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Right to development and analysis of public private partnerships in infrastructure and space sector in India

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Abstract--Development is the essence of well-being and can be broadly categorised into various categories, some of which are social, cultural, technological, economic development etc., A country needs to focus on importantly social, economic and technological development to be able to establish itself at the global level. India has gone far ahead in terms of this since independence. Thomas Friedman often quotes India among the four pillars of the new world order apart from the United States, The EU-Russia and China. India had adopted the planning commission which focussed on these developmental aspects and formulating the policies that were required for the same. The role of private partnership in the said development is of a great value as public private partnership ushers the wave of development and also ventures unto places where the government cannot reach through. Legislative lethargy and procedural nuances play a large role in non-addressing of developmental issues quickly. Hence, the role of public private partnership is far greater in achieving these goals quickly and efficiently. Development was defined as “comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well-being of entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”¹The right to development could be categorised as a lawful and yet non-binding arrangement that has its reference under international law through treaties and conventions, be that as it may, the refinement between legitimately authoritative and lawfully non-binding treaties in international law are something around which numerous contentions are brought out, especially contentions regarding the right to development have emerged and are hence

¹ “Declaration on the Right to Development” (OHCHR) www.ohchr.org Available at: <https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx> accessed October 22, 2021

challenged. The right to development is operative within the Indian legal framework through case law and judicial precedents. The researcher focuses the concept of the right to development with that of public private partnership in India.

Keywords---private partnerships, infrastructure, development, public private.

Introduction

Article 1 of the United Nations declaration on the right to development states that² development is a “comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well-being of entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” It also categorises the right to development as an inalienable human right and further states that “it is a right by virtue of which every human person and all persons are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedom can be fully realized. Development is the essence of well-being and can be broadly categorised into various categories, some of which are social, cultural, technological, economic development etc., A country needs to focus on importantly social, economic and technological development to be able to establish itself at the global level. India has gone far ahead in terms of this since independence. Thomas Friedman often quotes India among the four pillars of the new world order apart from the United States, The EU-Russia and China. India had adopted the planning commission which focussed on these developmental aspects and formulating the policies that were required for the same. The role of private partnership in the said development is of a great value as public private partnership ushers the wave of development and also ventures unto places where the government cannot reach through. Legislative lethargy and procedural nuances play a large role in non-addressing of developmental issues quickly.

Right to Development and Judicial Response:

Human Rights are the rights which are essential to the human existence. Human rights belong to all humans irrespective of race, caste, gender, religion etc. The human rights are inseparable, symbiotic and inter-related which have a clear connection with the concept of development. The human right and right to development both share a common vision with a human purpose. The Constitution of India was drafted in the year 1949 nearly at the same time as the Universal Declaration of Human Rights (UDHR)³ and contains similar provisions. The Part III⁴ of the Constitution contains the Fundamental Rights (starting from

²Supra Note 2.

³ The Universal declaration of human rights - [www.un.org Available at: <https://www.un.org/en/universal-declaration-human-rights/>](https://www.un.org/en/universal-declaration-human-rights/) accessed October 22, 2021

⁴Part III – Fundamental Rights, lawmin.nic.in. Available at: <<http://lawmin.nic.in/olwing/coi/coi-english/>> [Accessed 23 October 2021].

Article 12 to Article 35) provision of which are similar to and corresponds to another international instrument that is the international covenant on Civil and Political Rights (ICCPR)⁵. The Directive Principles of State Policy of the Part IV⁶ of the Constitution are similar to and corresponds to another international instrument that is international covenant on Economic, Social and Cultural Rights (ICESCR)⁷. The Preamble of the Indian Constitution has a core value and philosophy that is “Dignity of the individual”. The contemplation of the dignity of an individual can be considered as a core value, and the aim of the Constitution through the directive principles of state policy enshrined in the Part IV of the constitution protect the concept of a welfare state and thus bring about social justice through Human Development, it being fundamental to governance. Therefore the essence of Constitutional Governance puts emphasis upon the human rights and subsequently the concept of development which is reflective of our Constitutional philosophy.

In the case of ***Air India Statutory Authority***⁸ it was observed by the court that “The Directive Principles in our Constitution are fore-runners of the U.N.O. Convention on Right to Development as inalienable human right and every persons and all people are entitled to participate in, contribute to and enjoy economic, social cultural and political development in which all human right, fundamental freedoms would be fully realised. It is the responsibility of the State as well as the individuals, singly and collectively, for the development taking into account the need for fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community which alone can ensure free and complete fulfilment of the human being.” The court cast the responsibility both upon the individual as well as the state for the fulfilment of the right to development and also observed that it is the State that must and should provide facilities and also raise opportunities that would ensure development. Apart from this it is also a duty cast on the state that it should eliminate all obstacles that would hinder development by the adoption of the appropriate economic and social reforms. These reforms must therefore eradicate all social injustice. These principles are imbedded as integral part of our Constitution in the Directive Principles of State Policy.

In ***Peerless General Finance***⁹ casecourt held that the stability of the political democracy centres upon socio- economic democracy and therefore the right to development is one of the important facets of basic human rights. Finally in ***LIC***¹⁰ case it was observed by the court that “the authorities or private persons or industry are bound by the directives contained in Part IV¹¹ and the Fundamental Rights in Part III¹² and the Preamble of the Constitution. The right to carry on

⁵ International covenant on civil and political rights - www.ohchr.org Available at:

<<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed October 22, 2021

⁶Part IV – Directive Principles of State Policy, lawmin.nic.in. Available at: <<http://lawmin.nic.in/olwing/coi/coi-english/>> [Accessed 23 October 2021].

⁷ International covenant on economic, social and cultural rights - www.ohchr.org Available

at: <<https://www.ohchr.org/EN/professionalinterest/pages/cescr.aspx>> accessed October 22, 2021

⁸Air India Statutory Corporation v. United Labour Union & others (1992) 1 SCC 695

⁹Peerless General Finance and Investment Co. Ltd. &Anr. v. Reserve Bank of India (1992) 2 SCC 343

¹⁰LIC of India &Anr. v. Consumer Education & Research Centre &Ors. (1995) 5 SCC 482

¹¹Supra Note7.

¹²Supra Note4.

trade is subject to the directives contained in the Constitution, the Universal Declaration of Human Rights, European Convention of Social, Economic and Cultural Rights and the Convention on Right to Development for Social Economic Justice.”

In summation the prevailing definition of development can be determined in the terms of economic growth which is also tested by the United Nations declaration on the right to development. This declaration redefines development and specifies it as the fulfilment of all human rights for all the people. The reading of the case laws of the right to development in Indian scenario showed that the right can become an instrument for the protection when it is used according to its redefinition of development as a basic human right. There is, on the other hand, a danger involved when the redefinition of development as put forth in the declaration on the right to development is turned towards its exact opposite and the right to development, thereby, becomes an instrument to justify human rights restrictions of particular kind for the purpose of the public interest and development of the people of India.¹³

Public Private Partnerships:

Public Private Partnerships can be defined as the mutual co-operation between general public (individual or artificial person) and the private actors with a durable character in which these private actors would develop mutual products and/or services and in which risk, costs, and benefits are shared between the public and private actor, these are based on the idea of mutual added value. India is not far behind in attaining the results through the Public Private Partnerships. The Department of Economic Affairs of the Ministry of Finance of the Government of India has defined Public Private Partnerships in the following terms: “Public Private Partnerships is an arrangement between a government/statutory entity/government-owned entity on one side and a private sector entity on the other, for the provision of public assets and/ or public services, through investments being made and/ or management being undertaken by the private sector entity, for a specified period of time, where there is well-defined allocation of risk between the private sector and the public entity and the private entity receives performance-linked payments that conform to specified and predetermined performance standards, measurable by the public entity or its representative”.

From the above definition it follows that Public Private Partnerships is a device or a vehicle to mobilise investment from the private sector for development purposes and is mutually profitable to both the parties. It is a hugely popular investment employed by developing and developed countries though the legal arrangement may vary from country to country and in different sectors within the same country. No wonder, at the present stage of massive infrastructure development undertaken in India, Public Private Partnerships is an inevitable tool for efficient and cost effective implementation of projects across all sectors of the economy

¹³Autor/in Anna-Lena Wolf Profilanzeigen and Wolf A-L, “Juridification of the Right to Development in India” (Völkerrechtsblog September 9, 2015) Available at: <<https://voelkerrechtsblog.org/de/juridification-of-the-right-to-development-in-india>>; accessed October 23, 2021

Currently in India the Public Private Partnerships covers largely the following subject matters namely State Highways, Water and Sanitation, Ports, Solid Waste Management, and Urban Transport. One of the core areas of operation in the Public Private Partnerships is the Infrastructure services. The infrastructure service, is a bottleneck and this has been a serious concern in India in its way of robust pace of economic progression.

While many advanced economies and fiscal constrained developing countries have developed their physical infrastructure successfully either through private participation or through public-private partnership (PPP) model, in India, private participation in the process of infrastructure development has received lacklustre response. While private telecom services is a success story in India, the Public Private Partnerships constitutes a miniscule share in overall infrastructure building despite initiation of various policy adjustments and sector-specific reform programmes.

Some specific concerns and point of focus in the working of the Public Private Partnerships and resulting development would be in the areas of power, transportation, telecom, petroleum, and urban infrastructure sectors and latest being Space Exploration and Communication through satellites. Certain suggestive measures are required to enhance the private participation and also identification some generic issues such as inadequate transparency of procedures, inappropriate risk allocation, improper project appraisal, cost and time overruns, overlapping of regulatory independence, dearth of good governance, etc., which need attention to attract private investors to participate in the public infrastructure building.¹⁴

The other complexities of infrastructure development need to be understood in an order that the supporting frameworks are sensitive to certain needs which among others include the lack of infrastructure which is the primary growth constraint, along with this comes the issue of lead times that are associated with infrastructure development which would mean that the decisions taken now would ultimately shape the world of the future. Increasingly, therefore, the role of the government is constrained to look towards the private sector as a partner.

However, the question of effective models for co-working between the public and private sectors need to be devised. It is a joint effort that the governments and businesses must make vital strategic decisions in this regards and promote changes. An increase in natural disasters or unpredictable events will test the resilience of infrastructure, not just in terms of reconstruction, but also in terms of supply chain disruptions. New technologies, like high-speed broadband, are already part of infrastructure thinking. Innovations, such as Internet of Things, will make infrastructure more efficient and sustainable.

In the ***Mahanadi Coalfields***¹⁵ case the Supreme Court made the observation that “Recently, there has been shift towards encouraging private bodies in the

¹⁴ L. Lakshmanan, 2021. Reserve Bank of India - Database. [online] Rbi.org.in. Available at: <https://www.rbi.org.in/scripts/bs_viewcontent.aspx?id=1912> [Accessed 23 October 2021].

¹⁵ Mahanadi Coalfields Limited v. Mathias Oram (2010) 11 SCC 269

Government works and promoting the concept of Public Private Partnership. In the words of the Supreme Court, if India has to develop and grow fast and become strong to take its rightful place in the comity of nations, then the imperialist's formula of philanthropy plus five per cent is the accepted norm." Public Private Partnership is the latest mantra for the development of economy and society.

According to the data of the World Bank¹⁶ in benchmarking infrastructure development with a total score out of a 100 point scale, India scores at 60 with a global average of 40, in preparation. It scores 67 with a global average of 63 in terms of the procurement index and an impressive 87 in Contract Management with a global average of 63. These correspond to good numbers which is comfortably higher than the global as well as the regional average.

According to the data of the NitiAyog¹⁷ (PPP Vertical)during the year 2020–21 (1 April 2020 to 31 March 2021), 125 Public Private Partnerships projects—with a total cost of Rs 1,72,314 crore—were appraised by the Vertical. This includes 123 Central Government projects and two State projects. The sector-wise distribution of the Public Private Partnerships projects (including the projects under the VGF scheme) appraised is given in the table below¹⁸:

Project Appraised	No. of Projects	Total Cost (Rs. in Crores)
Roads	69	63,279
Ports	12	3,359
Eco-Tourism	10	2,232
Silos	1	401
Petroleum Reserves	4	27,728
Ropeway	1	996
Telecom	9	29,199
Railway Stations	6	7,600
Railway Passenger Trains	12	30,099
Metro	1	7,420
Total	125	1,72,314

Recent development in PPP by Indian Space Research Organisation:

Recently the Indian Space Research Organisation opened the sector for private reforms. This was done in order to enhance the diffusion of space Technology and also to promote and boost the economy relating to the space Sector in the country. The department of space encourages participation of private companies in the space Sector thereby pushing the private space Sector towards the economic and scientific development of the country. There are many modes and reforms proposed for the execution of space activities in light of the opening doors

¹⁶ World Bank - Benchmarking Infrastructure Development. Bpp.worldbank.org. Available at: <<https://bpp.worldbank.org/economy/IND?survey=PPP>> [Accessed 23 October 2021].

¹⁷ NitiAyog - Public-Private Partnerships. www.niti.gov.in. Available at: <<https://www.niti.gov.in/verticals/ppp>> [Accessed 23 October 2021].

¹⁸ Ibid

for the private sector. Firstly in order to enhance and maximise benefits and also utilise the same of the space assets there is a proposal to change the approach from a supply based model to a demand based model. Setting up of the New Space India Limited (NSIL) which would act as an aggregator for obtaining commitments and also aggregating the user requirements for the same.

New Space India Limited will take up the ownership from the department of space in order to carry on the operational activities especially for the operational launch vehicles and commercial launches including satellite transmission. Another important reform is to permit the non-governmental private entities to carry out space activities through the Indian national space promotion and authorisation centre. This centre is an independent nodal agency under the department of space which would allow space activities and usage of the department of space owned facilities by the non-governmental private entities towards commercial launches operational launches and its priority as well. Some of the roles and responsibility of the Indian national space promotion and authorisation centre are as follows¹⁹:-

- The management of space activities including the building of launch vehicles and satellites and also providing space based services as per the definition of space activities.
- The sharing the infrastructure and premises under the control of the Indian Space Research organisation with due consideration to the ongoing activities.
- The establishment of New Space infrastructure and facilities by the non-governmental private entities in pursuance of space activities basing on the norms set and other statutory guidelines and necessary clearances.
- The establishment of temporary facilities in the premises under the Indian Space Research Organisation and its control based on the safety norms and feasibility assessment of the same.
- Initiation of launch campaigns and subsequently the launch based on the readiness of the launch vehicle and spacecraft Systems its groundwork and user segments.
- Building operation and control of spacecraft and its subsequent registration as Indian satellite by the non-government to private entities including all the associated infrastructure for the same purpose.
- Lastly the usage of spacecraft data and rolling out of space based services and all associated infrastructure with respect to the same.

Looking at all of these roles and responsibilities of the International Space promotion and authorisation centre it is designed to be an integrated launch manifest which would be considering the requirements of the Indian Space Research Organisation the NACL and non-governmental private entities most importantly it is going to assess and prioritise the readiness level of the same. This centre will work out a suitable mechanism for the sharing of Technology and expertise and also extend the facilities and the governmental authorities and also sharing of the expertise to encourage participation of the Non-governmental private entities in space activities.

¹⁹Department of Space, Indian Space Research Organisation. Isro.gov.in Available at: <<https://www.isro.gov.in/>> [Accessed 23 October 2021].

Therefore the Indian space promotion and authorisation centre is an autonomous body under the department of space and also is a single window nodal agency for enabling and regulating space activities and the usage of governmental facilities by the non-governmental private entities. The decision of the centre will be final and binding on all stakeholders including the Indian Space Research Organisation and the nongovernmental private entities need not take a separate permission or seek permission from the Indian Space Research Organisation.²⁰

Conclusion

Growing development in the field of public private partnership has immense importance in building a better society and for boosting the economic infrastructure of the state; this is also true in the case of India. India has formulated many policies in this regard and has made various rules and regulations to ensure that the public private partnership shall be utilised to the maximum extent. By now it is apparent that any public private partnership with reference to the infrastructural sector, agricultural sector, medical sector, power generation sector are the most focused areas currently. The data at the World Bank also makes it abundantly clear that India fares above average in terms of the implementation of the public private partnerships with respect to the preparation, procurement and contract management. With specific reference to unsolicited private proposals there is an Express bar in Indian law.

The real question would be whether the right to development includes this new dimension of the public private partnership which routes from the infrastructural sector and nose dive into the private space sector as well. Looking at all of the cases and policy discussed above it is safe to conclude that the right to development is not mono directional. The right to development is having a larger dimension where in the wholesome development of the nation is the target area. This development includes individual development as well as national development.

The recent decision of the Indian Space Research Organisation to open its doors for the private sector to venture into the space activities is indeed a welcome move by the state at the same time the setting up of the Indian National space promotion and authorisation centre and New Space India Limited in order to make the transition to incorporate the non-governmental private entities to carry on space activities and at the same time make room for the usage of Technology as well as the infrastructure facilities of the state towards the space activities is something that looks good on paper and has to be looked into from a practical sense when a private company ventures into the space activity in association with the Indian National space promotion and authorisation centre and New Space India Limited. There would be a lot of hiccups initially but ultimately this space activity would also be inclusive in the index of development and ultimately the role of the state would be far greater to ensure that the right to development shall be obtained and ultimately result in the building of a scientifically strong and economically structured society.

²⁰*Supra Note20.*

Considering the present scenario, the concept of right to development has been directly adopted from the United Nations declaration on right to development and the part IV²¹ of the Indian Constitution which deals with the Directive Principles of State Policy. Reflections have been made in ensuring the right to development is carried on. The question of enforceability however is not existing in the part IV of the Indian Constitution as the Directive Principles of State Policy are not enforceable rights. However the doctrine of harmonious construction is formulated to harmonize is the part III²² and part IV²³ of the Indian Constitution. Therefore the provisions of the Directive Principles of State Policy are executed by way of implementation by adequate legislative sanctions and subsequent violations of these legislative sanctions would make room for the Law to take its course and if they take away the fundamental rights on the individual then it would be directly in violation of fundamental rights and therefore the remedy through enforcement under article 32²⁴ of the Indian Constitution and also 226²⁵ of the Indian Constitution would be directly applicable in this regard. Hence, indirectly the provisions under the part IV²⁶ of the Indian Constitution will also become enforceable.

Protecting the status of right to development as a fundamental right is implied through the article 21²⁷ of the Indian Constitution. The state's activities to promote the right to development would naturally be associated with the protection of the article 21²⁸ of the Indian Constitution. The subsequent violation of these activities would directly attribute to the violation of the article 21²⁹ thereby bringing in the enforceability as per the law. Public private partnership are successfully implemented largely by implementing the provisions under the part IV³⁰ of the Indian Constitution. Therefore the state shall consider these directive principles before making laws and policies with respect to public private partnerships. The states largely inform of policy decisions through rules and regulations. The proper implementation and enforcement of the laws relating

²¹*Supra Note 7*

²²*Supra Note 4.*

²³*Ibid.*

²⁴Article 32 of Indian Constitution – 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...

The Constitution of India, available at: <<http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> [Accessed 23 October 2021].

²⁵Article 226 (1) of Indian Constitution – Power of High Courts to issue certain writs - Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose...

The Constitution of India, available at: <<http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> [Accessed 23 October 2021].

²⁶*Supra Note 7.*

²⁷Article 21 of the Constitution of India - No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Constitution of India, available at: <<http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> [Accessed 23 October 2021].

²⁸*Ibid*

²⁹*Ibid*

³⁰*Ibid*

to public private partnership are often done through autonomous and independent agencies of the state which might be nodal agencies or autonomous bodies which would be regulatory in nature.

Therefore, filling of the gap between the public and private actors is directly achievable through the promotion and boosting of the public private partnerships in the country and subsequently this would result in the protection of right to development and usher in the scientific development, economic development, social development and lastly individual development. It is therefore the job of the state to make sure that the policies governing the public private partnerships would keep into consideration the right to development as a yardstick and also ensure the policies undertaken by the government in promotion of boosting public private partnership would be uniform across all the sectors and ultimately this would achieve Social Justice as well as economic justice thereby creating a strong Nation which would be better equipped to handle the Global competition.

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The Constitution of India, *available at*: <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> [Accessed 23 October 2021].

Article 21 of the Constitution of India - No person shall be deprived of his life or personal liberty except according to procedure established by law.

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