

Disputing the Human Rights Discourse on Property: The Case of Development and Vulnerability in India

Deepa Kansra*

Abstract

Property rights today have occupied tremendous academic and political space because of their close affiliation to human rights. At the global forums the right to property is often advocated as a "fundamental human right" essential for the integrity of the individual, also crucial to freedom, prosperity and realizing equality. However, beyond the human right proposal, the fact of economic development in the globalization decade has affected the state policies that have disturbed the sanctity of property rights for many households. Owing to such occurrences, the issue of 'property' is now one of the biggest concerns of the state and the society, giving adequate reasons to question or dispute illusionary human rights discourse on property. In India, the harsh reality of land acquisition in exercise of the power of eminent domain has reduced property to a mere political construct. The conflicts over acquisition and subsequent social exclusion have begun to expand their ambit and have taken over the streets, court-rooms, public space. This paper is an attempt to put forth substantial arguments to satisfy that a human rights discourse on property is either faulty or ignorant to reality, if devoid of context. Also, theorizing on property rights does not suffice as a standard for reasonable reforms in state policy *vis-à-vis* property.

I. Introduction

The sanctity of 'property rights' to law and society has been established time and again through expressions; academic, philosophic and political.¹ Property has always been a

* Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi.

¹ As explained: "the relationship of people to things is a special, often highly emotional relationship. From early childhood to end of one's life, one's sense of worth; sense of self and identity are influenced by this relationship." See Peter Salsich, "Property Law serves Human Society: A First Year Course Agenda", 46:617 *Saint Louis University Law Journal* 617 (2002). In order for the right to property to be fulfilled and "for everyone to really enjoy the right to property, every individual should enjoy a certain minimum of property needed for living a life in dignity, including social security and social assistance." See Jacob Mchangama, "The Right to Property in Global Human Right Law" *Cato Policy Report* (2011). Available at http://www.cato.org/pubs/policy_report/v33n3/cprv33n3-1.html (Last visited 20.6.2011).

matter of curiosity,² owing to its unique placement within the socio-political landscape. To some scholars it is merely a contested concept and one that evolves historically. The dictionary defines property as a thing or collection of things that one owns, whereas a legal definition describes property as a bundle of rights. It is not even agreed whether property is a natural right, or a creation of the state. The "amorphous definition of property demonstrates the variety of meanings that may be attributed to property..."³ In the eyes of law, property rights establish security of assets, suggesting that "property rights are the rules of the game that determine who gets to do what and who must compensate whom if damages occur"⁴.

In the current times, property rights are extremely popular because of their close affiliation to human rights.⁵ It is suggested that for a long time the human-rights

² One opinion states that "property is a civil right, born of occupation and sanctioned by law. Another maintains that it is a natural right, originating in labor, and both of these doctrines, totally opposed as they may seem, are encouraged and applauded." "The Roman law defined property as the right to use and abuse one's own within the limits of the law -- *jus utendi et abutendi re suâ, quatenus juris ratio patitur.*" See P.J Proudhon, *What is Property? An Enquiry into the Principle of Right and of Government*, Dover Publications 4-47 (1970). Also, it was John Locke, who first shocked the ruling class of his era by proclaiming in his masterpiece *Two Treatises of Government* (1690) that property rights existed prior to the government. According to John Locke, property right is not a creation of the government, but instead, the source of the government. In his own words, "Government has no other end but the preservation of property." Locke identified the relation between rule of law, property rights and the accumulation of wealth. "The great and chief end...of men's uniting into common-wealth's and putting themselves under government, is the preservation of their property. See Rashmi Dyal Chand, "Exporting the Ownership Society: A Case Study on the Economic of Property Rights", Available at <http://ssrn.com/abstract=968689> (Last visited 21.6.2011). In addition, Adam Smith was influenced by John Locke's perspective. "Smith built on Locke's view that property existed within a larger system of natural rights and that the institutions of property and government were self-reinforcing. Private property, according to Smith, created a role for government in defending property, and the existence of government created the security to stimulate the creation of new property. Smith built on the relationship between property and government to justify government's role in providing national defense and in administering justice. National defense seeks to protect property from external threats, while the administration of justice ensures the integrity of property rights in the face of internal disputes. He argued that these two functions are critical to the sanctity of private ownership and ultimately to determining the wealth of nations." See Terry Anderson and Laura Higgins, *Property Rights*, Hoover Press 6 (2001).

³ Scott Shackelford, "The Promise and Peril of Property Rights Formalization", Available at <http://ssrn.com/abstract=1395958>, at 6 (Last visited 15.7.2011).

⁴ Terry Anderson and Laura Higgins, *Property Rights*, Hoover Press 2 (2001).

⁵ 'Human rights are norms that help to protect all people everywhere from severe legal, political and social abuses. They are addressed primarily to governments, requiring compliance and enforcement. They are norms dealing with how people should be treated by their governments and institutions. Often referred to as 'high priority norms' or of primary importance.' See Human Rights, *Stanford Encyclopedia of*

discourse had been self-contradictory for proposing human rights as essential for freedom and prosperity, without even committing to the protection of right to property. Such hostility within the human rights theory has been a hindrance to securing basic rights to livelihood and security, as well for ameliorating poverty. The need to uplift the status of property rights as a 'human right' has emerged strongly at the international forums.⁶ In 2008, the Commission on the Legal Empowerment of the Poor, a working group under the UNDP, furnished a report concluding that the right to property must be understood as a "fundamental human right" essential for the integrity of the individual. The report adopts a classical understanding of the right to property as intrinsically linked to individual freedom, the security of property is crucial to freedom, prosperity and realizing equality. In addition, the report stresses the importance of property rights for economic development, wherein access and security over land contributes to family wealth and social security.⁷

Philosophy, available at <http://plato.stanford.edu/entries/rights-human/#GenIdeHumRig> (Last visited 1.7.2011).

⁶ The positive obligation to fulfill the right to property was cited in a report in 2010 by UN Special Rapporteur on the Right to Food asserting that the unequal distribution of land threatens the right to food. The right to food entails an obligation on the state to secure access to land through redistributive programmes that may in turn result in restrictions on others right to property because landlessness is a cause of particular vulnerability. Access to land not only secures the right to food, but also other human rights such as right to work and housing. "The right to food requires that each individual alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. States may be under an obligation to provide food where "an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal". Primarily, however, the right to food requires that States refrain from taking measures that may deprive individuals of access to productive resources on which they depend when they produce food for themselves (the obligation to respect), that they protect such access from encroachment by other private parties (the obligation to protect) and that they seek to strengthen people's access to and utilization of resources and means to ensure their livelihoods, including food security (the obligation to fulfil). See General Assembly, Sixty-Fifth Session, "Report of the Special Rapporteur On the Right to Food" August (2010). Available at http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf (Last visited 23.6.2011).

⁷ As put forth by experts, there are avenues by which 'land access may contribute to livelihoods of poor households and to the alleviation of poverty in the short and longer terms. (a) Excess income gains that accrue when improved land access enhances family income above and beyond the pure rental value of land. Providing a hectare of land to a landless rural household will boost the family's net income significantly, and significantly more than it will boost the income of a wealthier household. This latter finding is especially important because it indicates that land permits the poor household to make better use of its labour and other endowments, something that is good for the family and for the overall

The global efforts are an endeavor to paint property rights as a basic or human right, falling short of any significant outcomes in practice. In realistic terms, experiences worldwide indicate that property has been a direct expression of the political affairs and policies of the state. In India there has been massive unrest and violence on the issue of property rights. The fact of economic development in the globalization decade has time and again reflected in the state policies that prejudicially have disturbed the sanctity of property for many households. The issue of 'property' is now one of the biggest concerns of the state and the most vulnerable sections of the society, giving adequate reasons to question the sanctity of the human rights discourse on property.

In this regard, the power of eminent domain has been scrutinized to offers a realistic answer as to establish property as a mere political construct. In exercise of power of eminent domain governments can seize private property and thus acquire assets of the people in the name of the public good.⁸ The primary remedy against acquisition is policy of resettlement and compensation. Quoting from experience, acquisition in India has faced mass protest and citizen violence; in Sub-Saharan Africa 'three sources of legal disempowerment of the vulnerable are visible: (1) process of acquisition, wherein compensation valuing billions of dollars remains unpaid in some regions without clear avenues of redress; (2) the basis for compensation payment, which routinely fails to take into account real costs to the loss of land, and (3) manipulation, through purposeful

economy. Thus, enhancing the land access of poor rural households is good social and economic policy.(b) Food security effects that occur when enhanced land access cheapens the effective or shadow price of food for households.' See M.R Carter, "Designing Land and Property Rights Reform for Poverty Alleviation and Food Security", available at <http://www.fao.org/docrep/006/j0415t/j0415t06.htm> (Last visited 12.6.2011).

⁸ Recognized public uses for which the power of eminent domain may be used including acquiring land for schools, parks, roads, highways, subways, public buildings, and fire and police stations, to mention a few. A key attribute of eminent domain is that the government can exercise its power to take property even if the owner does not wish to sell his or her property. When government seeks to acquire land, it usually does so by entering the voluntary market like any other party, but potential sellers may try to get higher than competitive market prices by threatening to hold up the acquisition." *Supra* note 4 at 56.

or poorly specified definition, of what constitutes public purpose'.⁹ In the wake of globalisation and privatization, acquisition of land is one of the critical issues to be faced by contemporary democratic politics, striking the very attempt to define property as a human right or a universal norm.

II. Property and Political Culture: The Case of India

Today, securing property rights is a popular idea. The human rights discourse has bonafide expressed the sanctity of property as an asset for wellbeing and social inclusion. However, "market-based capitalism has led to rapid industrialization and widespread prosperity in the developed world... capitalism has not been as successful in the developing world, in some cases breeding widespread discontent, insecurity, and leading to an explosion of unplanned urban sprawl."¹⁰ There is, of course, "a place for property rights within the human rights domain, but these rights must be considered together with a spectrum of rights...for example, in the realm of housing and land, property rights have often proven inadequate for fully achieving the objective of universal access to a place to live in peace and dignity. Indeed, on their own, property rights are often seen to undermine the pursuit of this goal, in many situations serving...merely to justify a grossly unfair and unequal status quo."¹¹ With the increasing pressures on land due to urbanization, rapid economic development, increasing infrastructure requirements etc., especially in a fast growing economy like India, the acquisition of land by the Government has increased. Development-induced displacement can be defined as the forcing of communities and individuals out of their homes, often also their homelands, for the purposes of economic development. Use of coercion or force of any nature by State is central to the idea of development induced displacement. At the international level, it is viewed as a violation of human rights. The underlying thrust of these facts is to expose the nature of property rights as being

⁹Anonymous, "Empowering the Poor through Property Rights", available at <http://www.undp.org/legalempowerment/docs/ReportVolumell/ch2.pdf> (Last visited 25.7.11).

¹⁰ Scott Shackelford, "The Promise and Peril of Property Rights Formalization", Available at <http://ssrn.com/abstract=1395958> (Last visited 15.7.2011).

¹¹ *Ibid* at 39.

contextual and subject to political manipulation. The case of India is an open suggestion to how the status of property evolves in terms of local politics, leaving limited scope for development or acceptance of a formal or universal theory of property rights as popularly advocated today.

The Indian Constitution is inclusive of both positive and negative rights in the form of fundamental rights and directive principles of state policy. "Much of the conflict especially in relation to property has been expressed as interplay between the positive attempt of the State to engineer a certain economic, social and political configuration resulting in the violation of negative liberties or rights as a consequence. Property has been a particular target in this contest and the outcome of this attack has delineated the distribution of powers across the three branches of the government – if not necessarily in general, then definitely with respect to the governance of property rights in relation to the State."¹² The right to property in India¹³ is often derided as the "least defensible right in a socialist democracy."¹⁴

¹² Jaivir Singh, "(Un) Constituting Property: The Deconstruction of the Right to Property in India", Available at <http://www.jnu.ac.in/cslg/workingpaper/cslg%20wp%2004-05%20jaivir%20singh.pdf> (Last visited 22.6.2011).

¹³ History: The Constitution of India derives its foundation from the Government of India Act, 1935 and the Universal Declaration of Human Rights (1948). Section 299 of the Government of India Act, 1935 secured the right to property and contained safeguards against expropriation without compensation and against acquisition for a non-public purpose. Article 17 of the Universal Declaration of Human Rights (1948) also recognizes the right to private property and India is a signatory to that Declaration. The Constituent Assembly examined the constitutions of various countries, which guarantee basic rights. In "Constituent Assembly of India, Constitutional precedents (Third Series)" (1947), it is stated "Broadly speaking, the rights declared in the Constitutions relate to equality before the law, freedom of speech, freedom of religion, freedom of assembly, freedom of association, security of person and security of property. Within limits these are all well recognized rights." The debates in the Constituent Assembly when the draft Article 19(1)(f) and Article 31 came up for discussion clearly indicate that the framers of our Constitution attached sufficient importance to property to incorporate it in the chapter of fundamental rights. The provision regarding freedom of "trade and intercourse," which was originally in the chapter of fundamental rights, was later removed from that chapter and put into a separate part (Article 301), in view of the suggestions by some members of the Constituent Assembly. It is significant to note that similar suggestions in respect of the right to property were not accepted.

¹⁴ Sushanth Salian, "History of the Removal of Fundamental Right to Property", Available at <http://www.ccsindia.org/ccsindia/interns2002/25.pdf> (Last visited 20.6.2011).

On attaining independence in 1947, India absorbed the liberal ideals in the form of a parliamentary democratic structure, the directive principles of state policy, fundamental rights, the separation of powers of the three institutions, independence of the judiciary, universal suffrage, economic planning etc. There was acceptance to a 'constructive democratic approach to social economic problems'.¹⁵ Under the Indian Constitution, "the liberal legal ideology",¹⁶ embodies a philosophy that can be summarized in three strands: "protecting and enhancing national unity and integrity, establishing the institutions and spirit of democracy, and fostering a social revolution to better the lot of the mass of Indians".¹⁷ The liberal provisions in the form of democratic institutional structure of the legislature, executive and the judiciary, Part III-Fundamental Rights, adult suffrage, and Part IV- Directive Principles of State Policy (hereinafter DPSP), travel beyond the limited realm of process values.¹⁸ The central idea has been to live in a democracy that addresses reform on humane and fair initiatives, a democracy that is 'an encroachment on uncontrolled power'¹⁹.

¹⁵ Vishwanath Prasad Varma, *Modern Indian Political Thought* 471 (1967).

¹⁶ Upendra Baxi, *Courage, Craft and Contentions: The Indian Supreme Court in the Eighties* 5 (1985).

¹⁷ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 16 (2003).

¹⁸ In the earliest of Constitutional interpretations, the DPSP under Part IV to the Indian Constitution were identified most closely to the socialist ideology. The DPSP enlist the most specific reforms that must be brought about by the state, in specific by the policy of the government. The goals are the provision for adequate means of livelihood, the 'ownership, control and distribution' of the material resources of the community to subserve the common good, equal pay for equal work, healthy environment of work and living for the impoverished persons, public assistance to the people in cases of unemployment, old age, sickness and disablement, and raising the level of nutrition to improvement of living of the people (Article 36-51 of the Constitution of India). The central character of Part IV revolves around Article 37, which states "the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws." Part IV of the Constitution makes reference to the 'purpose' strategy, which must be satisfied in the law and policy of the state. The proposed model of governance under the Indian Constitution is subject to the specific or underlying governing principles of check and balance, separation of powers, and the sanctity of fundamental rights and the DPSP. Over the years, the strategy for bringing about socio-economic change in pursuance of the DPSP, added strength and vigour to the democratic process. Much of the economic decisions like that of the abolition of zamindari system reflected a strong opposition to capitalism for moral as well as economic reasons.

¹⁹ Peter Salsich, "Property Law serves Human Society: A First Year Course Agenda", 46:617 *Saint Louis University Law Journal* 257 (2002).

The coming of independence had created an atmosphere of great social, economic and political expectations. The era was marked by continuous confrontation amongst the democratic institutions, and the theme of disputes involved the issues on power, reform and fundamental rights. First and foremost, the dilemma as to how socio-economic reform was to take place under constitutional mandates was evident in matters relating private property and state monopoly. The objective of reformation was sought through legislation and Constitutional amendments.²⁰ There were three problems with the process of reforms. Firstly, defiance to Article 31²¹ that categorically provided, only a legitimate authority under law could deprive a person of his property²², provided compensation was given for such deprivation,²³ and secondly, the negation of the fundamental rights by subjecting them to the legislative process of reforms. And thirdly, the authority of the courts to review the course of legislative action was seen as a frustration to the cause of socio-economic reforms. A series of cases culminated in challenging the process of reforms, setting ground for the First Constitutional Amendment that sought to remove all obstacles to land reforms, especially the jurisdiction of the courts to question the legitimacy of all legislative action that was

²⁰ There was constant exercise of the Constituent power of amendment under Article 368, along with a series of legislative measures to give effect to the legislative policy of socialist reform. The Constitution (First Amendment) Act, 1951 reflected upon the ideology of traditional socialism in the political decisions. The waves of socialism were intended to take the form of a 'government directed economy' to mobilise the country's resources for constructive utilization. At the outset, the Parliament was prevented time and again from establishing social reforms. In 1950, the Bihar High Court struck down as unconstitutional the Bihar Management of Estates and Tenures Act, 1949. The Act provided for taking over the estates of the Zamindars in the absence of any compensation. See Rashmi Dyal Chand, "Exporting the Ownership Society: A Case Study on the Economic of Property Rights", Available at <http://ssrn.com/abstract=968689>, at 78 (Last visited 21.6.2011).

²¹ No person could be deprived of his property except by authority of law, and no property could be acquired for public purposes unless the law provided for compensation.

²² The power of eminent domain of the state is reflected in provisions similar to that of Article 31. The power allows the government to take private property for public use. The power is also evident under the Land Acquisition Act, 1872.

²³ In *Kameshwar Singh v. State*, AIR 1951 Pat 91, the Patna High Court struck down the Bihar Land Reforms Act, on the grounds that the different rates of compensation for different categories of Zamindars violated Article 14. Also, in *Bela Banerjee case* AIR 1954 SC 170, the court considered whether the compensation provided under the West Bengal Land Development and Planning Act, 1948 was in compliance with 31 (2). The Act authorized the state to acquire property many years after it came into force, but it fixed the date of 1946 evaluating the compensation, and not of that when the land was acquired. The court decided that the provisions were arbitrary and did not cater to the principles of equity in ascertaining the compensation.

sought to be established.²⁴ The constitutional provision of Article 31 was at the core of all reforms. The idea was that Article 31 (2) laid two conditions subject to which private property of the individual could be acquired or taken possession by the state. Firstly, the property was to be acquired for some public purpose, and secondly, no law authorizing taking of the property was to be valid unless it made provisions for paying compensation to the owner. The conditions were not to be applicable in cases referred to under 31(4), under which the zamindari and land reforms were seeking exemption on grounds of compensation and requirements of public purpose. In order to remove the frustrating issue of fundamental rights as a curtailment, 31A and 31B were inserted. The latter introduced the Ninth Schedule to the Constitution, wherein Acts and Regulations could not be deemed to be void even if inconsistent with the fundamental rights conferred under Part III, and the former to oust the challenge to any law on acquisition of land. The first phase had successfully offended and justified the undermining authority of the courts and the sanctity of fundamental rights of the citizens.²⁵ The witness to the amendment only came on to be interpreted as the "denial of liberty and the imposition of despotic rule of whatever description or colour have gone hand in hand with the deprivation of property rights or the comprehensive control and regulation of the exercise of this right".²⁶ In *Akadasi Padhan v. State of Orissa*²⁷ the

²⁴ The Statement of Objects and Reasons to the Amendment stated; 'During the Fifteen months of the working of the Constitution certain difficulties had been brought to light by judicial decisions...specially in regard to fundamental rights...Although, the citizens right, under 19 (1)(g), to practice any profession or to carry on any occupation...was subject to reason restrictions which the laws of the state might impose in the interests of the general public and although these words were comprehensive enough to cover any scheme of nationalisation which the State might undertake, it was desirable to place the matter beyond doubt by a clarificatory addition to Article 19(6). The main objects of the Act were accordingly, to amend Article 19 for the purpose indicated above to insert provisions fully securing the constitutional validity of zamindari abolition laws...'

²⁵ In *Purushothamdas v. State of Kerala*, AIR 1962 SC 694, the objective to legislative reforms was rightly summed up. "The acquisition of zamindari rights and the abolition of permanent settlement, however, was only the first step in the matter of agrarian reforms which the Constitution makers had in mind. When the first zamindari abolition laws were passed...they contravened the provisions of Article 14, 19 and 31. In order to save the impugned legislation...Articles 31A, 31B and the Ninth Schedule were enacted."

²⁶ T. Mathew, "A Socialist Society Cannot be Democratic", in M.R. Pai (Ed), *Socialism in India: A Commentary* 67 (1967).

²⁷ AIR 1963 SC 1047.

court summed up the position; "It is relevant to recall the genesis of the amendment introduced by the Constitution (First Amendment) Act, 1951. Soon after the Constitution came into force, the impact of socio-economic legislation, passed by the legislature in the country in pursuance of their welfare policies on the fundamental rights of the citizens in respect of property came to be examined by courts and the Articles on which the citizens relied were 19(1) (f)²⁸ and (g) and 31 respectively."²⁹

The disturbing process subject the path of reform to a faulty premise. It was a questionable stance to simply state that "nationalization or state ownership is a matter of principle and its justification is the general notion of welfare, when infact nationalization or state ownership is a matter of expediency dominated by considerations of economic efficiency and increased output production... the first approach is doctrinaire, while the second is pragmatic."³⁰ The second phase of reforms came with the Constitution (Fourth Amendment) Act, 1955³¹, that went to establish the norms of 'Statism' in determining the manner in which reforms were to take place. The Amendment placed more legislation under the Ninth Schedule. The amendment to Article 31A protected from judicial challenge the taking over of the management of the property even if the process contravened fundamental rights.³² The Amendment to 31A

²⁸ The Constitutional provisions entitled the person to compensation, and to question the reasonableness of any legislation adversely affecting his property rights under Article 19.

²⁹ Supra note 17 at 22.

³⁰ *Ibid.*

³¹ The Statement of Objects and Reasons read as follows; 'Some decisions of the Supreme Court had given a very wide meaning to clauses (1) and (2) of Article 31. Despite the differences in the wording of the two clauses; they were regarded as dealing with the same subject. According, to these decisions, even where deprivation of property was caused by a purely regulatory provision of law and was not accompanied by an acquisition or taking possession of that or any other property...in order to be valid, had to provide for compensation under clause(2)...Finally, the judgment of *Saghir Ahmed v. The State of U.P.* had...given rise to an impression that notwithstanding the clear authority of the Parliament or of a State Legislature to introduce state monopoly in a particular sphere of trade or commerce...the law might have to be justified before the courts as being in the public interest...It was felt necessary that 305 should be amended to make this clear.'

³² Article 31 (2) and (2A) were interpreted to exclude the authority of the court to question the adequacy of compensation provided by any law aiming to acquire land. In addition 2A was to the effect that even if that no compensation can be demanded for deprivation of property without acquisition by the state. In addition, the Seventeenth Amendment, 1964 was framed to overcome the definitional problem of

further went onto establish the rigid economics of socialism. It excluded laws relating to taking over of management of property by state, amalgamation of two or more companies, extinguishment or modification of rights of persons in corporations etc, even if it offended Article 14, 19 and 31. The coming amendments were similarly directed to quash all judicial endeavors to confirm to constitutional guarantees. In 1970, the Supreme Court in *R.C. Cooper v. Union of India*³³ held that the bank nationalisation law was liable to be struck down as it failed to provide to the banks compensation according to relevant principles, and that Parliament could not be the final authority on the issue of compensation. The resultant was the Constitution (Twenty-Fifth Amendment) Act, 1971.³⁴ The word compensation was replaced with 'amount' in Article 31(2) to avoid judicial review of compensation as just and equitable. Eventually, the Constitution (44th Amendment) Act 1978 abolished the right to property from Part III and made a legal right under Article 300 A. The initial experiences with the Parliament only stated that, the "the Constitution had been amended, its fundamental right to property had been diminished, other rights placed under a shadow, and the courts powers of judicial review severely restricted especially to support land reform legislation, into the bargain, judges and the judiciary as an institution of the Constitution had been cast as enemies of socio-economic reform."³⁵ The dangers that were witnessed only reflected as to how property was subject of substantial deprivation. In

broadening the definition of estate to include tenure systems, which the Supreme Court had excluded from the definition and eventually not precluded from judicial scrutiny under 31A.

³³ AIR 1970 SC 564.

³⁴ It said, Article 31 of the Constitution specifically provided that no law providing for the compulsory acquisition or requisitioning of property which either fixed the amount of compensation or specified the principles on which and the manner in which the compensation was to be determined and given could be called in question in any court on the ground that compensation provided by the law was not adequate. In the *Bank Nationalisation* case, the Supreme Court had held that the Constitution guaranteed right to compensation, that is, the equivalent in money of the property compulsorily acquired. Thus, in effect, the adequacy of compensation and the relevancy of the principles laid down by the Legislature for determining the amount of compensation had virtually become justiciable... The Act amends the Constitution to surmount the difficulties placed in the way of giving effect to Directive Principles of State Policy by the aforesaid interpretation.

³⁵ Rashmi Dyal Chand, "Exporting the Ownership Society: A Case Study on the Economic of Property Rights", Available at <http://ssrn.com/abstract=968689>, at 118. (Last visited 21.6.2011)

later times, the 44th Amendment robbed right to property from its fundamental status.³⁶ It was the guiding principle for judicial intervention after every amendment that "any system that entrusts power to the majority must ensure that majorities can change, that the rules of the game remain fair, and that those elected remain accountable to the electorate".³⁷ The first few years were directed to overcome stagnant growth within a democratic constitution with some eclipse on certain basic values of life.

The imperialist association with capitalism did not prevent India as well as other nations from inviting Western investment and aid. In the words of Paul Sigmund, the rationale was basically that economic planning in India did show that nationalization will not assure the rationalized development of the economy that India seeks. The Indian experience seemed to demonstrate that as an economy expands, an entrepreneurial class of investors emerges which can invest and utilize the new surpluses more efficiently than government planners.³⁸ In 1991, the New Economic Policy (hereinafter NEP) pushed this proposition to another limit. The policy relaxed "many restrictions on private investment, inflow and investment of foreign capital, international trade and foreign exchange."³⁹ But the deal of the matter was the inflow of a new age philosophy of free market and capitalism. In response to such developments V.R. Krishna Iyer expressed: "we have a new democracy run from a far be strong capitalist proprietors influencing the political process and humoring the glitterati and winning parties Right, Left and Centre through a monoculture of globalization, liberalization, marketisation and privatization plus anti-socialism...Herein lies the contradiction between the Constitution and the elections held under the Constitution."⁴⁰ The developments were however absorbed because many believed that the NEP was not necessarily in

³⁶ By the Constitution (Forty-Fourth Amendment), 1978, the right to acquire, hold and dispose of property under Article 19(1) (f) was deleted, Article 31 was deleted and the right to property against deprivation without authority of law contained in the repealed Article 31(1) was expressed in a new Article- 300-A.

³⁷ Samuel Issacharoff, "Constitutionalizing Democracy in Fractured Societies", Available at <http://ssrn.com/abstract=547245>

³⁸ Paul E. Sigmund, *The Ideologies of the Developing Nations* 19 (1964).

³⁹ Mahendra P. Singh, "Constitutionality of Market Economy", 18 *Delhi Law Review* 276 (1996).

⁴⁰ V.R Krishna Iyer, *Rhetoric versus Reality: Essays on Human Rights, Justice, Democratic Values* 51 (2004).

contradiction with the Constitution, as even the Supreme Court had appropriately adopted the hands off policy.⁴¹ In the case of *Balco Employees Union v. Union of India*⁴², the court went to the extent of stating that in cases involving policy decisions in economic matters, the principles of natural justice have no role to play.⁴³

Since then the new age mantra for India has been: that mankind has entered upon the age of modernity, wherein modernity; "is above all the ideal and the fervently held aim of the 'emerging' developing areas which, as the acceptable words themselves indicate, now define themselves wholly in terms of the one directional movement toward this higher standard of technical proficiency and material results."⁴⁴ The strongest assertion of the new modernist economic strategy came by way of the Special Economic Zones (hereinafter SEZ). Although the issue itself deserves to be a separately studied and analyzed, it serves as the right example in exposing the evils that modernity may bring in the form of 'totalitarian tendencies' of the democracy.⁴⁵ Many of those exploring the reality of economic globalization have emphasized the negative impact of such trends

⁴¹ In *Delhi Science Forum v. Union of India*, AIR 1996 SC 1356, the court said; "the national policies in respect of economy, finance, communications, and trade...have to be decided by the Parliament and the representatives of the people...They cannot be tested in court of law."

⁴² (2002) 2 SC 333.

⁴³ The mirage of workers rights was shattered by the decision of the court in the case. The court refused to look into the process of disinvestment because it was a matter of policy involving complex factors. In addition, the court also stated that while it was expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision, there is no principle of natural justice which requires prior notice and hearing or consultation prior to the taking of the decision. "As a matter of good governance and administration whenever such policy decisions are taken, it is desirable that there should be wide range of consultations including considerations any representations which may have been filed, but there is no provision in law which would require a hearing to be granted before taking a policy decision." *Id* at para 57.

⁴⁴ Gwendolen Carter and John H. Herz, *Government and Politics in the Twentieth Century* (1965).

⁴⁵ The SEZ Act, 2005 was passed under the foreign trade policy 2004-2009, which legitimized the agenda for establishing SEZ. The SEZ crisis raised a whole lot of vital concerns in relation to acquisition of land for private players, the loss of national income owing to massive tax exemptions, the loss of land to thousands of persons, the non-existence of any adequate compensatory measures, the use of coercive force to impose policy of the government and the exposure of a weak democracy etc.

"The use of excessive force by the state is totalitarian and undemocratic, the reason being; "it is not an advance in civilization but retrogression. It has been adopted by peoples who are politically and socially immature. They have not grasped the fact that the essential condition for an advanced civilization is tolerance, and that society...of different views...can live together in peace...The achievement of the state involves the use of force." See Clement R. Attlee, "Democratic Socialism versus Totalitarian Communism and Fascism", in William Ebenstein, *Modern Political Thought: The Great Issues* 597 (1960).

on the poor citizens and eventually our Constitutional morality. Also, "a prevailing theme emerging from a key discourse on economic globalization is that the poor in developing countries will inevitably be incapable of mitigating the overbearing forces of globalised capitalism."⁴⁶ The new trend of privatization has introduced new forms of economic and social alienation by the process of land acquisition and displacement. The utility of the Land Acquisition Act, 1894⁴⁷ and the Rehabilitation and Resettlement Bill, 2007⁴⁸ require utmost attention. The two enactments reflect upon the exercise of power of eminent domain that has been used extensively since independence, and currently to effect mass displacement for promoting privatization. A brief overview of certain judicial pronouncements would clarify on the position.⁴⁹ The 2007 policy aimed at striking a balance between the need for land for development activities, and at the same time, protecting the interests of the land owners. However, the policy itself was

⁴⁶ Jonathan Jones, "India's Democracy has a Heartbeat", available at <http://www.indiaseminar.com/semsearch.htm> (2009). (Last visited on 27.3.09.)

⁴⁷ The Act is an expression of the doctrine of eminent domain, which invests power in the state to take over private land for a public purpose, which may include for the residential purposes of the poor or helpless etc. The coercive nature of taking over is toned down by compensating persons with interest in the land....The expansion of the power and its use to effect mass displacement and, more recently, to hand so acquired to corporations, has added urgency to understanding the scope of land acquisition and displacement.

⁴⁸ The Bill aims to provide a social impact assessment of the schemes and plans that are likely to affect the families by way of displacement. The assessment will involve participation and a transparent process to evaluate the problems to be faced by the concerned persons. The assessment will take place in case displacement affects a specific number of families as mentioned in the Act. The Act makes no provision for publishing the report of the social impact assessment.

⁴⁹ In *Barkya Thakur v. State of Bombay* AIR 1960 SC 1203 the court held that acquiring property for the purposes of a private industrialist was also protected by the doctrine of 'public purpose'. In *Pandit Jhandu Lal v. State of Punjab*, AIR 1961 SC 343, "an acquisition for a Company may also be made for a public purpose if a part or the whole of cost of acquisition is met by public funds". In this regard, the decision of *Hamabai Framjee Petit v. Secretary of State*, AIR 1914 PC 20 is often quoted to define public purpose. It says; the phrase 'public purpose' must include a purpose, that is an object or aim in which the general interest of the community as opposed to the particular interest of individual's, is directly and vitally concerned. In *Pratibha Nema v. State of Madhya Pradesh* AIR 2003 SC 3140 in reference to Part VII of the Land Acquisition Act relating to acquisition of property for Companies, the court stated: "the important point we would like to highlight at the outset is that the acquisition under Part VII is not divorced from the element of public purpose" (para 20). Also, "the existence or non-existence of a public purpose is not a primary distinguishing factor...the real point of distinction seems to be the source of funds to cover the cost of acquisition...Even if a token nominal contribution is by government...the character and pattern of acquisition could be changed by the government. In ultimate analysis, what is considered to be an acquisition for facilitating the setting up of an industry in private sector could get imbued with the character of public purpose acquisition if government comes forward to sanction the payment of a nominal sum towards compensation."

another half hearted expression of political will. The issues of 'land' and 'public purpose' are not necessarily a materialist adventure of give and take, as has always been defined by the merciful state by its compensatory and rehabilitation policies.⁵⁰ Under the Land Acquisition Act, the land for the companies can not be acquired without the consent of the government, which would depend upon how it is likely to serve the public purpose. So, basically the agreement between the state and the corporation is the determining factor as to what land, how much of it and what thereafter is to be done.⁵¹ The reality of the situations is that substantial deprivation of interests of life and livelihood are not in conformity with the dictates of the Constitution, and are bound to witness a negative reaction. The entire experience of land snatching with violence, and without apparent and adequate provisions for rehabilitation, even if 'legitimized', are alienating the helpless people from a life and society that they were promised. One specific response has been witnessed in 2009, wherein the 'right to property' is being deliberated to be given its original status as a fundamental right under Part III of the Constitution.

In the context of modern day governance, the form of judicial remedial governance will always require a need for much profound thought. The continuance of judicial interference in governance is proposing a theory wherein the role of 'the state' is limited to establishing formal equality, different from real equality. For instance, the

⁵⁰ One of the many studies conducted to assess the correct position of displacement, deeply analyzed a social assessment and management plan for the Baranj Coal Mining Project in Maharashtra in 1998. The project required land over which populations of 1269 persons belonging to 226 families were living. A detailed assessment plan had to be chalked out to look into the direct economic problems, cultural and social conditions of the Project Affected Persons. The villagers continued to resist the process of displacement because a lot many families had already experienced rehabilitation and the proposed rehabilitation was perceived in the context of cultural history of repeated relocation and resettlement. The proposed plan was witnessed as another course of breaking social bonds in addition to the economic losses. See Sanjay Vashisht and Avinash Kumar, *Social Assessment of Rehabilitation and Resettlement: A Case Baranj Coal Mining Project*, http://www.devalt.org/newsletter/may01/of_3.htm (Last Visited 15.4.09).

⁵¹ In *Butu Prasad v. Steel Authority of India Ltd* 1995 Supp (2) SCC 225., the government had advised that atleast one member of the family displaced should be employed at the plant. The company had employed a few persons, but the court was of the opinion that, although the acquisition was according to procedure established by law, so a claim to employ every adult member would be too high a demand.

issue of property reflects on the initial years of governance, when property was a central figure in most legislative, judicial and executive deliberations. Even today, it serves as an asset to assess the status of individual rights vis-à-vis exercise of democratic power. Elaborating on the point, Nester Davidson has developed a theory on how property serves an important function of communication.⁵² For instance, the status of property in India communicates that much of history introduced and defined 'property' in reference to particular patterns of inequality that flow from the structure of property, and which by the legal apparatus were to be diluted with redistribution. It further communicates, that any contemporary approach to the 'right to property' will remain incomplete and misguided if it fails to assess the implications communicated by the history of 'property' in India. It is true that under the Indian Constitution, the right to property as a fundamental right has been a 'social construct'. The expression 'social construct' only goes on to say that property has not been an abstract proposition, and has grown out of the particular social conditions that reflected on the state decisions on distribution of resources.⁵³ The problem with 'social construct' of property has been that it does not give due recognition to the right of the individual, and is only constructing an edifice for the state to justify actions in the name of state monopoly, privatization etc. In the words of Hernando De Soto⁵⁴, the people of the less developed countries seem to be poorer than they actually are because their wealth is often not formally recognized. In specific, they have houses but not titles; crops but not deeds..."⁵⁵ In India, prior to the 44th Constitutional Amendment (1977), the 'fundamental right to property' implied that the state shall not interfere with the possession and enjoyment of the right. The fundamental status served as a "constitutional limitation...on the powers of the government that acts on their behalf, or conversely, as demarcating

⁵² Nester Davidson, "Property and Relative Status", 107 *Michigan Law Review* 760 (2009).

⁵³ *Ibid.* at 771.

⁵⁴ Hernando is a Peruvian economist and a recipient of the Milton Friedman Prize for his groundbreaking work on property rights.

⁵⁵ Kaushik Das, "The Right to Property", April (2004). Available at http://www.ccsindia.org/policy/rule/articles/kdas_right_to_property.pdf. (Last visited 5.4.09).

spheres of private right into which through their government may not intrude." ⁵⁶ Secondly, the right was subject to reasonable restrictions under Article 19(1) (f), imposed by the law. In other words, even before 300 A was chosen as the resting ground for the right to property it could constitutionally be subject to restrictions.

Over all the years of experience with democratic experiments, in February 2009, the Supreme Court of India sought explanations from the Central government on a Public Interest Litigation (PIL) seeking direction to restoring the right to property as a fundamental right.⁵⁷ The purpose of defining 'property' as a fundamental right is to introduce a legal shield around the asset of property of the individuals. A certainty that is well captivated within the values of basic structure of the Constitution, as well enforceability under Part III of the Indian Constitution. The point of concern however is, how the court will substantially respond to such a demand without disturbing the already initiated process of privatization and economic reforms. Also, how far is the court morally justified in addressing the sufferings of the people, when it found no reason to interfere in the policy considerations that deprived the people of their lands? And is it that the mere institution of the right to property as a fundamental right will wipe out the past sins of our democracy which imported capitalism and gave impetus to

⁵⁶ Frank Michelman, "Possession v. Distribution in the Constitutional Idea of Property", 72 *Iowa Law Review* 1327 (1987).

⁵⁷ The background to such development was summed up in the PIL as follows: "The relegation of the right to property has granted the licence to the government to abuse its power of eminent domain by taking private property for purported public use. It is submitted that the common law principle of eminent domain is to be utilised for public utilities, highways, rail roads and other measures furthering infrastructure and public works. However, over the last decade, this power has been exercised even for propagation of private industry, private housing, private cooperative societies, private recreational projects, private residential development and even golf courses, most of which cater to private and vested interests, who are sometimes the decision makers themselves... Such acquisitions have given rise to political tussles, increasing black money transactions and profiteering by sale of such acquired property to third party interests, said petitioner citing examples of Singur and Nandigram land acquisitions in West Bengal... By allowing the government of the day to determine at its own whim and fancy, those properties that ought to be acquired for any purported 'public purpose,' without having to assuredly award any compensation, it affects the equality code. The random selection of individuals whose properties are taken away amounts to an irrational exercise of legislative power, which can remain virtually unchallenged." See Sanjay K. Singh, "SC Seeks Government Explanation on Right to Property PIL", 28 February (2009), Available at <http://economictimes.indiatimes.com/News/Economy/Infrastructure/SC-seeks-govt-explanation-on-right-to-property-PIL/articleshow/4203168.cms> (Last visited 5.03.09).

'accumulation by dispossession'?⁵⁸ It is a known fact that a lot has changed since the right to 'property' was denounced as a fundamental right. Mere adjudication, without addressing the nuances of socio-political discourse would only be distorting and improper. The courts cannot on their own 'undertake affirmative enforcement of any plausibly appealing set of rights and still be acting legally rather than politically- like courts as opposed to legislatures'.⁵⁹ The process must inevitably require the re-consideration of social conditions of accessibility and availability to propose and initiate process of fundamental legal entitlements.⁶⁰ The right to property in India is indicative of a reality which is still far from establishing property as a human right/inalienable right. The global advancement in thought towards better securing of property rights is still to thrust the boundaries of many countries like India.

III. Conclusion

The reports of the United Nations and independent experts based on empirical evidence are clearly indicative of a strong link between property rights, freedom, and prosperity. The right strategy developed is "Freedom from Poverty — Freedom to Change," emphasizing the role of economic growth based on free markets and private property benefiting the poor as well as respect for human rights.⁶¹ The agenda is targeted to the improvement in state political practices *vis-à-vis* property.

⁵⁸ Dipankar Basu and Debarshi Das, "Accumulation by Dispossession under the Aegis of a Communist Party- David Harvey on Bengal", Available at <http://davidharvey.org/2008/09/capital-class-13/>

⁵⁹ *Ibid* at 1337.

⁶⁰ The attempt to reform is reflected in the Draft National Land Acquisition and Rehabilitation and Resettlement Bill 2011. The core provisions of the Bill are as follows: (a) A new institutional mechanism to ensure that rehabilitation and resettlement (R & R) are implemented effectively as part of the land acquisition. (b) The Bill does not preclude companies from directly buying land from the farmers, with a fair R & R package. (c) Social Impact Assessment by the government before approval for acceptance.

⁶¹ The most recent commitments to pursue land reform by securing land as an asset, were made at the International Conference on Agrarian Reform and Rural Development of FAO, convened in Porto Alegre, Brazil, in March 2006. The Final Declaration adopted at the Conference encourages the holding of a national and inclusive dialogue to ensure significant progress on agrarian reform and rural development and the establishment of appropriate agrarian reform "mainly in areas with strong social disparities, poverty and food insecurity, as a means to broaden sustainable access to and control over land and related resources". The preparation of the Voluntary Guidelines on Responsible Governance of Tenure of Land and other Natural Resources, led by FAO, is the single most important attempt to follow up on the commitments made at the Conference, and the Declaration of the World Summit on Food Security, held

However, the experiences in India suggest that any attempt to protection of property cannot be detached from political context. Property is more than just a set of rights; it is capable of building social security, individual sense of identity and the means of survival for a household. As indicated, in the absence of equitable property rights there is a high likelihood of social unrest. State induced displacement has been a cause to give rise to social exclusion of the vulnerable many. The acquisition of property, coupled with an insensitive approach towards compensation and rehabilitation has had a direct impact on livelihood as well as identity and social bonding.

Within national boundaries, there is a need to prioritize models that promote security of property of the vulnerable. "Land investments implying an important shift in land rights should represent the last and least desirable option, acceptable only if no other investment model can achieve a similar contribution to local development and improve the livelihoods within the local communities concerned."⁶² The desire for economic gains does not suffice as an incentive to implement policies in disregard to conditions and needs of the poor and vulnerable. The sanctity of property rights as a human value can only be ascertained when state policy gives due recognition. The conflicts over acquisition and subsequent social exclusion have begun to expand their ambit and taken over the streets, court-rooms, public space to expose the essence of property as of a mere political construct. In India the status of property signals for context-based reform. All arguments in favour of a human rights discourse on property are either faulty or ignorant to reality. It is necessary that within the socio-legal framework, theory and practice must merge, or else the subsequent disturbances will undermine the solidarity of the legal system through further mass violence and protest.

in 2009, underlines that link. It is too early to assess the Guidelines in the light of what they promise to achieve. At the regional level, however, the African Union's Framework and Guidelines on Land Policy in Africa are an important step in that direction, and the Latin American project to follow up on the Conference, launched in August 2009, involves a large number of countries in the operationalization of the commitments set out in the Declaration. But the overall picture remains uneven across regions. See The United Nations findings on the Right to Food. Available at <http://www2.ohchr.org/english/issues/food/index.htm> (Last visited 27.7.2011).

⁶² *Ibid.*

Deepa Kansra, "Disputing the Human Rights Discourse on Property: The Case of Development and Vulnerability in India", Vol. 3 *Indian Law Review*, 129-146 (2011). ISSN 2229- 7960.