# 8. BALANCING ACTS OR TIPPING SCALES? SECOND-VS-THIRD-GENERATION RIGHTS IN INDIA

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**Abstract**

*Human Rights are often defined as a set of norms that govern how an individual, by virtue of being a human, is to be treated by other individuals, society, and the state. Some of these norms are considered fundamental in various societies for a meaningful life and thus often get incorporated into various national and international legal instruments. In modern times, the development of human rights, both globally and in India, has been influenced by various international treaties, constitutional amendments, and judicial interpretations. To make the study of human rights simpler and easier, an attempt has been made by legal scholars have attempted to classify human rights into generations, with each generation representing a broad theme or idea. The paper offers a comprehensive analysis and attempts to study the conflict between second and third-generation rights within the Indian legal framework. The Indian courts have long been criticised for being biased in favour of third-generation rights like the right to environment or development at the cost of second-generation rights, like employment, the standard of living, housing, education, etc., in light of various case laws and judicial pronouncements. The paper also tries to analyse the reason behind such bias, identifying the reasons for the conflict between the two rights. The paper further proposes that to resolve the dispute between the second and third generations, the proportionality standard of review as provided by the Puttaswamy Judgement can be used as a guiding light.*

**Keywords:** *Rights, Second Generation, Third Generation, Judiciary, Proportionality*

## INTRODUCTION

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Zia Mody, in her book, '10 Judgements that Changed India', observes that, "Faced with a clash between second and third generation rights, the Supreme Court has often allowed the latter to prevail over the former, without making serious attempts to reconcile the two."[1] The author of this article thus attempts to understand this statement by examining the conflict between second and third-generation rights in India in light of judicial pronouncements.

The development of modern legal tradition has been accompanied by the expansion of human rights. Human rights have been held to be those "norms that are considered to be inherent to all human beings regardless of their race, sex, nationality, and religion. Human Rights are inalienable rights and hence cannot be waived off or taken away in any circumstance except by due process. In a legal sense, human rights can be understood as standards that prescribe how a government should treat its population, either by acting in a positive way or by refraining from acting."[2] These Rights do not emanate from any legislation, nor are they bestowed upon the citizenry by the government, but rather find their genesis in the natural law.[3]

The evolution of Human Rights dates back to the beginning of human civilisation, right from Hammurabi's code to the adoption of the United Nations Declaration of Human Rights,[4] and it displays a complex web of interplay between the historical struggles, social conditions, and economic developments. With the emergence of various rights under the ambit of Human Rights after the Second World War, an attempt was made by Karel Vasak to classify and organise these rights into separate groups containing specific features.[5] Henceforth, these rights were referred to as first-generation, second-generation, and third-generation rights.

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[1] Zia Mody, *10 Judgements that Changed India* (Penguin India, 2013) 40

[2] Gabrielle Appleby, Alexander Reilly, and Laura Grenfell, *Australian Public Law* (3rd edn, OXFORD 2011) xii

[3] Iredell Jenkins, *Social Order and the Limit of the Law: A Theoretical Essay* (Princeton University Press, 1988)

[4] R.M. Kamble, 'Evolution And Historical Development Of Human Rights - A Journey From Ancient To Modern' (*Manupatra*) <https://docs.manupatra.in/newsline/articles/U pload/1F344D 63-D1BF-4 17C-B206-97EFC 366F896.%202,%202015-12_Human%20rights.pdf> accessed 19 August 2024

[5] Karel Vasak, 'A 30-year struggle- A sustained effort to give force of law to the Universal Declaration of the Human Rights'(*UNESCO,* 1977) <https://unesdoc.unesco.org/ark:/48223/pf0000048063> accessed 20 August 2024

Second-generation rights, encompassing economic, social, and cultural rights, have been a focal point of India's development agenda since independence. These rights, including the right to education, healthcare, and employment, are crucial in a country where poverty and inequality remain significant challenges. On the other hand, Third-generation rights, also known as collective or solidarity rights, have gained increasing attention in India in recent decades. It is also important to note that the development of these rights and the terminologies used in defining and categorising them don't suggest a linear development of these rights. Several of these rights were developing simultaneously in various parts of the world, and their development is often interdependent on one another.

The author has adopted a doctrinal or non-empirical approach in understanding the conflict between the two generations. The arguments are developed in the following manner: Section I delves into the origin, definition, and growth of second-generation rights within the broader context of human rights. It also deals with how these rights have been integrated into the Indian Constitutional setup through key judicial pronouncements. Section II deals with the distinction of third-generation rights from the other two. It further explores how these rights are made a part of the Indian legal setup. Section III discusses the judicial pronouncements in breadth, where there is an apparent conflict between the second and third-generation rights and how the judiciary has favoured the third generation over the second generation. In Section IV, the author attempts to identify the lacuna that exists between both generations and tries to identify the possible reasons behind the Courts' preference for third-generation rights over second-generation ones. In Section V, it is argued that the proportionality standard of review, promulgated and used extensively in leading cases, particularly the *Puttaswamy* case, could be a way to solve the conundrum between the two generations.

## *ÉGALITÉ* –THE SECOND-GENERATION RIGHT

Karl Vasak, in his work "*Human Rights: A Thirty-Year Struggle: the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*," defines socio-economic rights as second-generation rights. The rights are covered under the broad theme of *égalité,* drawing inspiration from the famous motto of the French Revolution,

'*liberté, égalité, fraternité'* or 'liberty, equality, fraternity'[6] (As per Vasak, Liberty was more in line with first-generation rights or political rights.)

The categorisation of these rights under the head *égalité* can be best understood in light of the dictionary meaning of the term 'equality', which is "a situation in which men and women, people of different races, religions, etc. are all treated fairly and have the same opportunities."[7] Thus, there is an enhanced emphasis on social and economic equality. Apart from this, the categorisation also reflects the great divide of ideologies during the ongoing Cold War, during Vasak's period. Communist countries often place greater emphasis on economic and social equality among their subjects, treating economic, social, and cultural rights as of a more fundamental nature. In contrast, the Western bloc, or the capitalist world, tended to prioritise civil and political rights (first-generation rights), viewing them as essential for individual liberty.[8] In the globalised world, with the rise of the working class, second-generation rights have increasingly become a subject of international recognition, with the effects of early industrialisation and the rise of the working class.[9]

These rights, as far as international covenants go, find their place primarily in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). Examples of second-generation rights include the right to social security,[10] the right to work,[11] the right to a standard of living adequate for the health[12] and well-being of self and family, and the right

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[6] Lindsey Reid, 'The Generations of Human Rights' (*UAB Institute for Human Rights Blog*, 14 January 2019) <https://sites.uab.edu/humanrights/2019/01/14/the-generations-of-human-rights/> accessed 1 September 2024

[7] 'Equality' (*Cambridge Dictionary,* 11 September 2024) <https://dictionary.cambridge.org/dictionary/english /equality> accessed 12 September 2024

[8] Reid (n 7)

[9] 'The Evolution of Human Rights' (*Council of Europe - Manual for Human Rights Education with Young People*) <https://www.coe.int/en/web/compass/the-evolution-of-human-rights> accessed 15 September 2024

[10] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 22

[11] *ibid* art 23

[12] *ibid* art 25

to education[13]. Similarly, ICESCR also provides for the enjoyment of just and favourable conditions of work[14], the right to take part in cultural life,[15] etc.

Whatever the grounds of the categorisation, the second-generation rights, to an extent, are positive rights; that is, they require the state to take a positive action. governments as having the responsibility to "respect, protect, promote and fulfill" these rights.[16] If an attempt is made to apply Vasak's classification in the Indian Constitutional setup, it is inferred that Part III embodies civil/political (or 'first-generation' rights), whereas Part IV enshrines socio-economic, second-generation guarantees. This, yet again, is simply labelling.[17]

After Independence, the Apex Court followed a positivist approach to fundamental rights, but this shifted in the 1970s, particularly after the *Maneka Gandhi* case, with the rise of Public Interest Litigation and the incorporation of second-generation rights under Article 21 of the Constitution of India.

The *Olga Tellis*[18] judgement was a watershed moment wherein the court, for the first time, 'brought socio-economic rights within the sweep of Part III of the Constitution (encompassing fundamental rights), holding that the right to shelter was a fundamental right and thus impacting millions of slum/pavement dwellers in India. It reflected the gradual transition of the Supreme Court from merely recognising fundamental rights, which are framed negatively as negative obligations like commands preventing the state from acting in a certain manner, to elevating them to the level of positive duties to be

[13] *ibid* art 26
[14] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3(ICESCR) art 6
[15] *ibid* art 15
[16]Reid (n 7).
[17] Gautam Bhatia, 'The Directive Principles of State Policy: An Analytical Approach – I: Conceptual Foundations' (*Constitutional Law and Philosophy*, 1 December 2014) <https://indconlawphil.wordpress.com/2014/12/01/the-directive-principles-of-state-policy-an-analytical-approach-i-conceptual-foundations/> accessed 22 August 2024
[18] *Olga Tellis & Ors v Bombay Municipal Corporation & Ors.* (1986) AIR 180

performed by the state.[19] It developed procedural and substantive techniques to incorporate those rights.[20]

The case opened the floodgates for a plethora of judgements that declared several other socio-economic rights under the ambit of fundamental rights. In 1992, the Right to Education[21] was recognised as a Fundamental Right. Similarly, the Right to Health,[22] the Right to Food[23], etc., were declared to be a part of the Right to Life. It has been argued that the "contribution of the Supreme Court in respect of widening the scope of the right to life and personal liberty under Art. 21 is the most valuable contribution the judicial activism has made in any part of the world."[24]

## *FRATERNITÉ*- THE THIRD GENERATION RIGHTS

Vasak argued that there are certain rights based on the principle of *Fraternité* or fraternity. These rights are 'soft rights', available to groups, as compared to individuals.[25] According to Vasak, they are "Solidarity Rights" because their achievement is not possible without a common aim, perseverance, and cumulative action.

They are new generation rights or upcoming rights, not yet developed fully and whose enforceability could only be realised "by the combined efforts of all social factors: states, public and private associations, and the international community."[26] One major feature that sets the third-generation rights different from the other two is that, as defined by Dinstein, "Individual human rights (e.g., freedom of expression or freedom of religion) are bestowed upon every human being personally. Collective human rights are afforded to human beings communally, that is to say, in conjunction with one another or as a group a people, or a minority."[27] Thus, third-generation rights are a 'group of policy goals' that

[19] Mody (n 1)
[20] Jessie M. Hohmann, 'Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing' (2010) 13 Yale Human Rights and Development LJ 135
[21] *Mohini Jain v. State of Karnataka* (1992) AIR 1858
[22] *Consumer Education and Research Centre v. Union of India* AIR 1995 SC 922
[23] *People's Union for Civil Liberties* Writ Petition(Civil) No. 196 of 2001
[24] Hohmann (n 20)
[25] Reid (n 6)
[26] Bulent Algan , 'Rethinking Third Generation Human Rights' (2003) 1 Ankara Law Review 121,125
[27] *ibid* 128

can be achieved only by collective international action. Examples of these rights include the Right to Environment, the Right to Peace, the Right to Development, the Right to the common heritage of mankind, etc.[28]

As far as the Indian legal system is concerned, the examples of third-generational rights that have been recognised by the Court include the right to development,[29] to a healthy environment,[30] to share in the exploitation of the common heritage of mankind[31], etc.

In the Indian context, the emergence and recognition of third-generation rights have closely coincided with the Supreme Court's growing environmental judicial activism. Although it is difficult to pinpoint a specific judgement as the definitive starting point for the incorporation of third-generation rights into the Constitution, the *Subhash Kumar v. State of Bihar*[32] case can be considered a pivotal moment. This case, for the first time, brought the Right to a Clean Environment within the ambit of Article 21 of the Constitution of India. It marked a significant step in recognising third-generation rights as an essential part of the constitutional framework, thereby expanding the scope of fundamental rights to address collective and environmental concerns. This position has been further reinforced through numerous judgements by the Apex Court, making the right to a clean environment one of the most extensively developed aspects of third-generation rights in India.

Another limb of the third-generation right that has been extensively explored by the Indian Courts is the Right to Development. The Right to Development is the process "in which all human rights and fundamental freedoms can be fully realised."[33] In India, the invocation of this right has been seen in cases about the rights of marginalised communities and sections of society,[34] particularly women, tribes, and other backward classes. The Apex Court, while deciding such cases, has often underlined the idea that

[28] Vasak (n 5)
[29] *ND Juyal & Ors v Union of India & Ors* 2004 (9) SCC 362
[30] *M.C. Mehta v Kamal Nath & Ors* (1997) 1 SCC 388
[31] *Reliance Natural Resources Ltd. v Reliance Industries Ltd*. (2010) 7 SCC 1
[32] *Subhash Kumar v State of Bihar & Ors.*, 1991 AIR 420
[33] Wolf A-L, 'Juridification of the right to development in India' [2015] Völkerrechtsblog <https://voelkerrechtsblog.org/de/juridification-of-the-right-to-development-in-india/> accessed 3 August 2024
[34] *ibid*

steps must be taken by the government, whether economic or social, to ensure the full-fledged development of such marginalised sections and to eradicate all the social injustices.[35]

The rights of the third generation in India represent a forward step toward human rights, on the one hand, in terms of responsibility, and on the other hand, in terms of solidarity on a world scale. Major strides have been made in recognising and enforcing such rights in India; however, further development is necessary to overcome such challenges and ensure equitable sharing of the fruits of development and natural resources for the common good of the present and future generations.

## THE CONFLICT BETWEEN GENERATIONS

In *Maneka Gandhi v Union of India,*[36] the Court broadly interpreted the guarantee of the right to life, the right to personal liberty, and the right not to be deprived of either of these rights except by procedure established by law under Art 21 of the Constitution of India. The Court viewed this judgement as an opportunity to expand the ambit of rights to include the right to livelihood, access to potable drinking water, fresh air, health care, a clean environment, and several other essential aspects of life.

Over recent decades or so, the judgements of the Supreme Court have marked a significant shift, with the third-generation rights triumphing over the second-generation ones. Furthermore, a serious concern emerges when there is a failure on the part of the Court to reconcile the two. Even after having an illustrious history of judicial activism earmarked by the expansion of fundamental rights, the Court has failed to bring out any consistency while interpreting and enforcing second and third-generation rights.

[35] *Madhu Kishwar and Ors. v The State of Bihar and Ors.,* AIR 1996 5 SCC 125
[36] *Maneka Gandhi v. Union of India* AIR (1978) SC 597

In the case of *M.C. Mehta*[37], concerning the closure of tanneries and other industries located alongside the banks of the Ganges, discharging toxic effluents into the river and leading to pollution, the Court held that,

> *"We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health, and ecology have greater importance to the people."*[38]

The decision had far-reaching impacts. By ordering the closure of the tanneries along the Ganges, the court completely ignored the fundamental and socio-economic rights of those employed in these factories, whose lives and livelihoods depended on their continued operation. No provision for alternative arrangement was made for those workers.

Even a comprehensive analysis of the *Olga Tellis*[39] judgement, as mentioned above in this article, leads to the conclusion that the Apex Court has never explicitly recognised the right to housing for slum dwellers. Instead, it held that "an eviction without notice and a hearing would amount to an arbitrary violation of the right to livelihood, which is an integral part of the right to life under Article 21".[40] Although, when compared to environmental cases, the level of protectionism and activism demonstrated in *Olga Tellis* may fall short, the judgement's significance lies in its recognition of the need for alternative housing. The Court noted that,

> *"It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law."*[41]

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[37] *M.C. Mehta v. Union of India & Oth*. (1988) AIR 1115
[38] *ibid*
[39] *Olga Tellis & Ors v. Bombay Municipal Corporation & Ors*. (1986) AIR 180
[40] Balkrishnan Rajagopal, 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 8(3) Human Rights Review 157,162. <https://doi.org/10.1007/s12142-007-0004-8> accessed 6 September 2024
[41] *ibid*

The Court took a U-turn on its position in the case of *Almitra H. Patel*[42]. The Apex Court when faced with this over the right to shelter, a socio-economic right, and the problem of pollution and solid wastes generated by inhabitants of unauthorised colonies who were forced to live without any access to proper hygiene facilities, creating a sense of unhealthy environment for the city of Delhi, overwhelmingly ignored the socio-economic rights of the slum-dwellers. The Court went on to note that giving alternative accommodation to slum or pavement dwellers was something like rewarding a pickpocket and suggested that 'land grabbers' should be dealt with with an iron fist. This view was echoed by Ruma Pal J. and Markandey Katju J. of the same court, who said that,

> *"[i]f you are occupying public land, you have no legal right, what to talk of the fundamental right, to stay there a minute longer."*

A similar situation is seen in the Narmada Bachao Andolan case, which led to what has been called the largest judiciary-sanctioned eviction drive in the world. In May 1995, the Court issued a stay on further construction of the dam. Subsequently, there was a shift in the Court's approach. In 2000, the Supreme Court finally allowed construction up to ninety meters and, in a dramatic gesture, declared the completion of the dam a matter of priority. The Court held that

> *"The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations, they are better off than they were. At the rehabilitation sites, they will have more and better amenities than those they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress."*
>
> *"The tribals who are affected are in indigent circumstances and who have been deprived of the modern fruits of development such as tap water, education, road, electricity, convenient medical facilities, etc."*

[42] *Almitra H. Patel & Anr. v. Union of India* (2000) 2 SCC 679

Another Supreme Court judgement that reflects the apathy of the court towards second-generation rights is the *T.K. Rangarajan v. Government of Tamil Nadu*[43] case. The Court in the judgement refused to recognise the collective right of the Strike even as a moral or equitable justification, which is also recognised by the Supreme Court as an important right. The refusal was clearly against the international economic and social standards.[44] The reasoning behind the refusal was to alleviate the pain and ordeal caused by strikes to 'others in society,' and this in turn leads to the violation of their right to development. The Court gave the reasoning that the basic rights of the people as a whole cannot be subservient to the claim of a basic right of an individual or only a section of the people. Thus, there cannot be any right to call or enforce a 'bandh' that interferes with the exercise of the fundamental freedoms of other citizens besides causing national loss in many ways.

*"Strike affects the society as a whole and particularly when two lakh employees go on strike on mass, the entire administration comes to a grinding halt. In the case of a strike by a teacher, the entire educational system suffers; many students are prevented from appearing in their exams which ultimately affects their whole career. In case of a strike by doctors, innocent patients suffer; in case of a strike by employees of transport services, the entire movement of the society comes to a standstill: business is adversely affected and the number of persons find it difficult to attend to their work, to move from one place to another or one city to another".*

**IDENTIFYING THE CONFLICT**

The Supreme Court has often been proclaimed as the harbinger of the protection of rights. It has pronounced several landmark rulings which have not only expanded the scope of rights but also introduced new rights through innovative legal interpretations, earning its reputation as 'the last resort of the oppressed and bewildered.'[45] However, it has increasingly become inaccessible to the very individuals it seeks to serve. The analysis of cases where the conflict is apparent indicates that the Courts are over-emphasising the

[43] *T.K. Rangarajan v. Government of Tamil Nadu* (2003) (6) SSC 581
[44] Rajagopal (n 41) 160
[45] Sital Kalantry, 'The Supreme Court of India: A People's Court?' (2017) Cornell Legal Studies, Research Paper No. 19-22 <https://dx.doi.org/10.2139/ssrn.3416675> accessed 28 August 2024

environmental causes, completely ignoring the violation of the socio-economic rights of those affected by the judgement. Prashant Bhushan refers to this as an inherent Environmental Bias[46]. Whenever the Court comes under the question of conflict between environmental and Socio-Economic Rights, the Court leans towards Environmental rights, which is a clear violation of Art. 21 of the affected communities. The court itself has pointed out that the Right to livelihood and the Right to shelter are both necessary to provide a meaningful life.

Secondly, it can be argued that the Court was hamstrung by a desire to preserve the boundary between law and policy or it was concerned about its function and role in comparison with the other arms of government or perhaps it had an interest in ensuring that its orders had some prospects of being carried out. However, several commentators contend that none of the above arguments stands valid as the Court has historically paid very limited attention to these issues during its glorious career of judicial activism. For example, the Court in the recent *cracker ban*[47] case in Delhi ventured into an area usually meant for the executive.

Thirdly, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) does not mandate a signatory party to enforce and implement the rights as soon as the covenant is ratified. The presence of the 'now' factor, which puts any instrument or legal document like the ICCPR in action from the very moment it gets ratified, is absent in ICESCR. Article 2 cl. 1 of the document subjects the guarantee of rights to two conditions, firstly that they should be 'progressively realisable' and that the realisation should be subject to 'available resources'.[48] This creates an impediment to the realisation of second-generation rights. Further, as far as the application of tenets of socio-economic rights in India goes, Balakrishnan points out that although counsel in the Narmada case argued that the forced eviction of tribal people was a violation of the Right to life under Article 21 read with International Labour Organisation (ILO) Convention 108, to which India is a

[46] Prashant Bhushan, 'Misplaced Priorities and Class Bias of the Judiciary' (2009) 44 EPW 32 <https://www.jstor.org/stable/40278698> accessed 26 August 2024
[47] *Arjun Gopal v Union Of India*, W.P.(C) No. 728/2015
[48] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3(ICESCR) art 2 cl.1

party, the Court rejected the argument. But remarkably, counsel did not argue that several economic, social, and cultural rights of the tribal people were violated under the International Covenant on Economic, Social and Cultural Rights, to which India is a party, showing perhaps how much salience the language of socio-economic rights has before the Court.[49]

Fourthly, in his article, *The Psychologic Study of Judicial Opinion*, Theodore Schroeder argues that "every judicial opinion necessarily is the justification of every personal impulse of the judge in relation to the situation before him, and the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration in emotional tone"[50] A similar trend can also be seen in the cases of adjudication of conflict between rights. Judges like Justice Krishna Iyer and PB Sawant are known to champion the causes of socio-economic rights. Justice Iyer even served as a minister in Kerala under the communist government, holding important ministries like Law, Prison, and Social Welfare, which often reflected in the way he pronounced judgements.[51] Thus, the impact of experience and the political and economic climate around a judge can't be entirely divorced from the way he/she adjudicates a case. This explains that with the coming of the Globalisation era, the change in the frame of mind of the judges was quite apparent.[52] This could be seen in terms of the 'pro-development' judgements promulgated. A stark contrast can be witnessed by comparing the judgement by J. Krishna Iyer in State of *Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd*,[53] a case concerning the constitutionality of Kerala Land Reform Laws, where the Hon'ble Justice noted that "*The village man, his welfare, is the target,"* to the *Narmada Bachao* case, where entire tribal communities were uprooted.

It has further been noted that there is a trend wherein judges appear to view claims advanced on behalf of the poor and marginalised members of society less favourably.

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[49] Rajagopal (n 41) 162
[50] Timothy J. Capurso, 'How Judges Judge: Theories on Judicial Decision Making' (1998) 29 University of Baltimore Law Forum 5,6
[51] VS Pari, 'Justice Krishna Iyer- A Tribute' (*Livelaw*, 4 December 2022) <https://www.livelaw.in/columns/justice-krishna-iyer-a-tribute-215749> accessed 5 September 2024
[52] Rajagopal (n 41) 163
[53] *Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd* (1973) 2 SCC 713

While this could be attributed to the relative weakness of the claims brought before the courts, a corresponding increase in judgements in favour of more advantaged individuals suggests that the court is generally less willing to assist those living in poverty. [54]

Lastly, another interesting observation and discourse that emerges is that though environmental rights, which are third-generation rights, prevail over the other second-generation rights, the environmental rights are, or as the judgements of the court speak, often themselves subject to development rights. In the *Narmada*[55] case, although many international legal standards were at the disposal of the court which showed that raising the height of the dam would be detrimental to the people living around it, and even if the records showed that the government has not carried out the Environmental Assessment properly, the court leaned towards the 'development rights' and gave a green signal for constructing the dam and later on, raising the height of the dam. Now, this point of environmental rights being subordinate to development rights leads to the question of hierarchy within rights. Justice Das, in the case of *AK Gopalan*[56], provides that certain rights are more pertinent than others. He had written,

> *"The truth of the matter is that the right to live and the freedom of the person are the primary rights attached to the person. If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can, within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his "own inclination may direct," reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently rights attached to the person. It should be clearly borne in mind that these are not all the rights attached to the person. Besides them, there are varieties of other rights which are also the attributes of the freedom of the person. All rights attached to the person are usually called personal liberties and*

[54]Anayshri Pillay, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014) 63 The International and Comparative Law Quarterly 385,400

[55] *Narmada Bachao Andolan v. Union of India And Ors*. AIR 2000 SC 3751

[56] *AK Gopalan v. State of Madras* AIR 1950 SC 27

*they are too numerous to be enumerated. Some of these auxiliary rights are so fundamental that they are regarded and valued as separate and independent rights apart from the freedom of the person."*

Thus, certain rights are primary and thus given the highest importance, while other rights are secondary or auxiliary and are always under primary laws. Though he did not suggest a principle for differentiating between different rights falling within the scope of Art 21, but recognised that because Art 21 has been 'expanded in such numerous directions in so many different ways', it is reasonable to treat the variety of rights falling within Art 21 differently. It must be seriously acknowledged that Art 21 enshrines rights recognised as absolute and permitting no limitations whatsoever, such as the right against torture.[57]

**RECOMMENDATIONS AND SUGGESTIONS**

Now, furthering the question of the hierarchy of rights, which often puts socio-economic rights on a lower pedestal, leading to conflict, needs to be looked at from a different perspective. The author proposes that a proportionality standard of review could be used to resolve the dichotomy. The proportionality standard of review of rights, as proposed under the *Puttaswamy II* judgement,[58] opens new possibilities for interpretation and harmonisation of the rights.

A pertinent question that arises at this point is whether the standards used for the Right to Privacy, a first-generation right as per Vasak's classification, can be used for second and third-generation rights. There is a reason for the answer to be affirmative. As Rishika Sehgal argues[59], it is difficult to clearly distinguish these generations of rights in watertight compartments. There is always a substantial overlap in how 'rights' often play out in real-life scenarios. For example, the right to clean environment and the right to shelter shall both fall under Art. 21, and often the courts will struggle to decide under which of the three generations both shall fall. In *Gujarat Mazdoor Sabha*[60], the Supreme

[57] Rishika Sahgal, 'Proportionality Review and Economic and Social Rights in India' (6 March 2024) <https://papers.ssrn.com/abstract=4749722> accessed 5 September 2024
[58] *Justice K.S. Puttaswamy v. Union Of India* (2017) 10 SCC 1
[59] Sahgal (n 59)
[60] *Gujarat Mazdoor Sabha v. State of Gujarat* Writ Petition no.708 of 2020

Court indicated the possibility of applying the proportionality standard of review in a case involving labour rights, though the idea was never fruitified.

In Puttaswamy[61] the court held that,

> *"The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:*
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> *(i) The action must be sanctioned by law;*
>
> *(ii) The proposed action must be necessary in a democratic society for a legitimate aim;*
>
> *(iii) The extent of such interference must be proportionate to the need for such interference;*
>
> *(iv) There must be procedural guarantees against abuse of such interference."*

Justice Sikri[62] further laid down a four-fold test to determine proportionality:

> *"(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).*
>
> *(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).*
>
> *(c) There must not be any less restrictive but equally effective alternative (necessity stage).*
>
> *(d) The measure must not have a disproportionate impact on the right holder (balancing stage)."*

[61] *Puttaswamy* (n 59)
[62] *ibid*

**Application of the Doctrine**

a. **Legality** - The legality prong is relatively straightforward - any restriction on one right in favour of another should have a clear basis in statutory law. The legitimate aim prong requires courts to scrutinise the purported objective behind privileging one right over another. Is the state genuinely pursuing a valid public interest, or is it using rights rhetoric as cover for other motives?

b. **Legitimate Aim** - The test requires that, in cases of conflict between second and third-generation rights, the court first must check whether the act fulfils a proper purpose or not. The proportionality test requires courts to first identify whether these aims are valid. It was in light of the explanation of this step that Sikri J noted that,

   "*It is, thus, of some significance to remark that it is this Court which has been repeatedly insisting that benefits reach the most deserving and should not get frittered mid-way.*"[63]

   The court must first identify the aim that the state is alleged to be driving by prioritising one right over another. So, for example, if the state prioritises industrial development over workers' rights to safe working conditions, the claimed aim might be economic growth or poverty reduction. The legitimacy of an aim can often be assessed against international human rights standards and the Sustainable Development Goals. For instance, the UN Sustainable Development Goals set some guidance on how to balance economic, social, and environmental goals. In addition, the urgency of the goal might also be of concern. Lastly, even if an aim is broadly legitimate, the court should consider whether it could be achieved through means that do not require the same degree of rights trade-offs.

c. **Proportionate/Necessity**- The proportionality prong is where the real balancing occurs. Courts must carefully weigh the relative importance of the competing rights claims, the extent to which each right would be impaired, and whether less

[63] *Justice K.S. Puttaswamy v. Union Of India* (2017) 10 SCC 1

restrictive alternatives are available. Justice Sikri noted in Puttaswamy's judgement that,

*"No doubt, there are many other modes by which a person can be identified. However, certain categories of persons, particularly those living in abject poverty and those who are illiterate will not be in a position to get other modes of identity like PAN Card, Passport, etc...The manner in which malpractices have been committed in the past leaves us to hold that apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with a lesser degree of limitation that can achieve the same purpose."*[64]

Thus, the court is required to first determine whether the limitation of one right for the sake of the other is rationally connected to the legitimate aim that it identified. This is a precondition for determining whether the reasonable course of action chosen can reasonably further the desired result. The court should further determine whether the measure adopted is strictly necessary to achieve the goal. It means considering whether similar aims could be achieved by measures that are less restrictive of rights. It involves weighing the benefits gained by the fulfilment of the purpose against the harm caused to the right that is limited. The grounds may include assessing the relative importance of the competing rights in the specific context, evaluating how severely each right would be limited, etc.

d. **Procedural Guarantees**- The procedural guarantees prong of the *Puttaswamy* test is critical to a fair judgement on whether the right involved is limited with adequate safeguards. It is such an important feature when the court has to adjudicate between rights that constitute second and third-generation rights, inasmuch as it upholds the integrity of the process and insulates the process against possible abuse. Decision-making processes ought to be transparent and open to public scrutiny. Affected parties and communities should be represented in the decision-making process. This becomes a crucial aspect when weighing and

[64] *ibid*

balancing collective rights (ordinarily third-generation) against individual or group rights.

The court must finally make an overall appraisal of whether such a limitation on one right would be proportionate to the advancement of the other. For that matter, all factors would need to be balanced against each other, recognising that in such conflicts, there is often no ideal solution.

**CONCLUSION**

The ever-expanding domain of second and third rights in India through judicial discourse is a way of manifestation of the nation's growing commitment to address diverse social, economic, environmental, and developmental needs. Second-generation rights, focusing on socio-economic welfare, have significantly shaped India's legislative and judicial discourse. These are often referred to as positive rights because they require state intervention to ensure that the rights pertaining to fields like education, health, and social security are available. On the other hand, third-generation rights embody collective values such as environmental protection, sustainable development, and peace. They represent a forward-looking approach aligned with global concerns.

The judiciary has played a critical role in exercising the delicate balancing act between expanding these rights. Landmark cases stand as testimony to how Indian courts, and particularly the Supreme Court, more often than not tip the scales of inclination towards third-generation rights rather than second-generation rights. This tendency can be attributed to the broader collective impact of third-generation rights, which tend to safeguard generations yet to come and thus align with India's international obligations under various global treaties and conventions. It would not be wrong to say that this judicial preference has been well exemplified in cases like *M.C. Mehta v. Union of India* and in *Narmada Bachao*. In general, when individual or group rights conflict with broader environmental or collective interests, the judiciary tends to prioritise the latter.

However, this third-generation rights preference over second-generation rights has generated tensions, particularly where socio-economic rights may be compromised in the name of collective good. As observed, proportionality is the needed tool to balance these

conflicting rights. This lacuna in research and doctrine is filled by the article, by the author, in answering the question of whether and how a structured proportionality analysis ought to be applied to test limitations on social and economic rights recognised under the Indian Constitution. The application of the proportionality standard of review by the judiciary would allow for an appropriate weighing of competing interests between the two generations of rights so that neither is disproportionately compromised. This approach ensures that while third-generation rights are crucial, the state cannot neglect its duty to fulfil socioeconomic responsibilities.