EMERGING NEED FOR A NEW RIGHT TO PROPERTY

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Abstract

Our Constitutional history and the Constituent Assembly debates strongly suggest that private property rights are fundamental rights. As such, some sort of deep and broad societal harmony would seem to be required for change in the character of this fundamental right, and it is necessary and proper that the imposition on those rights that we permit to be exercised by the sovereign power residing in the people be strictly limited.

This Article deals with the brief legal history of Indian private property law, covering the 44th Amendment Act, 1978. This history shows that private property rights were considered as fundamental, even foundational, elements by the founders of the Indian Constitution. The question that emerges for consideration, whether in a democratic polity, which is supposedly governed by the rule of law, the State should be allowed to deprive a citizen of his property without adhering to the law? Property rights have been at the centre of recent human rights debates on land reforms. The author concludes with suggestions to create new right to property for the welfare of the society.

Introduction

"So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."

- William Black Stone

The purpose and function of law is to regulate social interests, arbitrate conflicting claims and ensure security of persons and property of

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people. Property means the highest right a man can have to anything being that right which one has to lands or tenements, goods or chattels which does not depend on others courtesy.[1] The right to property is one of the most controversial human rights, both in terms of its existence and interpretation because the definition of the right was not included in the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights.[2] **Article 17** of the Universal Declaration of Human Rights (UDHR) enshrines the right to property as follows:

"(1) everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property"[3].

Property can serve as the basis for the entitlements that ensure the realization of the right to an adequate standard of living and it was only property owners which were initially granted civil and political rights, such as the right to vote. Property rights have frequently been regarded as preventing the realization of human rights for all, through for example slavery and the exploitation of others. Unequal distribution of wealth often leads to discrimination on the basis of sex, race and minorities, therefore property rights may appear to be part of the problem, rather than as an interest that merits protection. Property rights have been at the centre of recent human rights debates on land reform, the return of cultural artifacts by collectors and museums to indigenous peoples, and the popular sovereignty of peoples over natural resources.[4]

Historical background of Right to Property

If the legislative history of Right to Property shall be seen it would be found that it has been emphatically recognized in the past. The Constituent Assembly debated both the inclusion and the content of a fundamental right to property for two-and-a-half years. Article 31 was modeled on Section 299 of the Government of India Act, 1935.

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[1] R.C. Cooper v. Union of India, AIR 1970 SC 564. (Bank Nationalization Case)

[2] Deobbler, Curtis; Introduction to International Human Rights Law; CD Publishing; (2006); pp. 141-142.

[3] "Universal Declaration of Human Rights"; United Nations; pp. Article 17.

[4] Robinson, Eric W.; Ancient Greek Democracy; (2004); Wiley-Blackwell; p. 302.

While drafting Article 19(1)(f) and Article 31 the framers of our Constitution attached sufficient importance to Right to property to incorporate it in the chapter on fundamental rights and rejected the suggestions and contentions to the contrary.

The length of the Constitution is a reflection of the magnitude of problems faced by the nation at birth - its integration and consolidation as a nation state, the need to reassure minorities following the trauma of Partition, the desperate poverty of the vast majority, the low rates of economic growth, and pervasive practices of social and religious discrimination. The reorganization of property relations in India was at the heart of the solutions to all of these problems. The members of the Constituent Assembly realized that a social transformation was necessary to achieve a liberal democracy.

44th Amendment Act, 1978 and Right to Property

By Constitution (Forty Fourth Amendment) Act, 1978, articles 19(1)(f) and 31 were deleted from the Constitution and a new chapter; i.e. chapter IV entitled "Right to Property" was inserted incorporating a new article, viz. 300-A. It provides that "no person shall be deprived of property save by authority of law". The scope and extent of this article was considered in some cases particularly the question whether having regard to the express language of article 300-A, the common law limitations of eminent domain can be read into that article especially when, the right to property is no more a fundamental right?

Article 300-A enables the State to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond required public interest. The limitation or restriction must not be disproportionate to the situation or excessive. Thus in each case courts will have to examine the scheme of the impugned Act, its object, purpose also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms of other provisions of the Constitution.

Modern challenges of displacement, livelihood and rehabilitation and need for a new Right to Property as a Basic Feature

The policy of the Government to take over the land of small poor peasants in the name of development projects for social welfare actually infringes the basic human right to livelihood. Moreover, the government also delays in payment of compensation to a landowner whose land was acquired. But according to law, "statutory authorities are bound to not only pay adequate compensation but also rehabilitate displaced persons." The Supreme Court said in various cases that denying compensation to farmers amounts to deprivation of livelihood, which is a violation of Article 21 of the Constitution. "Even under valid acquisition proceedings, there is a legal obligation on the part of the authorities to complete the proceedings at the earliest and to make payment of requisite compensation." In the famous case of ***KT Plantation v. State of Karnataka***[5], the Supreme Court declared that "the right to claim compensation is inbuilt in Article 300-A." When a person is deprived of his property, the State has to satisfy this claim. In addition, the law taking away the property should specify the public purpose and it is subject to judicial review. Thus, what was lost by downgrading the fundamental right to property to an ordinary right was partly salved.

The same Constitution Bench reiterated this right in another case called, ***Rajiv Sarin v. State of Uttarakhand***.[6] It said, under Article 300A, "a person can be deprived of his property, but in a just, fair and reasonable manner." The Court set guidelines for computing compensation and asked the authorities "to determine and award compensation following a reasonable and intelligible criterion enunciated above."

But the issues related to property rights are far from solved. The amended version of the Land Acquisition Act has been passed, but it does not entirely settle the issues of dubious takeover of land and failure to pay fair compensation. Although renamed the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, it leaves open the possibility of the Central and State Governments being able to bypass it and deny vulnerable property owners much-needed

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[5] (2011) 9 SCC 1.
[6] (2011) 8 SCC 708

relief. Land acquisition is inevitably a controversial issue in nations with land scarcity which are trying to achieve rapid economic development through greater industrialization. India is no exception.[7]

In 2011, when the government published the draft Bill for public comments, it was found to have exempted 16 Central Acts, including the infamous Special Economic Zones (SEZ) Act, 2005 from the proposed provisions. Given that reckless acquisition of land for SEZs had precipitated protests against forced acquisition, these exemptions understandably created outrage. As pointed out by the Parliamentary Standing Committee on Rural Development that reviewed the draft Bill in 2012, as much as 95 per cent of all land acquisitions by the Central government were done through the 16 Central Acts, and that exempting them from their purview would make the proposed amendments meaningless. It recommended the removal of the exemption clause. It went further and suggested that the 16 Central Acts, which had provisions for acquiring land, should be amended to bring their compensation and entitlements package on a par with the proposed Bill.[8]

In its final form, the Bill exempted 13 Central Acts from the new provisions. The fewer number of exemptions from 16 down to 13 did not indicate any change of heart. The government had to drop the SEZ Act since it could not defend it by any better logic. In other words, the government has kept a substantial part of its land acquisition process outside the purview of the new Act.

The position of the State governments in this issue is no better. Land and development are State subjects, but acquisition is in the Concurrent List. State governments have their own pieces of legislation to take over property, and these too are riddled with problems.

For instance, Maharashtra acquires large tracts of land under the provisions of its Industrial Development Act. It uses this Act to create exclusive industrial and economic zones. It has started acquiring 67,500 acres from 78 villages to create a Mumbai-Delhi industrial corridor. Farmers are agitating against this and are concerned about forcible acquisition.

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[7] Namita Wahi, Compromise over land takeover. New Indian Express/ 11-09-2013.

[6] A. Srivathsan, Grounds Far From Settled. The Hindu/ 17-09-2013.

Tamil Nadu too has a similar legislation. A few years ago, it creatively deployed the Acquisition of Land for Industrial Purposes Act to take over land for the expansion of Chennai airport. Affected residents unsuccessfully challenged such extended use of the Act.[9]

In 2011, the Mayawati Government in Uttar Pradesh announced changes in land acquisition policy that sought to outdo the then prevailing Central Act in many ways. The government decided not to directly involve itself in acquiring land for private developers, and promised to give 16 per cent of developed land to farmers affected by acquisition, and pay cash compensation. It committed itself to providing jobs for affected people. Widespread farmer protests in **Bhatta-Parsaul** and an impending round of elections then may have compelled the U.P. government to make those changes. But it clearly demonstrated the fact that State governments, if they wish to, can improve over the Central Act and bring forward a more people-friendly legislation. Many more issues are there portraying large-scale displacement caused by the creation of Special Economic Zones and projects like the **Narmada Dam**, as well as land conflicts in **Singur** and **Nandigram**, as motivating the demand to safeguard the right to property from State intervention. These rights actually need protection from being violated by the executive time and again and require becoming the part of basic structure.

The doctrine of basic structure has been used to accommodate different objectives at different times in the history of India. At first, it was used to protect the Constitution's very document from being altered at the whims and fancies of the executive.[10] The executive was indeed powerful, and at the danger of being subject to its tyrannical powers, the judiciary even curved out its own independence. When India witnessed corruption and misuse of executive powers, the Supreme Court utilized the doctrine for expanding its own power of judicial review in areas, which had nothing to do with the original formulation of the doctrine, questions that were essentially in the political thicket of things. With its own accountability coming under scanner, the court was quick to turn the application of the doctrine into one that of judicial restraint.

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[9] A. Srivathsan, Grounds Far From Settled. The Hindu/ 17-09-2013.

[10] Jasdeep Randhawa, Understanding the Judicialization of Mega Politics - The Basic Structure Doctrine and Minimum Core; http://www.juspoliticum.com

Suggestions

Laws dealing with land and property have led to a maximum number of Constitutional amendments and litigation in the Supreme Court over the decades. After the 44th Amendment to the Constitution in 1978, a citizen has no constitutionally guaranteed right to acquire, hold or dispose of property. It is no longer a fundamental right. Therefore, an aggrieved citizen cannot move the Supreme Court or a high court alleging infringement of his fundamental right. All that is left is an ordinary right under Article 300A that says "no person shall be deprived of his property save by authority of law." There is no indication of the right to compensation, let alone a fair and just amount. Therefore, the assertion of the Constitution Bench on the right to compensation is significant. The right to property is now considered to be, not only a Constitutional or a statutory right, but also a human right. Though, it is not basic features of the Constitution or a fundamental right, human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now, however human rights are gaining an even greater multifaceted dimension. The right to property is considered, very much to be a part of such new dimension.[11]

1. The human rights of livelihood, rehabilitation etc should be woven into the new type of property right that may be adopted as a new fundamental right to property under Part III of the Constitution to safeguard the welfare of the poor and illiterate citizens having no other means of livelihood except cultivation.
2. Moreover, many of the legislative entries, including entries which set out the subject-matters in respect of which taxes can be levied, necessarily pre-suppose the right to private property. The existence of the separate States would be in direct jeopardy if the right to private property did not exist.
3. The democratic way of life, the very institution of Parliament with its necessary incidents like free elections, freedom to oppose and the

[11] Lachhman Dass v.Jagat Ram & Ors. (2007) 10 SCC 448: (AIR 2007 SC (Supp) 1169) : Amarjit Singh & Ors. V.State of Punjab & Ors. (2010)10 SCC 43(AIR 2011 SC (Civ)1587: 2011 AIR SCW 3413) ;Narmada Bachao Andolan v. State of Madhya Pradesh & Anr. AIR 2011 SC 1989 : (2011 AIR SCW 3337); State of Haryana v. Mukesh Kumar & Ors.AIR 2012 SC 559: (2012 AIR SCW 276) and Delhi Airtech Services Pvt.Ltd.V.state of U.P. & Anr. AIR 2012 SC 573): (2012 AIR SCW 129)

right to dissent would all be paralyzed if the right to private property did not exist.

4. There is an urgent and real need to democratize the process of treaty making. The Court should intervene or restrain the Union of India from entering into treaty obligations which are against the rights of the citizens and should also check the validity of the treaty provisions and economic policies that are at the root of this treaty, even before a law is made by the Parliament. Under our Constitutional system, it is not the right of the executive. Moreover the treaty making power should be subjected to Basic Structure Review.

"Law cannot stand still. It must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will shed that bark and grow a living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress, or if the society is vigorous enough, it will cast away the law, which stands in its growth. The law must, therefore, constantly be on the move adapting itself, to the fast changing society and not lag behind".[12] Accountability is an essential part of rule of law. Conferment of some discretion to the legislature should be the minimum possible, and the set norms, standards or guidelines should regulate it, so that it does not tend to become arbitrary. Therefore, the rule of non-arbitrariness is something to be tested by the judiciary whenever the occasion arises.

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[12]This observation was made by Mr. Justice P.N.Bhagwati in National Textiles Workers Union v. P.Ramkrishnan (1983) 1 SCC 228.