

Juridification of the Right to Development in India

By Anna-Lena Wolf*

Abstract: *The right to development is a legally non-binding treaty under international law. In this paper, however, the distinction between legally binding and legally non-binding treaties in international law, around which many of the controversies regarding the right to development have arisen, is challenged. I argue that the right to development is used in the Indian legal system through case law, which I interpret as a process of juridification. The juridification, I claim, is manifested through Indian judges who have shown an increased inclination to refer to the United Nations Declaration on the Right to Development in their legal argumentation to solve judicial conflicts. Judges explicitly affirm the existence of a human right to development and statutorily regulate it by interpreting it as part of the constitutional fundamental ‘right to life’. Furthermore, the paper approaches the question of how different concepts of development and correlated ideas of justice are negotiated in the genesis of interpretations of the right to development in Indian case law. The application of the right to development mainly reflects a legal argument for the protection of minority rights, such as women’s rights, Dalit rights and Adivasi rights, in cases on affirmative action in education, land acquisition and labour rights. However, I consider an additional imminence of misusing the right to development for a utilitarian legal argument to justify human rights violations of small groups of people in the name of development and public interest.*

I. Introduction

The United Nations Declaration on the Right to Development (1986) declared development a human right, which is commonly categorised as a ‘third-generation’ human right or solidarity right. These rights are said to be as equally inalienable and universal as the ‘first-generation’ (civil and political) and ‘second-generation’ (social, economic and cultural) human rights. Third-generation human rights, however, are characterised by defining not only individuals, but also collectives as right-holders. The Declaration on the Right to Development mentions states (individually or collectively), groups, people and individuals as right-

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holders and states (individually or collectively) are named as right-bearers.¹ The Declaration redefines development as a participatory process ‘in which all human rights and fundamental freedoms can be fully realized’ (Art. 1). Other chief contents of the Declaration include decolonisation and non-discrimination, international peace and security, disarmament, the right to self-determination, the right to sovereignty over all wealth and natural resources, equality of opportunity for development, and the establishment of a new just international economic order. The way in which development is defined in the Declaration challenges prevalent definitions of development in terms of economic growth. However, the Declaration’s moral and legal justification, justiciability and chief contents have been much debated. Proponents of the right to development characterise it as one of the core human rights. Critics, on the other hand, argue that human rights cannot, by definition, include collective rights. Moreover, the right to development is sometimes considered to be insignificant because it does not provide legally binding obligations for duty-bearers.

Taking India as an example, I argue that these discussions fail to notice the actual use of the right to development in national legal systems through case law. I claim that a juridification² of the right to development arises, which is manifested through Indian judges who have shown an increased inclination to refer to the United Nations Declaration on the Right to Development in their legal argumentation to solve judicial conflicts. Moreover, judges explicitly affirm the existence of a human right to development and statutorily regulate it by interpreting it as part of the ‘right to life’ (Article 21), which is a fundamental right in the Constitution of India that the court interprets to be a ‘right to *dignified* life’, thus, making it possible to effectively read other rights, especially socio-economic rights, into that right.³ The interpretation of the right to development in Indian judgments has particular meaning against the backdrop of the common-law legal system in India, which is largely case-centred and relies upon judicial interpretations and precedent cases. India, moreover, constitutes an interesting case study because of its distinct occurrence of judicial activism.⁴

The application of the right to development in India reflects mainly a legal argument for the protection of minority rights in cases on affirmative action, labour rights, succession, land acquisition or property rights in which judges have tried to protect the rights of wom-

1 Non-governmental and other grass-roots organisations were added as right-bearers later on in the *Vienna Declaration and Programme of Action* 1993, Art. 73.

2 See Lars C. Blichner / Anders Molander, Mapping Juridification, *European Law Journal* 1 (2008), pp. 36-54.

3 One prominent example is reading the right to education into the right to life before it became a fundamental right in the Indian Constitution. See Florian Matthey-Prakash’s article in this volume.

4 See S.P. Sathe, Judicial Activism. The Indian Experience, *Journal of Law & Policy* 6 (2001), pp. 29-109.

en, Dalits⁵, Adivasis⁶ or persons with disabilities. However, there are also cases in which the right to development is used for a utilitarian legal argument to justify human rights violations by evoking the notion of public interest. This completely reverses the redefinition of development as the fulfilment of all human rights for all people as put forth in the Declaration on the Right to Development.

The present article is divided in two parts to engage with the right to development. The first part presents a discourse analysis of the right to development based on secondary literature as well as primary sources related to the right to development published by the United Nations. The second part analyses the use of the right to development in Indian judgments and its implications for the discourse and meaning of the right to development. The judgments were selected by using the Indian legal database *Manupatra*. The analysis of the judgments was complemented by expert interviews with Indian lawyers, activists and academics in Delhi in 2014.

II. The discourse on the right to development

*'A philosopher is a person who goes into a dark room on a moonless night to look for a nonexistent black cat. A theologian comes out claiming to have found the cat. A human rights lawyer, after such an on-site visit, sends a communication to the Commission on Human Rights; and a member of the Commission leaves the room drafting a resolution on the treatment of black cats. This, in a nutshell, is uncomfortably close to the history of the so-called human right to development.'*⁷

- 5 Dalit literally means 'oppressed'. The term was coined by the social reformer Mahatma Jyotirao Phule in the mid-nineteenth century. It was taken up as a self-designation by people formerly called 'untouchables' in the 1930s against other designations such as 'Harijan' (literally meaning 'people close to God') which was imposed on Dalits by Mahatma Gandhi, but rejected by them. Dalits are considered to be at the bottom of the caste system and ritually impure, which impacts on their social and economic standing in India. Many Dalits in India are categorised as Scheduled Castes. This administrative category, scheduled by the Indian Constitution, declares such categorised groups of people eligible for affirmative action provided by the Indian government. Scheduled Castes constitute 16.6 per cent of the Indian population. See *Marc Galanter*, *Competing Equalities. Law and the Backward Classes in India*, New Delhi 1984, p. 13. For further information, see *Ashwini Deshpande*, *Affirmative Action in India*, New Delhi 2013.
- 6 'Adivasi' literally means 'first inhabitant'. It is a collective term referring to different ethnic groups mainly residing in central and northeast India. The term was shaped by activists claiming to be India's indigenous people in the early twentieth century. Many Adivasis are categorised as Scheduled Tribes, which is an administrative category for the second largest historically discriminated ethnic minority in India constituting 8.6 per cent of the Indian population. See *Alf Gunvald Nilsen*, *Adivasis in and against the State*, *Critical Asian Studies* 44 (2012), p. 252. For discussion about indigeneity, see *Alpa Shah*, *The Dark Side of Indigeneity? Indigenous People, Rights and Development in India*, *History Compass* 5 (2007), pp. 1806-1832.
- 7 *Jack Donnelly*, *In Search of the Unicorn. The Jurisprudence and Politics of the Right to Development*, *California Western International Law Journal* (1985), p. 473.

‘The right to development stands enunciated as an “inalienable human right” of all human beings and peoples everywhere. The UNDRD [United Nations Declaration on the Right to Development] enunciates a human rights-based conception of human and social development... This enunciation marks an epistemic break from the ideology of developmentalism, one that perfects the vision of top-down “development” process in which also the major costs of development stand assigned to the developpees.’⁸

The right to development has mainly been the subject of studies in the field of international law, international political science, political philosophy, economics and, most recently, historiography.⁹ The evolution of the human right to development is seen as a confluence between the United Nations’ human rights and development domains. Up to the 1980s, references to human rights were rare in international development politics, whereas a macro-economic perspective identifying development with economic growth has been dominant. On 19 December 1961, the United Nations General Assembly declared ‘the development decade’, which later became known as the ‘first development decade’. The idea of development was inspired by the successful implementation of the Marshall plan after the Second World War. International politics were influenced by Cold War conflicts between the United States and the Soviet Union. Referring back to modernisation theories¹⁰, development was mainly identified with economic growth. The prevalent belief was that development could be achieved by systematically planned strategies that were articulated in annual or periodic development plans. The strategies aimed at an economic integration of ‘less developed countries’ into the global market as providers of primary goods. In this way, these countries were believed to become self-supporting economies and, moreover, function as sales markets for so-called ‘developed nations’. Aggregate income (a former term for gross

8 Upendra Baxi, *Human Rights in a Posthuman World*, New Delhi 2007, p. 132.

9 See, e.g., Philipp Alston, *Making Space for New Human Rights. The Case of the Right to Development*, Harvard Human Rights Yearbook 1988, pp. 1-38; Philipp Alston, *Ships Passing in the Night*, Human Rights Quarterly 3 (2005), pp. 755-829; Upendra Baxi, *The Development of the Right to Development*, in: Janusz Symonides (ed.), *Human Rights. New Dimensions and Challenges*, Dartmouth 1998, pp. 99-116; Baxi, note 8; Stephen Marks (ed.), *Implementing the Right to Development. The Role of International Law*, Geneva 2008; Bard Andreassen / Stephen Marks (eds.), *Development as a Human Right. Legal, Political, and Economic Dimensions*, London 2006; Oliver Ness, *Das Menschenrecht auf Entwicklung. Sozialpolitisches Korrektiv der neoliberalen Globalisierung*, Münster 2004; Franz Nuscheler, *Recht auf Entwicklung. Involution zum Recht auf alles?* in: Klaus Dicke et al. (eds.), *Menschenrechte und Entwicklung*, Berlin 1997, pp. 77-95; Franz Nuscheler, *Recht auf Entwicklung. Ein universelles Menschenrecht ohne universelle Geltung*, in: Sabine von Schorlemer (ed.), *Praxishandbuch UNO*, Heidelberg 2002, pp. 305-318, Donnelly, note 7; Arjun Sengupta, *Right to Development as a Human Right*, Economic and Political Weekly 27 (2001), pp. 2527-2536; Ramon Leemann, *Entwicklung als Selbstbestimmung. Die menschenrechtliche Formulierung von Selbstbestimmung und Entwicklung in der UNO, 1945-1986*, Göttingen 2013.

10 See, e.g., Walt W. Rostow, *The Stages of Economic Growth. A non-communist Manifesto*, Cambridge 1960.

national product) was the indicator to measure development. Social development, however, was seen rather as an accoutrement to economic development.¹¹ The United Nations' development decades (1960s, 1970s and 1980s) are part of what the Indian legal scholar Upendra Baxi calls the dominant ideology of *developmentalism*, 'the discourse of power, that is the official mindset of key globally networked policy and political actors dedicated to the pursuit of economic growth... in which relevant knowledges and languages produce the various regimes of "truth" of development'.¹² Apart from seeing economic growth as indispensable for development, according to Baxi, the truth-claims of *developmentalism* also include that economic growth (1) progresses best in conditions of a free market, (2) requires a free movement of global capital, (3) is said to be accompanied by human and social development, (4) the state, and its laws, ought to serve primarily the purpose of 'wealth-maximization' and (5) that human rights must 'be disciplined... to respect macroeconomic development decisions/choices'.¹³ The Declaration on the Right to Development, adopted in 1986, marks for Baxi an 'epistemic break from the ideology of *developmentalism*'¹⁴ by defining development as a participatory process 'in which all human rights and fundamental freedoms can be fully realized' (Art. 1).

The evolution of the right to development has to be understood in the historical context of the non-aligned movement, which was founded in 1961 under the direction of five heads of states including Jawaharlal Nehru, India's first Prime Minister. The movement's demand for the establishment of a new international economic order was formally raised for the first time during the non-aligned movement's fourth conference in Algiers in 1973.¹⁵ During that time, the global economy experienced a crisis. The fixed exchange rates that were introduced with the Bretton Woods system were replaced in the early 1970s with flexible global exchange rates and the Organization of the Petroleum Exporting Countries (OPEC) managed to raise oil prices fourfold and, thereby, strengthened their global position. The global North, especially America, on the other hand, struggled to defend their global hegemony, which created an advantageous bargaining position for the non-aligned countries.¹⁶ Against this historical backdrop, discussions on a human right to development came up when Kéba M'Baye, then Chief Justice of the Supreme Court of Senegal, claimed for the first time in 1972 that development was a human right.¹⁷ M'Baye emphasised both the

11 *Ramon Leemann*, *Entwicklung als Selbstbestimmung. Die menschenrechtliche Formulierung von Selbstbestimmung und Entwicklung in der UNO, 1945-1986*, Göttingen 2013, pp. 278-289.

12 *Baxi*, note 8, pp. 116-117.

13 *Baxi*, note 8, pp. 117-118.

14 *Baxi*, note 8, p. 132.

15 *Leemann*, note 11, pp. 304-305.

16 *Leemann*, note 11, pp. 305-306. See also *Nils Gilman*, *The New International Economic Order: A Reintroduction*, *Humanity Journal* 6 (2015), pp. 3-4.

17 *Leemann*, note 11, p. 298. The first mention of the right to development is also sometimes dated back to an utterance by the Senegalese foreign minister Thiam during a plenary session of the UN General Assembly in 1966 to criticise the global economic order. See *Leemann*, note 9, p. 275.

moral and the juridical ground for the right to development. He saw the right to development to derive from the United Nations Charter of 1945, the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political (1966) and on Economic, Social and Cultural Rights (1966).¹⁸ In 1977, the Human Rights Commission mentioned the human right to development in a resolution which is sometimes interpreted as its official recognition.¹⁹ At that time, Kéba M'Baye was Senegal's representative in the Human Rights Commission. A working group was appointed by the Commission to prepare a draft for a declaration on the right to development.²⁰ The working group failed to draft it due to their disagreement on the definition of development. In 1985, the Yugoslavian delegation drafted a declaration which, to a great extent, was included in the final declaration on the right to development.²¹

Finally, the United Nations General Assembly adopted the Declaration on the Right to Development on 4 December 1986. A total of 146 states voted for the Declaration's adoption and eight countries abstained from voting (Finland, Iceland, Denmark, Germany, Israel, Japan, Great Britain and Sweden). The United States was the only country that voted against the right to development and has remained hostile against it until the present time. The Declaration contains a preamble and ten articles with key contents being fulfilment of all human rights, decolonisation and non-discrimination, international peace and security, disarmament, the right to self-determination, the right to sovereignty over all wealth and natural resources, equality of opportunity for development, and the establishment of a new just international economic order. A working group of governmental experts on the right to development was appointed after its adoption between 1991 and 1993. The right to development was then affirmed at the Second World Conference on Human Rights in Vienna in 1993. In the *Vienna Declaration and Programme of Action* it is stated that, '[t]he World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights' (Art. 10 and 11) and it is urged that, '...the universal and

18 Special emphasis is given to the notion of living standard improvement, the implementation of human rights and international cooperation in the United Nations Charter (Art. 55 and 56); on the right to education 'directed to the full development of the human personality' and on a 'social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (UDHR, Art. 26 and 28); and the right to self-determination (ICCPR and ICESCR, Art. 1).

19 *Leemann*, note 11, p. 276.

20 *Leemann*, note 11, pp. 369-373.

21 Two months before the adoption of the Declaration on the Right to Development in December 1986, the *African Charter on Human and Peoples' Rights*, also called the *Banjul Charter*, was enforced. In the Charter's Preamble, the right to development is mentioned to affirm the unity of civil/political and economic/social/cultural rights. Additionally, Article 22 of the Banjul Charter declares that 'all people shall have the right to their economic, social and cultural development', whereby states (individually or collectively) have the duty 'to ensure the exercise of the right to development', http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (last accessed on 1 March 2016).

inalienable right to development, as established in the Declaration on the Right to Development, must be implemented and realized' (Art. 72).²² Furthermore, states are addressed as duty-holders for creating an appropriate environment and effective policies for the right to development's implementation in article 73, in which non-governmental and other grass-roots organisations are additionally addressed to take an active part in the realisation of the right to development.

A number of different working groups were appointed to further elaborate the right to development and its implementation.²³ The Indian economist Arjun Sengupta was the United Nations independent expert on the right to development between 1998 and 2004. Afterwards, the High-Level Task Force on the Implementation of the Right to Development was appointed to support the Working Group on the Right to Development in 2005.²⁴ The Task Force formulated the core norm of the right to development as '...the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centered development respectful of all human rights'. Three key attributes further define the core norm as (a) comprehensive and human-centred development policy, (b) participatory human rights processes and (c) social justice in development. A list of 18 criteria, 68 sub-criteria and 149 related indicators was formulated for the implementation of the right to development.²⁵ One may critically ask if an extensive list of 149 indicators adds clarity to the broad formulation of the right to development in the initial Declaration.

Parallel to these developments, the concept of 'sustainable development' was introduced into the global development domain by the Brundtland Commission in the late 1980s. The Commission's report, *Our common future* (1987), defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.²⁶ Different components of sustainable development, such as ecology, economic and socio-political justice, as well as cultural sustainability, were further elaborated at conferences, such as the Rio Earth Summit (1992), the New York Earth Summit (1997) and World Summits on Sustainable Development (Johannesburg 2002 and 2007). The Millennium Development Goals of 2001, which are based

22 <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> (last accessed on 1 March 2016).

23 Working Group on the Right to Development (1993-1996), Intergovernmental Group of Experts on the Right to Development (1996-1998) and its successor, the Open-ended Working Group on the Right to Development which has had its mandate since 1998 as part of the Office of the High Commissioner of Human Rights.

24 *Leemann*, note 11, p. 49.

25 United Nations 2010: Right to development. Report of the high-level task force on the implementation of the right to development on its sixth session. Addendum: Right to development criteria and operational sub-criteria (A/HRC/15/WG.2/TF/2/Add.2), <http://www.ohchr.org/EN/Issues/Development/Pages/HLTFSession6th.aspx> (last accessed on 1 March 2016).

26 <http://www.un-documents.net/wced-ocf.htm> (last accessed on 1 March 2016).

on the United Nations Millennium Declaration of 2000, declare the commitment ‘to making the right to development a reality for everyone...’²⁷

It can be seen that references and affirmations of the right to development have been made continuously. Its declared importance in different parts of the United Nations organisation and other institutions of international cooperation, however, contrasts with the fact that negotiations on the transformation of the right to development into a legally binding contract, such as a United Nations convention, have failed.²⁸

Indian scholars have contributed significantly to the literature on the right to development. The first reference to the right to development in India can be found in 1990. Raju Ramchandran, a Supreme Court Advocate, published a short article in the Supreme Court Cases journal entitled ‘The Right to Development. Paradigm-Shift in Human Rights’. Arjun Sengupta, the Indian economist who was the United Nations independent expert on the right to development, has played a crucial role in promoting the idea of a human right to development which, he argues, is justified because people agreed upon it. Sengupta has published several articles on the right to development and founded the Centre for Human Rights and Development (CHRD) in Delhi. The CHRD is dedicated to generating ‘an academic debate aimed at promoting a better understanding of the notion of the “Right to Development”’²⁹ by organising conferences and by publishing two major books on the right to development.³⁰ Publications by the Indian legal scholar Upendra Baxi are further important contributions to the study of the right to development. Baxi maintains there are nine important values inherent to the Declaration on the Right to Development: (1) right to self-determination, (2) right to sovereignty over wealth and natural resources, (3) elimination of human rights violations, (4) indivisibility of human rights, (5) international peace and security, (6) human-centred development process, (7) equality of opportunity, (8) process of disarmament used to benefit people’s development, and (9) establishment of a new just international economic order.³¹ For Baxi, development is a participatory process of implementing *all* human rights for *all* people, a reformulation that is an ‘epistemic break from the ideology of *developmentalism*’.³²

27 <http://www.un.org/millennium/declaration/ares552e.htm> (last accessed on 1 March 2016). Its successor, the Sustainable Development Goals, was adopted at the UN Sustainable Development Summit in 2015. See <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/09/24/undp-welcomes-adoption-of-sustainable-development-goals-by-world-leaders.html> (last accessed on 1 March 2016).

28 See *Stephen Marks* (ed.), *Implementing the Right to Development. The Role of International Law*, Geneva 2008.

29 *Arjun Sengupta* et al. (eds.), *Reflections on the right to development*, New Delhi 2005, p. 7.

30 *Arjun Sengupta*, *The Right to Development. A Primer*, New Delhi 2004 and *Sengupta* et al. (eds.), note 29.

31 *Baxi*, note 8, p. 100.

32 *Baxi*, note 8, p. 132.

Nonetheless, there are also a number of critical arguments opposed to the right to development's moral and legal values. The most famous critic of the right to development is Jack Donnelly, the American political philosopher and human rights scholar. Even before the Declaration on the Right to Development was officially adopted, Donnelly published a critical article.³³ He argued that no human right to development exists, as his polemical anecdote quoted above illustrates. Donnelly emphasised threats to the established human rights standards by declaring solidarity rights as human rights in general, or the right to development as a third-generation human right in particular. The generation metaphor, according to Donnelly, can be read either as a stratification of human rights or as an evolution of human rights in which one generation supersedes the former ones. This would, consequently, endanger the claim of human rights being indivisible. Moreover, solidarity as the foundation of the right to development requires membership of a certain group, whereas the former foundation of human rights in human dignity takes nothing more than being born a human. The controversy is part of a broader question on the criteria for adding any new human rights to the Universal Declaration of Human Rights. Development, for Donnelly, should be considered an important aim in realising human rights, but not a right in itself. In Donnelly's point of view, right-holders, duty-bearers, rights-content and related binding obligations of the right to development are not clearly defined.

Although critics of the right to development seem to have become fewer, the issues raised by Donnelly are still prevalent in the discourse on the right to development. Upendra Baxi, for instance, who is generally supportive of the right to development, emphasises critically what is *not* said in the Declaration on the Right to Development by pointing to five 'silences'.³⁴ The first silence is the gap between the Preamble and the text of the Declaration. Only certain values (five out of the nine values Baxi highlights earlier) are listed in the Preamble. Depending on how the text is read, some of the core values of the Declaration which are only mentioned in the Preamble might be underestimated. The second silence is the limited definition of right-holders. The Declaration defines people and states as right-holders, however, the notion of 'people' remains unclear. If the right to development is to be considered as the core human right, a special emphasis would need to be put on women, persons with disabilities and indigenous people, as according to Baxi. The third silence is concerned with the ambiguous definition of duty-bearers and their duties. The Declaration defines the duties of states as (1) the creation of international development policies in accordance with the Declaration on the Right to Development, (2) 'co-operation in ensuring development and specifically in removing "obstacles" to development', and (3) the removal of human rights violations.³⁵ Nevertheless, the Declaration overlooks the contrast between the official target of 0.7 per cent of the gross domestic product for development assistance and the actual volume, as well as the debt burden in many countries caused by structural

33 *Donnelly*, note 7.

34 *Baxi*, note 8, pp. 135-150.

35 *Baxi*, note 8, p. 140.

adjustment programmes. Moreover, the Declaration defines no sanctions for violations against the right to development. The fourth silence deals with the fact that the Declaration invokes comprehensive participation, but refrains from dealing with political regimes that fail to provide a minimum level of participation, such as free and fair elections or policies that exclude certain groups from the right to participation – for example, prisoners, migrants, homosexuals or persons with disabilities. The fifth and final silence refers to disparities between declared goals and means. Additionally, Baxi mentions the danger that states might extend their power for the ‘removal of “obstacles” to the right to development’ by weakening the right to participation of civil society.³⁶

To conclude, I argue that the discussions on the right to development as presented in the present article’s first part remain limited to evaluate the right to development from the perspective of international law. The non-legally binding character of the Declaration on the Right to Development remains unquestioned by both critics and proponents. Critics see the non-legally binding nature of the right as a good reason to condemn it. Proponents, on the other hand, try to circumvent the equally taken-for-granted non-legally binding nature by differentiating rights with perfect and imperfect legal obligations. This differentiation broadens the definition of rights because it includes rights with ‘imperfect legal obligations’, such as the right to development and many other social and economic rights, additional to rights with ‘perfect legal obligations’. The rights with ‘imperfect legal obligations’ rely on indirect implementation mechanisms, such as international or national development policies. I argue that the perspectives presented still fail to notice that the right to development is used in national legal systems such as case law. I illustrate this new perspective on the right to development by taking India as an example in the next section.

III. *The right to development in Indian case law*

The present section demonstrates the right to development’s interpretation, use and juridification in Indian case law. I argue that juridification takes place at three levels: (1) an increase in references to the Declaration on the Right to Development by Indian judges, (2) an affirmation of the existence of a human right to development in judgments and (3) the interpretation of the right to development as part of the Indian Constitution.

The right to development has been mentioned in 29 Supreme Court judgments³⁷ and 77 High Court judgments in India.³⁸ The judgments were identified by using an Indian online legal database called *Manupatra*.³⁹ While a steady annual increase of references to the right

36 Baxi, note 8, pp. 147-148.

37 By using the term ‘judgment’ in the following, I mean both ‘orders’ that are given in the progress of litigation processes and ‘judgments’ that close a case.

38 There are seven additional judgments referring to the ‘right to development rebate’ and not to the United Nations Declaration on the Right to Development. They are, therefore, not considered here.

39 *Manupatra* provides, amongst others, judgments by the Supreme Court of India and Indian High Courts. The database makes it possible to search for catch phrases in judgments, while more estab-

to development cannot be registered, an overall increase can be measured: There are 18 judgments between 1990 and 1999, 48 between 2000 and 2009 and 40 judgments between 2010 and 2015. I argue that this increase can be analysed as a juridification in the sense of increased judicial conflict-solving with reference to the right to development.

‘Juridification’ may generally be defined as the proliferation of law. An extensive range of literature on juridification is available, which was analysed by Lars Blichner and Anders Molander in 2008 to clarify the term’s manifold application. The authors have differentiated five dimensions of juridification. The first dimension, constitutive juridification, refers to ‘a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system’.⁴⁰ The second dimension is juridification as law’s expansion and differentiation, defined as ‘a process by which an activity becomes subjected to legal regulation or more detailed regulation’.⁴¹ The third dimension is juridification as increased conflict-solving with reference to law which is further differentiated between the levels of ‘judicial conflict solving’, ‘legal conflict solving’ and ‘lay conflict solving’.⁴² The fourth dimension is increased judicial power: ‘a process by which the legal system and the legal profession get more power as contrasted with formal authority’.⁴³ Finally, the fifth dimension is juridification as legal framing: ‘a process by which people increasingly tend to think of themselves and others as legal subjects’.⁴⁴ Accordingly, the increased reference to the right to development in Indian case law correlates with the third dimension of juridification as outlined by Blichner and Molander, or, more precisely, with the subcategory of ‘judicial conflict solving’. This means that Indian judges increasingly refer to the right to development for their legal argumentation to solve judicial conflicts. The interpretation of the right to development in Indian judgments has particular importance because the common-law legal system in India is largely case-centred and relies upon judges’ interpretations.

The legal database *Manupatra* ascribes one or two subjects to each of the judgments for their categorisation. The following table shows the number of judgments by the Supreme Court and High Courts of India referring to the right to development per year (years without judgment are not listed) and each judgment’s subjects as ascribed to them by *Manupatra*.

lished legal databases for Indian law (such as the free search engine Indian Kanoon or the Judgment Information System of the Indian Supreme Court) only allow a search for single key words and not whole catch phrases.

- 40 Blichner / Molander, note 2, p. 38, for example, the establishment of the European Court of Human Rights.
- 41 Blichner / Molander, note 2, p. 38-39, for example, the UN Convention on the Elimination of All Forms of Discrimination against Women.
- 42 Blichner / Molander, note 2, p. 39.
- 43 Blichner / Molander, note 2, p. 39, for example, the expansion of Indian courts’ jurisdiction to investigate itself (*suo moto*) in human rights violations of marginalised (groups of) people by public interest litigation.
- 44 Blichner / Molander, note 2, p. 39.

Year	Subject	Number of Judgments
1992	Banking/Law of evidence	1
1995	Property Insurance Property/Constitution	3
1996	Family (3) Constitution Labour and Industrial Service	6
1997	Constitution/Criminal Constitution Human Rights	3
1999	Environment Family Labour and Industrial	3
2000	Labour and Industrial (3) Environment (2)	5
2001	Trusts and Societies Environment (3) Civil Constitution	6
2002	Constitution (2)	2
2003	Customs Service (2) Service/Constitution Electricity Property/Constitution Constitution Environment Environment/Civil Civil	10
2004	Constitution Property Civil/Constitution Civil	4
2005	Labour and Industrial Constitution (2) Civil/Property Constitution/Civil	5
2006	Civil Constitution/Excise Property/Civil Service Environment	5
2007	Constitution (3) Property/Environment Property/Civil Service/Constitution	6

Year	Subject	Number of Judgments
2008	Commercial/Constitution Tenancy/ Constitution	2
2009	Environment Commercial Property (2)	4
2010	Family (2) Property Civil (2) Constitution Motor Vehicles	7
2011	Constitution Civil (2) Company (2) Mines and Minerals Environment	7
2012	Miscellaneous Land Acquisition Tenancy Constitution/Service Trusts and Societies Civil Environment Constitution Education	9
2013	Constitution/Environment Environment Homosexuality/Gay Rights Case/ Constitution Land Acquisition Civil Constitution/Miscellaneous	7
2014	Civil (2) Property Constitution (2) Land Acquisition	6
2015	Family Environment Constitution/Election Property Criminal	5

Tab. 1

The number of judgments by the Supreme Court and High Courts of India referring to the right to development per year and the subject as ascribed to them by *Manupatra*. See: <http://www.manupatrafast.com/> (last accessed on 18 April 2016).

The first judgment that refers to the right to development⁴⁵ was decided by the Supreme Court on 30 January 1992. The Reserve Bank of India accused the Peerless General Finance and Investment Company of conducting prize chits and money circulation schemes that were banned by the Prize Chits and Money Circulation Scheme Act of 1978. The Finance Company's schemes, according to the judgment, would disadvantage subscribers 'who need security and protection most'. The judges in the case were N.M. Kasliwal and K. Ramaswamy. In their judgment, they stated that, 'the right to development is one of the most important facets of basic human rights'. They mentioned the right to development in the context of the right to life, although they did not explicitly interpret it as part of the right to life, nor did they explicitly refer to the Declaration on the Right to Development or to the United Nations in general.

The first twelve judgments between 1992 and 1997 were decided exclusively by the Supreme Court Justice K. Ramaswamy. According to two interviews⁴⁶ conducted, K. Ramaswamy is one of the few Dalit⁴⁷ judges at the Supreme Court of India. He wrote a large number of judgments during his career. A Supreme Court Senior Advocate described Ramaswamy to me as 'a social reformer who was dedicated to changing India'. Another interviewee reported that the judgments by Ramaswamy that refer to the right to development were to be seen in a broader trend towards the reference to international law in Indian jurisprudence in the late 1980s and early 1990s. Previously, Indian judges had referred rather to judgments of other common-law countries, such as the UK or Australia.

The second reference to the right to development was made in a Supreme Court order of 1995.⁴⁸ The appellant, Murlidar Dayandeo Kesekar, entered into an agreement with an Adivasi called Vishwanath Pandu Barde (respondent in the case) to transfer a piece of land to him that was initially allotted to the respondent by the state government for agricultural use to improve his living conditions and self-supply. The court refused to grant permission for the transmission and alienation of the land and dismissed the appeal of Kesekar because it held the appellant's possession of the land to be unlawful and directed the respondent Barde to resume his land. While elaborating the legal argument in this case, Justice K. Ramaswamy evokes different sources to illustrate his understanding of justice with emphasis on the rights of the 'less privileged', especially Dalits and Adivasis (he uses the term 'tribal'). He mentions, amongst others, Mahatma Gandhi, Rabindranath Tagore, Swami Vivekananda, Pope Pius, B.R. Ambedkar and John Rawls. Ramaswamy's first reference to a legal source is the Universal Declaration of Human Rights (Art. 1, 3, 17, 22, 25). Thereafter, an entire paragraph is dedicated to the United Nations Declaration on the Right to De-

45 *Peerless General Finance and Investment Company vs. Reserve Bank of India* (MANU/SC/0685/1992).

46 First interview on 9 September 2014 with an activist and independent legal scholar who works mainly on land acquisition and displacement in India; second interview on 19 October 2014 with a practicing Senior Advocate of the Supreme Court of India whose focus is on affirmative action.

47 See note 5 for an explanation of the term 'Dalit'.

48 *Murlidhar Dayandeo Kesekar vs. Vishwanath Pandu Barde* (MANU/SC/1046/1995).

velopment. Eventually, he refers to Articles 14, 15, 16 and 21 of the Indian Constitution (articles on the right to equality, non-discrimination and the right to life). In the paragraph on the right to development, Justice K. Ramaswamy quotes the definition of development as presented in the Declaration's Preamble, and he quotes Articles 1, 2, 3, 4, 8 and 10 of the Declaration fully. He says, interestingly, that India was a signatory of the Declaration on the Right to Development. This statement is surprising, because it does not make sense from the perspective of international law. The Declaration on the Right to Development was adopted by the United Nations General Assembly as a resolution. There are, however, no signatories as such to a United Nations *declaration*. A *declaration* is different from so-called legally binding international treaties, such as United Nations *conventions* or *covenants* which must be signed by a certain amount of countries before being ratified and which are, after their ratification, legally binding for the signatories.

An Indian human rights scholar, in an interview in October 2014, interpreted this 'wrong' usage of international law by Indian judges as a lack of knowledge regarding international law theory due to insufficient training in international law. In the special case of Justice K. Ramaswamy, the human rights scholar commented that Ramaswamy might have used the references to the right to development (and other international laws) to gain prestige from presenting his knowledge on international law without necessarily adding value to the legal argument. Her argument might be supported by the fact that the references to the right to development in Ramaswamy's judgments often seem indirectly connected to the legal argument, rather part of a whole list of references to international law.

Nonetheless, I would like to consider the use of the right to development by Justice K. Ramaswamy in a range of further judgments to demonstrate his affirmation of the existence of a human right to development which is, I propose, another form of juridification enabled by Ramaswamy's own (intended or unintended) misconception of the Declaration on the Right to Development. In the third judgment of K. Ramaswamy,⁴⁹ he seems to broaden his 'wrong' interpretation of the right to development when he calls it a *covenant* on the right to development or, as in another judgment, a *convention* of the right to development, '...to which India played a crusading role for its adoption and ratified the same'.⁵⁰ This interchangeable use of the terms *declaration*, *convention* and *covenant* becomes of further importance when Justice Ramaswamy argues in another judgment⁵¹ that the right to development has become part of the Indian Constitution and is, thus, enforceable. The argument goes as follows: Section 2(b) of the Indian Protection of Human Rights Act (1993) defines human rights as 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international conventions and enforceable

49 *LIC of India vs. Consumer Education & Research Center* (MANU/SC/0772/1995).

50 *C. Masilamani Mudaliar vs. Idol of Sri Swaminathaswami Thirukoli* (MANU/SC/0441/1996).

51 *Mrs. Valsamma Paul vs. Cochin University* (MANU/SC/0275/1996).

by courts in India'.⁵² 'Thereby', according to Ramaswamy's legal argumentation, 'the principles embodied in CEDAW [Covenant on the Elimination of the Discrimination against Women] and the concomitant right to development became an integral part of the Constitution of India and the Human Rights Act and became enforceable.'⁵³ I would argue that this interpretation of the right to development as part of the Indian Constitution which, according to Ramaswamy, becomes 'enforceable' in Indian jurisprudence is another dimension of the juridification of the right to development.

Justice K. Ramaswamy's legal enhancement of the right to development in his judgments is an *obiter dicta* in the legal sense. In common law, *obiter dicta* is differentiated from *ratio decidendi*. Regarding judicial precedents, only *ratio decidendi* is binding. *Obiter dicta*, on the other hand, is persuasive only.⁵⁴ This means that *obiter dicta* has less legal impact than *ratio decidendi* and does not constitute a legally binding precedent or judge-made law in the narrow sense. Nonetheless, both types of precedents constitute an interesting object of study for legal anthropology because the latter focuses not only on constitutional law or judge-made law, but also on how law emerges – even if it might not eventually be transformed into 'proper' law. This becomes important because judges later refer back to Justice K. Ramaswamy's interpretation of the right to development. Even if this does not mean that Ramaswamy created a legally binding precedent or *ratio decidendi* by his interpretation of the right to development as a human right or as part of the Indian Constitution, he, nonetheless, created an *obiter dicta* or persuasive precedent that served other judges in supporting their respective legal arguments.

The right to development in each of Justice K. Ramaswamy's judgments is used to support minority rights, especially those of Dalits, Adivasis and women. Apart from the cases mentioned above, there was, for instance, a judgment on the constitutionality of customary law in the Indian state of Bihar in 1996. Bihar has excluded Adivasi women from the inheritance of property. The right to development was used by Ramaswamy to argue for an amendment of the discriminatory law '...to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.'⁵⁵ The right to development is related mostly to Articles 14, 15 and 16 of the Indian Constitution on the right to equality and the right to equal status and equal opportunity of minorities. It is also related to Article 21 to protect the right to life, including the right to property, the right to shelter, the right to food, the right to so-

52 The Section Ramaswamy refers to is actually Section 2(d) of the Protection of Human Rights Act, which reads as follows '...the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.' Apart from smaller variations, Ramaswamy replaced the 'International covenants' in his quotation with 'international conventions'.

53 *Mrs. Valsamma Paul vs. Cochin University* (MANU/SC/0275/1996).

54 Black's Law Dictionary Online, <http://thelawdictionary.org/ratio-decidendi/> (last accessed on 1 March 2016).

55 *Madhu Kishwar vs. State of Bihar* (MANU/SC/0468/1996).

cio-economic well-being and so forth. This introduction and emphasis on the right to development as a human right and part of the Indian Constitution by Justice K. Ramaswamy spread further in judgments of the Indian Supreme Court and High Courts up to the present time.⁵⁶ Minorities that are protected in the judgments which refer to the right to development include women, children, persons with disabilities, Dalits, Adivasis and religious minorities (i.e. Christians and Muslims). The areas of discrimination of minorities are mainly education, labour rights, succession, land acquisition and property rights. The discrimination is often part of an extra-constitutional customary law which contains aspects that are perceived as being unconstitutional.

Apart from the cases that support minority rights, there are judgments from the early 2000s onwards that interpret the right to development as opposed to the right to environment or the human rights of particular groups of people. Thus again, there is a narrowing of the notion of development to an understanding of development in terms of economic growth. The right to development is used for utilitarian legal argumentations by judges to justify human rights violations of ‘small’ groups of people in the name of the development and public interest of the people of India.⁵⁷ One example is a case on the building of the Yamuna Expressway between Greater Noida (close to Delhi) and Agra. That project was negotiated firstly in the High Court of Uttar Pradesh⁵⁸ and afterwards in the Supreme Court.⁵⁹ There it is said that, ‘The scales of justice must tilt towards the right to development of the millions who will be benefited from the road and the development of the area, as against the human rights of 35 petitioners therein.’ This utilitarian argument looks at the greatest happiness of the greatest number of people and, thus, justifies human rights violations of particular groups of people (here displaced persons).

IV. Conclusion

The Declaration on the Right to Development has been seen to mark a paradigm shift by defining development as a participatory process to fulfil all human rights of all people rather than an idea that equates development solely with economic growth. On the other hand, it has been criticised as a threat to human rights because the idea of ‘third-generation’ or solidarity rights additionally defines collectives as right-holders, which endangers the

56 For a similar argument on how ‘rumours of rights’ can be interpreted as a juridification of human rights, see *Julia Eckert*, Rumours of Right, in: Julia Eckert et al. (eds.), *Law Against the State. Ethnographic Forays into Law’s Transformations*, Cambridge 2012, pp. 147–170.

57 The use of the notion of public interest/public good or the right to development of the people of India to justify human rights violations is common in India. See *Usha Ramanathan*, Displacement and the Law, *Economic and Political Weekly* 24 (1996), pp. 1486–1491. See also the debates about India’s Intelligence Bureau’s list of anti-development organisations which emerged in June 2014 (“Invisible Strings” *Tehelka*, 28 June 2014).

58 *Nand Kishore Gupta vs. State of U.P.* (MANU/UP/1123/2009 and MANU/UP/0409/2010).

59 *Nand Kishore Gupta vs. State of U.P.* (MANU/SC/0681/2010).

claim of human rights as indivisible. In addition to this moral doubt, the right's legal justification and justiciability are regarded as questionable by critics because right-holders, duty-bearers, rights-content and related binding obligations are defined too vaguely. I argued that these discussions fail to notice the usage of the right to development in national legal systems through case law. I illustrated the interpretation, use and juridification of the right to development in Indian case law as one example. Firstly, I showed that there was a juridification by increased references to the Declaration on the Right to Development for judicial conflict solving. Secondly, I demonstrated that there was an affirmation of the existence of a human right to development in the judgments. And thirdly, I asserted that Indian judges had interpreted the right to development as part of the fundamental constitutional right to life. As illustrated, the use of the right to development serves mainly to protect minority rights. However, the right to development is also used to justify human rights violations of particular groups of people for the purpose of the public interest and development of the people of India in a case on infrastructure building. The right to development can, in the end, cut both ways by its inherent plurality of possible meanings and its ample scope for possible interpretations in legal argumentations. On the one hand, it served as a fulfilment of promises it actually never made, which was seen by Ramaswamy's enhancement of the right to development to a legally-binding law for his promotion of minority rights. On the other hand, the Declaration's definition of development as a process 'in which all human rights and fundamental freedoms can be fully realized' (Art. 1) was turned towards the exact opposite by being used to legitimise human rights violations. This double-edged nature of development then raises broader questions concerning the concept of development and if it could ever become an instrument to create a fairer world or if the world needs a real 'alternative to development'⁶⁰ to become more just.

60 *Arturo Escobar*, *Imagining a Post-Development Era? Critical Thought, Development and Social Movements*, *Social Text* 32 (1992), p. 27.