular legislation based on Article 14, and stressed the need for a deferential, rational-basis mode of review when examining government economic policies.[31] In so holding, the Court effectively announced a "double standard" approach, applying the new heightened standard of Article 14 non-arbitrariness review to claims involving direct abrogation of fundamental rights, while applying a lower, rational-basis review to economic policy.

B. Fundamental Rights and Judicial Review: The Post-Liberalization Era and Beyond

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.[32] This included the introduction of policies aimed at deregulation, liberalization of government licensing regimes, and a shift toward privatization of government owned enterprises.[33] 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

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[29] *See id*. at 698–700.
[30] *See id*. at 705–06.
[31] *Id.*
[32] *See* SURESH TENDULKAR & T.A. BHAVANI, UNDERSTANDING REFORMS: POST-1991 INDIA 1–5 (2007).
[33] *See* David B. H. Denoon, *Cycles in Indian Economic Liberalization, 1966–1996*, 31 COMP. POL. 43, 52–55 (1988).

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 governments' 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. In doing so, this article argues that while the Court has applied a lower and more limited standard of review to globalization policies, it has effectively deployed rights as "structuring principles" for adjudicating the fairness, legality, and propriety of government economic policies and actions involving privatization and disinvestment, rather than allowing these rights to serve as strong checks on government policies and actions. In the development context, this article suggests that rights have been deployed as "substantive-normative principles" that are used to assess and validate the legality and optimality of development projects and policies under a highly deferential mode of review. In deploying rights in this way, the Court has redefined and reshaped the processes and regulatory structures that govern in these areas.

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 privatization

and 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 article 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.

III. FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW: LIBERALIZATION AND PRIVATIZATION

In the area of liberalization and privatization, the Supreme Court of India has consciously embraced a particular conception of its own role as an institution in adopting a deferential and limited scope of review of these policies. Despite its careful delineation of a highly deferential and limited judicial role in cases involving government policies and actions in economic policy-making, the Court's decisions suggest that it has not been neutral when it comes to the underlying substantive norms behind these policies. Although the Court has adopted a highly deferential standard of review, its decisions reveal discursive narratives evincing broad support for the goals of liberalization and privatization. At the same time, the Court has effectively sought to advance the normative goals of fairness, transparency, competitiveness, and a level playing field, while also policing against corruption. This Part analyzes how the Court has deployed fundamental rights as "structuring principles" to assess the legality of government liberalization and privatization policies. It then examines how the Court has effectively created an "asymmetrical rights terrain" in the domain of liberalization and privatization policies by privileging certain rights and interests over others through limitations on public interest litigation and recognizing corporate rights over labor rights. Finally, it explores how the Court has played a significant and important role in shaping and overseeing the regulatory context and in actively policing corruption.

A. Rights as Structuring Principles: Deferential and Limited Review

In the early 1990s, the Court adjudicated challenges to a series of reform policies involving India's telecom sector.[34] In *Delhi Science Forum*, the Court adjudicated a challenge to the adoption of the National Telecom Policy, whereby the government shifted toward privatization of the industry.[35] Pursuant to this policy, the government issued licenses to companies that made tender offers for telecom licenses. The Court ultimately upheld the privatization of the telecom sector. In rejecting arguments challenging the merits of the underlying policies, the Court held that it could not question the merits of the policy and that the proper place for substantive challenges was Parliament and the political process, not the courts.[36]

Notably, the Court in its decision recognized the virtues of a robust telecom sector as part of the broader shift toward globalization, noting:

> Telecommunications has been internationally recognized as a public utility of strategic importance . . . . Because of the economic growth and commercial changes in different parts of the world, need for interconnectivity means that communication systems have to be compatible with each and other and have to be actually interconnected. Because of this there is a demand even in developing countries to have communication system of international standards.[37]

In addition, the Court in *Delhi Science Forum* took note of the trend toward privatization of telecom in developed countries, and observed that "[b]y and large it was realized that this sector needed acceleration because of the adoption of liberalized economic policy for the economic growth of the country."[38]

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[34] In 1991 the Congress regime of P.V. Narasimha Rao launched liberalization reforms that sought to move India from a socialist to a more open, market-based economy with less government controls, regulation and state-owned enterprises. Successive governments continued and expanded these policies. *See id*.

[35] Delhi Science Forum v. Union of India, (1996) 2 SCC 405, 410–12. This section draws in part on the discussion of economic policy decisions in Manoj Mate, *Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India*, 28 TEMPLE INT'L & COMP. L.J. 361, 421–24 (2014) [hereinafter Mate, *Elite Institutionalism*].

[36] Delhi Science Forum v. Union of India, (1996) 2 SCC 405, 412.

[37] *Id*. at 411.

[38] *Id*. at 412.

The Court in *Delhi Science Forum* sought to refine Article 14's non-arbitrariness standard for review of government and administrative decisions involving economic policy. According to the Court, review under this standard must also be limited to determining whether such decisions are: 1) made in bad faith; 2) based on irrational or irrelevant considerations; or 3) made without following the prescribed procedures required under a statute (illegality).[39] In applying this limited scope of scrutiny, the Court ultimately upheld the telecom policy as legal and consistent with the Indian Telegraph Act, and also upheld it on the grounds of reasonableness.

In later cases, the Court was also deferential to subsequent regimes' disinvestment policies, and further delineated the contours of Article 14 non-arbitrariness and reasonableness review. In *BALCO Employees Union v. Union of India* (2001), the Court upheld the government's disinvestment in and sale of the Bharat Aluminum Corporation to a private company, Sterlite.[40] In reaching its decision, the Court held that economic policies must be reviewed under a highly deferential rational basis scrutiny, and that courts should limit their review to whether policy decisions are "absolutely capricious, arbitrary and unreasonable, or violative of constitutional or statutory provisions."[41] The Court upheld the disinvestment and found that it had not been shown to be "capricious, arbitrary, illegal or uninformed" and that the process was completely transparent.[42] The majority's decision was noteworthy in that it endorsed the need for disinvestment and change in economic policies.[43]

Significantly, the Court adopted a restricted approach toward labor rights and held that the employees of the BALCO union did not have a right to a hearing prior to the disinvestment of government owned enterprises under Articles 14 and 16 of the Constitution.[44] In adopting this approach, the Court refused to recognize a potentially wider scope of the right of laborers to challenge government privatization and disinvestment. In

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[39] *Id*. at 417–18. The standard applied in Delhi Science Forum drew on the approach applied in Tata Cellular v. Union of India (1994) 6 SCC 651 (upholding six licensing decisions under new licensing regime while striking down two decisions). *See also* Arun K. Thiruvengadam & Piyush Joshi, *Judiciaries as Crucial Actors in Southern Regulatory systems: A Case Study of Indian Telecom Regulation*, 6 REG. & GOVERNANCE 327, 334–35 (2012).

[40] Bharat Aluminum Company, Ltd. Employees Union v. Union of India, (2002) 2 SCC 333, 363 [hereinafter BALCO].

[41] *Id.* at 360 (citing M.P. Oil Extraction v. State of Madhya Pradesh, (1997) 7 SCC 592).

[42] BALCO, 2 SCC at 362.

[43] *Id.* at 355.

[44] *Id.* at 363. Article 16 of the Indian Constitution provides for equality of opportunity in government employment or appointment to government positions. INDIA CONST. art. 16.

reaching this decision, the Court also observed that workers had some level of protection in the Shareholders Agreement between the Union of India and their strategic partner, and also had protection under existing statutes including the Industrial Dispute Act, which provides that management (including the new management of BALCO) must provide for collective bargaining and other rights.[45] However, it should be noted that these labor rights are statutory, not constitutional rights.

Finally, the Court in *BALCO* significantly restricted the scope of public interest litigation challenges in suggesting that PIL had become increasingly abused by litigants, and that courts should not entertain PILs challenging the merits of policies. In reiterating and defining these suggested parameters of PIL, the Court sought to effectively limit the scope of PIL and the ability of litigants to deploy PIL in private challenges to government policies. In its decision, the Court noted that it has mainly entertained PILs involving "violations of Article 21, or of human rights, or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage."[46]

Building on its decisions in *Delhi Science Forum* and *BALCO*, the Court has mostly upheld government policies involving economic liberalization and privatization.[47] However, the Court has been assertive in invalidating government policies or actions in cases of clear illegality, unconstitutionality, or corruption.[48] In addition, in defining the scope and understanding of arbitrariness under Article 14, the Court has also acknowledged the need to examine business norms in adjudicating whether government decision-making processes have infirmities in terms of arbitrariness. For example, in *Reliance Airport Developers Ltd. v. Airport Authority of India* (2006), the Court held that accounting or other business norms and benchmarks should be used in certain cases in order to assess the fairness and legality of privatization schemes.[49]

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[45] BALCO, 2 SCC at 363.

[46] *Id.* at 381.

[47] *See* Mate, *Elite Institutionalism*, *supra* note 35, at 420–25.

[48] *See, e.g.*, Centre for Public Interest Litigation v. Union of India, (2003) SC 350 (invalidating the government's privatization of government oil companies through disinvestment in two of India's major petroleum companies based on failure to secure Parliamentary approval).

[49] *See* Reliance Airport Developers Ltd. v. Airports Authority of India, (2006) 10 SCC 1.

B. Globalization and Rights Privileging: Mapping the Asymmetrical Rights Terrain of Liberalization and Privatization

The Court has effectively created an "asymmetrical rights terrain" in the domain of economic liberalization and privatization. In articulating the scope of fundamental rights in economic policy cases, the Supreme Court has restricted labor rights by holding that laborers do not have strong constitutional rights to challenge government policies and actions. As illustrated in *BALCO*, the Court has restricted workers' rights to challenge government policies under a narrow and limited standard of review under Article 14. In rejecting strong constitutional protections for labor, the Court has effectively bolstered government efforts to reform India's labor laws.[50]

This dynamic is illustrated in *Rangarajan v. Government of Tamil Nadu* (2003), in which the Court drew on a series of earlier precedents and held that employees did not have a constitutional or statutory right to strike under Articles 19(1) and Article 21.[51] In refusing to recognize constitutional or statutory rights to strike, the Court relied on the extraordinary harms and costs to society that result from strikes.[52] The Court in *Rangarajan* and other cases actually helped to advance the government's labor reform agenda. In the post-2000 era, successive regimes were unable to enact comprehensive labor market reforms aimed at restricting labor rights because of opposition from the Left Front (including the communist parties).[53] However, the Court arguably assisted the Government in this process by issuing decisions that restricted labor rights.[54]

In contrast to its more restricted approach to labor rights, the Court has held that Articles 14, 19, and 21 provide protections for the rights and interests of private corporate and business entities. This is illustrated by the Court's decision in *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd.* (2007). In *Reliance*, the Court adjudicated a challenge to the Maharashtra state government's floating of global tender for completion for the Mumbai Trans Harbour Link.[55] The Court interpreted Article 14 as a "non-discrimination" provision and held that it must be read in conjunction with both Article 21 and Article 19 of the Constitution.

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[50] *See* TENDULKAR & BHAVANI, *supra* note 32, at 145–46.
[51] T.K. Rangarajan v. Gov't of Tamil Nadu, (2003) 6 SCC 581, 589–92.
[52] *Id.* at 591–92.
[53] *See* TENDULKAR & BHAVANI, *supra* note 32, at 148.
[54] *Id.*
[55] Reliance Energy Ltd. v. Maharashtra State Road Development Corp. Ltd., (2007) 8 SCC 1, 7–8.

According to the Court, Article 21's protection for the "right to life" also included protections for "opportunity." The Court thus held that Article 19(1)(g), which guarantees a "fundamental right to carry on business to a company," also gives rise to the "level playing field" doctrine for private businesses that "provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest."[56] Justice Kapadia grounded the level playing field concept in a globalization rationale, noting that "[g]lobalisation, in essence is liberalization of trade . . . . Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of 'level playing field' embodied in Article 19(1)(g)."[57]

Because the Maharashtra state government failed to clearly specify the accounting norms for calculating the net cash profit for a designated number of years, which was one of the criteria specified in the tender conditions, the government's decision to exclude business entities based on that failure violated Article 14 and 19. The Court ordered that appellants Reliance Energy Ltd. and Hyundai Engineering and Construction Company Ltd. be allowed to participate again in the bidding process.[58]

Interestingly, even in contexts where the Court has refused to recognize fundamental rights to carry on business under Article 19, recent decisions suggest that the logic of globalization itself may influence how judges interpret the scope and nature of the private business rights under Article 19. For example, in a 2004 decision, *State of Punjab v. Devans Modern Breweries Ltd.*,[59] a five judge constitutional bench adjudicated a set of appeals arising out of a constitutional reference made by a three judge bench as to whether state governments were permitted to impose taxes on the sale of liquor and whether such taxes violated rights under Article 301 and Article 19(1)(g).[60] Applying the doctrine of "[r]es extra commercium," a three-judge majority of the Court reaffirmed its earlier jurisprudence that because rights to trade or sell liquor are part of the state's privilege and within the purview of the state's police power, there is no fundamental right

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[56] *Id.* at 21.
[57] *Id.*
[58] *Id.* at 21, 32.
[59] State of Punjab v. Devans Modern Breweries Ltd., (2004) 11 SCC 26.
[60] *Id.* at 99–101. Article 301 states, "[f]reedom of trade, commerce and intercourse. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free." INDIA CONST. art. 301. Article 19(1)(g) provides that all citizens shall have the right "to practice any profession, or to carry on any occupation, trade, or business." *Id.* art. 19(1)(g).

to trade or sell liquor under Article 301 or Article 19(1)(g).[61] Under the res extra commercium doctrine, the state has the power to restrict fundamental rights in order to prohibit activities that are considered immoral, criminal, or injurious to the public health, safety, and welfare.[62] The majority thus held that rights-based challenges under Articles 19 and Article 14 (equality and non-arbitrariness) could not be brought against state taxes on liquor.[63] In contrast, two dissenting opinions by Justices B.N. Agrawal and Justice Sinha rejected the applicability of the res extra commercium doctrine and held that the trade or sale of liquor is a fundamental right under Article 19(1)(g) and Article 301.[64]

In his dissenting opinion, Justice Sinha went further by suggesting that broader social and economic changes brought on by globalization should inform the Court's approach to interpreting Article 19 and observed:

> Globalisation has brought a radical change in the economic and social landscape of the country . . . . As and when occasion arises the interface between the globalisation and constitutionalism whether from economic perspective or human rights perspective is required to be seriously gone into. The Court will have to take a realistic view in interpretation of Constitution having regard to the changing economic scenario.[65]

In addition, Sinha argued that global changes in international trade and liberalization had brought about social changes regarding the perceived morality of liquor.[66] He also held that the majority should have also considered the impact of its decision on "global changes and outlook in trade and commerce."[67]

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[61] State of Punjab v. Devans Modern Breweries Ltd., (2004) 11 SCC 26, 108–14.

[62] *See* Arvind Datar, *Privilege, Police Power and Res Extra Commercium—Glaring Conceptual Errors*, 21 NAT'L L. SCH. INDIA REV. 133, 145–46 (2009), http://www.manupatra.co.in/newsline/articles/Upload/8DE9E7DE-8DDA-48FE-9682-1C0F0B185AF3.pdf.

[63] *Id.*

[64] *See* State of Punjab v. Devans Breweries, (2004) 11 SCC 26, 70–76, 84–95, 130–38, 140–48.

[65] *Id*. at 145–46.

[66] *Id*. at 146 (Sinha, J. dissenting) ("[T]he States are encouraging liberalization to such an extent that in the near future alcohol beverages may be allowed to be sold in the small grocery shops. . . . The society has accepted pub culture in the metros. A view in the matter, therefore, is required to be taken having regard to the changing scenario on the basis of ground reality and not on the basis of the centuries' old maxims.").

[67] *Id.* (Sinha, J. dissenting) ("Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, due to the liberalization policy adopted by the

In adjudicating cases involving private broadcasting rights in the post-liberalization era, the Court has also suggested that Article 19 provides some protections to private broadcasters. In the landmark *Airwaves* case in 1994, the Court adjudicated a dispute between the Cricket Association of Bengal and Doordarshan (a publicly owned broadcasting company) over telecasting rights for the "Hero Cup" international cricket tournament.[68] In its ruling, the Court recognized that Article 19 encompassed the rights of private broadcasters to broadcast cricket matches, while at the same time recognizing that the television airwaves spectrum was a public resource and that the government-run Doordarshan station could charge licensing fees to private broadcasters.[69] The Court effectively adopted a middle-ground approach and held that while Doordarshan should play an important role in offering free access to cricket matches for the majority of the country lacking cable access, it should not have a monopoly, and private broadcasters should also have a right to telecast the event to international viewers outside of India with cable.[70] In recognizing a "right to information" based on Article 19, the Court posited that government or private monopolies in broadcasting would interfere with the right to broadcast or receive information.[71]

It is clear that the Court's rights jurisprudence in economic policy cases has created an asymmetrical bias that favors corporate interests and rights in the adjudicative process. This "asymmetrical rights terrain" reflects the preeminence and growing importance of private law concepts within constitutional law in India.[72] While Article 14 and 19 have been deployed as structural principles for evaluating the fairness of processes and statutory compliance, this process-based norm effectively privileges corporate interests as the potential beneficiaries of a non-arbitrariness standard under Article 14 and the Article 19 level playing field standard. The Court has effectively created a hierarchy of norms in economic and privatization adjudication by suffusing Article 14 and Article 19 rights-based scrutiny with normative content, enabling the Court to advance globalization norms of competitiveness, transparency, and accountability. Corporate interests

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Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away.").

[68] *See* The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal, (1995) 2 SCC 161 (the *Airwaves Case*).

[69] *Id.*

[70] *Id*. *See also* Madhavi Divan, *Telecast Tussle: A Sorry Spectacle*, (2004) 4 SCC (Jour) 52, 52–54.

[71] *See* The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal, (1995) 2 SCC 161.

[72] *Cf.* Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

thus effectively serve as "rights holders" who in the process of challenging government policies have also become vehicles for vindicating these globalization norms.

C. The Court's Role in Shaping and Monitoring the Regulatory Landscape

In addition to redefining the scope of rights-based scrutiny, the Court has played a crucial role in reshaping the regulatory and institutional landscape of globalization. Two key examples of the Court's roles are: 1) catalyzing the creation of independent and autonomous regulatory structures, and 2) expanding anti-corruption and accountability oversight of privatization policies.

1. Catalyzing Creation of Independent and Autonomous Regulatory Structures and Monitoring and Oversight of Tribunals

The Supreme Court of India has played a crucial role in helping to catalyze the development of independent regulatory structures. For example, in the area of telecom regulation, the Court has played a key role in catalyzing the formation of independent regulatory authorities like the Telecom Regulatory Authority of India (TRAI)[73] and the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).[74] In *Cellular Operators Association of India v. India* (2002), the Court adjudicated an appeal from the TDSAT in which the tribunal dismissed a challenge to the government's approval of the use of "wireless services within the local loop" (WLL) technology by fixed line operators. The TDSAT dismissed the case on the grounds that TDSAT did not have the authority to challenge the government's decision to approve WLL, as it was a policy decision.[75] On appeal, the Supreme Court reversed and remanded for "reconsideration with special emphasis on the question of level playing field."[76] The Court's decision ultimately drove the TDSAT to be far more assertive in its scrutiny of government actions following the decision.[77]

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[73] Thiruvengadem & Joshi, *supra* note 39, at 337–38.

[74] *Id.* at 338 (citing COAI v. Union of India, (2002) 2 Comp. LJ 161; COAI v. Union of India, (2003) 3 SC 186).

[75] *Id.*

[76] *Id.*

[77] Thiruvengadam and Joshi, *supra* note 39, at 339 (citing R.U.S. PRASAD, RESOLVING DISPUTES IN COMMUNICATIONS: GLOBAL PRACTICES AND CHALLENGES (2011)).

The Court has also played a significant role in applying and advancing globalization norms of liberalization policies against the orders of tribunals favoring domestic industries.[78] This is illustrated by the Court's activity in the area of trade and competition law in cases arising under the Monopolistic and Restrictive Trade Practices Act (MRTP), including adjudication by the Monopolistic and Restrictive Trade Practices Commission (MRTPC).[79] In *Haridas Exports v. All India Float Glass Manufacturers Association* (2002), the Court reversed the decision of the MRTPC in orders in the "Soda Ash" case and the "Float Glass" case by holding that the MRTPC lacked jurisdiction to decide the matters, and held that the MRTPC could not act to restrict imports in these cases.[80] While the MRTPC's decisions were based on a protectionist conception of the public interest that was aligned with the interests of investors and labor, the Supreme Court's decision privileged a conception of the public interest that favors corporate and industrial entities and consumers over the rights and interests of labor.[81]

2. Expanding Anti-Corruption and Accountability Oversight in Privatization

While the Court's exercise of Article 14 non-arbitrariness review has been heavily restricted and limited, the Court has also greatly expanded its role as an anti-corruption institution, policing corruption in the processes of privatization and liberalization. In doing so, the Court has built on its earlier jurisprudence and record in previous corruption cases including the landmark *Vineet Narain* litigation. In *Vineet Narain v. Union of India*, the Court built on its earlier activism in PIL, broadening its powers to oversee and monitor government investigations into corruption by employing its power of "continuing mandamus," based on the mandamus authority under Article 32 of the Indian Constitution.[82] The Court held that under Article 14's equality provision, the Court was empowered to fill the void left by

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[78] *See* Sen & Suraj, *supra* note 8.

[79] *Id.* at 16 (citing Aditya Bhattacharjea, *Indian Competition Policy: An Assessment*, 38(34) ECON. & POL. WEEKLY 3561–74 (2003).

[80] *Id.* (citing Haridas Exports v. All India Float Glass Mfrs. Assn (2002)).

[81] *Id.*

[82] Article 32 of Indian Constitution provides, in relevant part: "Remedies for enforcement of rights conferred by this Part. — (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. INDIA CONST. art 32.

other institutions in preserving and maintaining the rule of law, and that it could issue directives and orders to do so under Article 32 and Article 142.[83]

The Court has thus expanded the scope of its review to directly impugn and challenge government auctions of public resources including the *2G Telecom Scam Case* (2012) and the *CoalGate* case (2012).[84] In these cases, the Court has scrutinized the auction processes for allocation of both the telecom spectrum and coal blocks to private entities based on Article 14 arbitrariness review, while at the same time also playing an active role in investigating allegations of corruption.[85] These cases illustrate that despite the narrow and limited scope of judicial review articulated by the Court for economic policies, the Court continues to play an active role in policing corruption in privatization and liberalization policies.

IV. 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.[86] This Part explores how the Supreme Court has adjudicated the scope and meaning of the fundamental rights as it relates to development. As noted in Part II, 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

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[83] *See* Vineet Narain v. Union of India, (1998) 1 SCC 226.

[84] *See* Subramanian Swamy v. A. Raja, (2012) 3 SCC 1 (quashing allocation of telecom licenses); Subramaniam Swamy v. A. Raja (2012) 9 SCC 257 (Court adjudication of investigation into 2G scam); Manohar Lal Sharma v. Union of India, (2014) 9 SCC 516 (cancelling Coal Block mining licenses).

[85] *See* Subramaniam Swamy v. A. Raja (2012) 3 S.C.C. 1 (2012); Subramaniam Swamy v. A. Raja (2012) 9 SCC 257; Manohar Lal Sharma v. Union of India, (2014) 9 SCC 516.

[86] *See infra* Part IV.

widespread environmental degradation.[87] 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.[88]

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 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.[89] However, this national goal-oriented conception of the right elides the actual contestation over the meaning of the right to

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[87] *See generally* SHYAM DIVAN AND ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 41–42 (2001); SATHE, *supra* note 14, at 224–27.

[88] *See* DIVAN & ROSENCRANZ;, supra note 87, at 41–42; SATHE, *supra* note 14, at 224–27.

[89] 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)).

development in international law discourse.[90] 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."[91] 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.[92]

However, the Court's decisions in the *Narmada* and *Tehri Dam* cases reflect that the Supreme Court has accepted the national goal-oriented conception of the right to development.[93] The Court has deployed this conception of the right to development, as well as principles of sustainable development based on the right to life under Article 21 as substantive-normative principles to guide the Court's assessment of the constitutionality and legality of government projects. Moreover, in embracing this conception of the right to development, while Justice Kirpal's opinion in the *Narmada* case acknowledged that there are "conflicting rights" at play in development projects, the decision subsumes fundamental rights into the broader programmatic goals of the nation.[94] In doing so, Justice Kirpal's "conflicting rights" theory weakens and limits the scope and meaning of fundamental rights protections, preventing them from serving as a meaningful check on government policy and actions.

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 in

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[90] *Id.* at 221–23. *See* 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).

[91] 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, *supra* note 3, at 221.

[92] *Id.*

[93] *See* Balakrishnan Rajagopal, *The Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle*, *in* LAW AND GLOBALIZATION FROM BELOW 187, 204–05 (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, eds., 2005) [hereinafter Rajagopal, *The Limits of Law*]; RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 3.

[94] *See* Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 644, 764. *See also* Rajagopal, *The Limits of Law*, *supra* note 93 at 207 (arguing that the Court's decision reflects a "legalist/dominant" script wherein the Court accepted that because existing constitutional and statutory law provided authorization for the Dam project, the court was prevented the Court from challenging the Dam project on the basis of fundamental rights violations).

development 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.[95] 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 Maharasthra).[96]

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.[97] 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.[98] Second, in recognizing constitutional and statutory

[95] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 644, 675–86.
[96] *Id.* at 686.
[97] *Id.* at 701–04. Rajagopal, *The Limits of Law*, *supra* note 93, at 202, 204–05.
[98] *Id.* at 695. *See* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008); Rajagopal, *The Limits of Law*, *supra* note 93, at 207–08 (criticizing the court's invocation and application of the doctrine of laches as inconsistent with its earlier rights jurisprudence, and "factually inaccurate and in bad faith" in light of the litigants' previous attempts to litigate in lower courts and work through government agencies).

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.[99] 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.[100] Third, the Court upheld the Government's resettlement and rehabilitation policies for those displaced by submergence.

The high level of deference in the Court's ruling is noteworthy, especially given that this rationale was cited in *BALCO* and other cases. Justice Kirpal's majority judgment articulated a circumscribed role for courts in reviewing development, noting:

> In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority . . . . If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive . . . .[101]

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 21's protections were quite robust.[102] Remarkably, the Court not only endorsed the underlying merits of the dam project and its benefits, but also held that the fundamental rights of those displaced by the dam project were not violated because the Relief and Rehabilitation programs would actually improve the quality of the lives of those displaced. In reaching its holding, the Court actively embraced a vision of development and modernization which suggests that displacement, resettlement, and compensation are far preferable to the status quo of village existence, thereby diminishing the cultural identity and rights of villagers and the rural poor.[103] In doing so, the Court held that the relief and

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[99] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 644, 712–22.
[100] *Id.* at 770–76
[101] *Id.* at 763.
[102] *See supra* note 21 and accompanying text for discussion of cases expanding the scope of rights based on the right to life and liberty under Article 21.
[103] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 644, at 765. (Kirpal, J.).

rehabilitation programs would in the aggregate improve the quality of life of those displaced by these projects.[104]

The Court relied on its earlier decision in the *Narmada* case in upholding the government's policies with respect to the Tehri Dam in *N.D. Jayal v. Union of India* (2007) (*Tehri Dam* case or *Jayal*).[105] In that case, the Court again adopted a highly deferential standard of review to examine the government's compliance with the Environment (Protection) Act's requirements, and MoEF's own clearance requirements. Although a report from the Hanumatha Rao committee found several violations of the conditions on which the MoEF had given environmental clearance, and suggested the need for further studies on the environmental impact of the project, the Court still upheld the government's actions under a highly deferential standard of scrutiny.[106]

In addition, the Court in *Jayal* followed the *Narmada* case in holding that the precautionary principle's requirement of placing the burden of proof on developing interests was inapplicable to hydroelectric dam projects.[107] The Court in *Jayal* held that while the right to a clean environment under Article 21 may serve as a limitation on development projects, based on its decision *Samatha*, development itself may be a conceptualized as a right under Article 21.[108] In discussing the "right to development," the Court redefined the scope of Article 21 to bolster and justify government development policies: "The right to development encompasses much more than economic well being, and includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of GNP."[109] The Court also cited to Amartya Sen's *Development As Freedom* in which Sen posited that "the issue of development cannot be separated from the conceptual framework of human right."[110]

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[104] *Id.* (Kirpal, J.) ("It is not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or due too outside compulsions... In the present case, the R&R packages of the States are such that the living conditions of the oustees will be much better than what they had in their tribal hamlets.").

[105] N.D. Jayal v. Union of India, (2004) 9 SCC 362.

[106] *Id.* at 386–88.

[107] *Id.* at 381

[108] *Id.* at 382 (citing Samatha v. State of Andhra Pradesh, (1997) 8 SCC 191).

[109] *Id.* at 382.

[110] *Id.*

Despite invoking Sen's human rights-based approach to development, the Court ultimately upheld the project under a collectivist goal-oriented conception of development, notwithstanding its impact on the rights of the rural poor and tribal communities who would be displaced:

> The right to development includes the whole spectrum of civil, cultural, economic, political[,] and social process, for the improvement of peoples' well being and realization of their full potential . . . . Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development.[111]

Finally, the Court in *Jayal* also upheld the government's rehabilitation and relief programs for those displaced by the dam's construction. However, in actually reviewing the remediation and relief package, the Court again was highly deferential in its review, and accepted the recommendations of the Rao committee without question or challenge.[112]

B. Contesting Development Rights and Narratives at the Frontier

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).[113] In that decision, the Court held that under the 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."[114] 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

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[111] *Id.*
[112] *Id.* at 386–87.
[113] *See* Samatha, v. State of Andhra Pradesh, (1997) 8 SCC 191.
[114] *Id.* at 244. *See also* Asha Krishnakumar, *The 'Samata Judgment'*, FRONTLINE (Sept. 2004), http://www.frontline.in/static/html/fl2119/stories/20040924006001200.htm

constitution.[115] 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.[116] 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."[117]

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.[118] 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.

C. Development Governance Structures and Governance Narratives: The Forest Case, Development and Fundamental Rights

In the domain of privatization and liberalization, the Supreme Court of India has been assertive in recommending or mandating the creation of independent regulatory bodies to police and regulate liberalization and privatization policies, including the TRAI. In addition, as illustrated by the Court's decisions in the *2G Telecom* case and *CoalGate* case, the Court has also been assertive in scrutinizing and challenging the processes by which natural resources are allocated to private interests. In contrast, as illustrated by the *Narmada Dam* and *Tehri Dam* cases, the Court has been far more deferential to the expertise and judgment of the government's own executive

[115] Samatha v. State of Andhra Pradesh, (1997) 8 SCC 191, at 244–46
[116] *Id.*
[117] *Id.* at 243.
[118] Nandini Sundar v. State of Chattisgarh, (2011) 7 SCC 547.

agencies, expert committees, and regulatory bodies in their assessments regarding environmental impact reports and provisions for relief and rehabilitation of displaced persons.

Despite the Court's strong pro-tribal and human rights judgment in *Samatha*, the Supreme Court has had a mixed record when it comes to the rights of tribes in cases involving encroachment in India's forests. In contrast to the *Narmada* and *Tehri Dam* contexts, the Court has been more far more assertive in recommending, and indeed creating, new governance structures and bodies in other development contexts in the Godavarman Forest case litigation.[119] In that context, the Court has established high-powered committees, appointed amicus curiae who have functioned much like government ministers, and closely monitored state and national government compliance with the Forest Act and the Court's own judgments and orders. Although the Court has received significant praise for its activism and assertiveness in seeking to protect and conserve India's forests in line with the Forest Act and constitutional mandates for environmental protection, some of the Court's orders undermined the fundamental rights of tribes and villagers in India. The Court's actions in *Godavarman v. Union of India* illustrate how by creating parallel court-led bureaucracy aimed at conservation, the Court itself became an agent of development and displacement.

In 1996, following the filing of a writ petition aimed at curbing deforestation of the Nilgiris forest caused by illegal logging, the Court in *Godavarman* adopted an expansive definition of the term "forest" in interpreting the Forest Conservation Act of 1980, and through a series of orders aimed at curbing logging, mining, and other activities, effectively took over the management and governance of India's forests.[120] Significantly, in advancing a particular conception of sustainable development, this article suggests that the Court-established forest governance bureaucracy itself became a vehicle for creating a distinct "asymmetrical rights terrain" in development.

This is illustrated in the series of guidelines issued by the Court and its committees as part of the complex afforestation management regime

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[119] *See* T.N. Godavarman Thirumulkpad v. Union of India, (1996) 9 SCR 982; Godavarman v. Union of India, (1997) 2 SCC 267.

[120] *See generally* Armin Rosencranz, Edward Boeing, & Brinda Dutta, *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, 37 ENVTL. L. REP. 10032.

created in the *Godavarman* case. As part of this regime, and in response to the MoEF's own failures to implement Court orders, the Court, with the support of its own Central Empowered Committee (CEC), issued a series of guidelines requiring that state governments pay the "net present value" (NPV) of forest land that was allocated for mining and private development projects.[121] Funds from the NPV were then supposed to be allocated in support of afforestation programs.[122] When some state governments were found to have diverted NPV funds to non-afforestation purposes, the Court ordered the MoEF to create the Compensatory Afforestation Management and Planning Agency (CAMPA) in order to manage the funds collected.[123] As a result the new CAMPA agency was empowered to bypass state governments and to use the funds collected to directly fund afforestation activities by conservation organizations.[124] This court-managed system of forest governance effectively privileged development interests by accommodating their activities through a particular model of sustainable forest development.

While elevating the rights and interests of state governments and development industries as part of a broader sustainable development model based on afforestation and compensation, the Court also played a major role in abrogating the rights of the rural poor and tribal populations in the forests. In a series of orders in 2001 and 2002, in response to recommendations from amicus curiae Harish Salve, the Court ordered a series of eviction drives that resulted in mass displacement of the rural poor and tribal populations that inhabited and utilized forest land.[125] This portrait of the Court's forest governance management regime illustrates how even court-led bureaucracies can replicate the rights-oppression and displacement of the state.

V. 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

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[121] *Id.* at 10035.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id. See also* Anuradha Kumar, *A Controversial Eviction Drive*, FRONTLINE (2002), http://www.frontline.in/static/html/fl1915/19150460.htm

policies in the post-1991 era. This article has suggested 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.

From a normative standpoint, the Court's redefinition and reshaping of the discourse of liberalization, and its reframing of development narratives, has arguably altered both the regulatory environment, and limited the scope of meaningful rights advocacy and litigation in the courts. 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. This article thus highlights the need for scholars, advocates, and policy-makers to carefully reassess the Court's rights jurisprudence, and the underlying development rights narratives that inform judicial worldviews and opinions in globalization. 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.