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Property and Right to Housing and Shelter

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ABSTRACT

Development-induced displacements, and the usurpation of land of small property holders, are contributing to property rights gradually becoming a central social justice issue. Ordinarily, property rights consisting of land are conceived without due consideration of socio-economic rights. But in practice, property has a material effect on the enjoyment of the wide range of these rights including right to food, health, work, development etc. Similarly, there is a link between land, and right to housing and shelter, as the security of latter directly depends on the tenure system of the former. Without access to land, many people and communities may be deprived of the housing and shelter. In developing countries like India, right to housing is important for the social inclusion of the most marginalised people in the society. Enforcement of housing rights would compel governments to respect legal obligation to ensure a life of dignity for all. This also implies fighting against forced evictions of which thousands of people are victims every year in India.

In this paper author attempts to analyse this relationship between property rights and socio-economic rights; in particular right to housing and shelter. Author argues that the ideal of constitutional transformation demands that socio-economic goals should not be isolated from the transformative effect of the Constitution and the constitutional courts must work to reflect this effect. Property rights can not only coexist with socio-economic rights, but they also rest at the core of the social and economic justice. The first section- Introduces the debate on property rights and socio-economic rights in India; second section discusses changing conception on property rights; third section throws lights on the evolving jurisprudence on the right to housing and shelter in the context of forced evictions; fourth section looks at the possibilities of reinventing property rights post Forty-fourth Constitutional amendment and its implication for socio-economic rights.

I. INTRODUCTION

Right to property has a dual function. On the one hand, property rights serve as the basis for entitlements that can ensure an adequate standard of living; while, on the other hand it is a basis

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for autonomy and therefore for freedom. In traditional societies not everyone enjoyed right to property equally. Therefore, even though property rights enhanced autonomy but not for all the people.³ The shift from an agricultural to an industrial society required a more advanced system of rights in order to ensure livelihood and dignity for all.⁴ The second generation of socio-economic rights was the product of rapid industrialization and accompanying inequalities. Post Second World War, amid the ideological confrontation, the communist nations strongly advocated for socio-economic rights. The distinctive feature of these rights was the active state involvement in making these rights realizable.⁵ Like many other post-war constitutions, Indian Constitution too adopted non-justiciable socio-economic rights in the form of directive principles of state policy under chapter IV.

The Constituent assembly of India faced a daunting challenge during the drafting of provisions related to property rights. The major issue was “how to balance the fundamental right to property with social and economic reforms?” Strong enforcement of the property rights would have imposed severe restrictions on the fulfilment of the socio-economic needs of the poor and at the same time the redistribution of resources might be seen to violate justiciable property rights.⁶ Eventually, in the Constitution, right to property was expressly provided under Article 19 (1) (f) along with the reasonable restrictions⁷. Moreover, Article 31 made provision for acquisition of property by the state for the public purpose and upon payment of compensation. The tension between property rights and socio-economic reforms is quite evident when one looks at post-independence constitutional and legal history of India. As regards the land reforms, Namita wahi has argued that justiciable right to property did not obstruct land reforms in all the cases and “it is not a priori true that enforcement of property rights through judicial review imposes sever restrictions on the fulfilment of the socio-economic needs of the poor”.⁸ Nevertheless, the Forty-fourth Constitutional amendment removed the right to property from fundamental rights chapter and placed it under newly added Article 300-A as a non-justiciable right.

Apart from the purported weakening of property rights, another major constitutional development that took place in the post-emergency India was the frequent invocation of the

³ ABSJORN EIDE, ECONOMIC AND SOCIAL RIGHTS, at 120 (Brill 2001)

⁴ Id.

⁵ Spasimir Domaradziki, Margaryta Khvostova, David Pupovac, *Karel Vasak's Generations of Rights, and the Contemporary Human Rights Discourse*, HUMAN RIGHTS REVIEW at 425 (2019)

⁶ Namita wahi, *The tension between property and socio-economic rights* in in SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES at 138 (Routledge 2014)

⁷ Article 19 (1)(f) provided: All citizens shall have the right to acquire, hold and dispose of property.

⁸ Wahi, *supra note* 8, at 146

socio-economic rights which were initially considered to be unenforceable in the court of law. The Constitutional courts have often given effect to certain directive principles by reading them as an essential feature of individual's right to life under article 21 of the Constitution.⁹ But, this judicial creativity has not been inadequate in establishing rich and coherent jurisprudence on the justiciability aspect of the various socio-economic rights. The deliberate omission of socio-economic rights from the fundamental rights chapter would generally raise the legitimacy concerns whenever the Courts try to enforce them directly against any other fundamental rights in question.¹⁰

II. FROM EXCLUSION TO INCLUSION, CHANGING CONCEPTION OF PROPERTY RIGHTS

Post Second World War constitutionalization of socio-economic rights was a prominent phenomenon. Universal declaration of Human rights (UDHR), International Covenant on Economic, Social and Cultural rights (ICESCR) and various International Labour Organization (ILO) Conventions have played instrumental role in the promotion and constitutionalization of these rights. However, as discussed above the enforcement of strong property rights by the courts may create impediments for the large-scale socio-economic reforms in the society. The contemporary scholarship on property laws has appropriately acknowledged and attempts to respond to this tension between property rights and socio-economic needs of the general populace. The widely shared commitment to people's most cherished right to autonomy and self-determination has for long dominated the classical liberal conception of property. Efficiency based law and economics model has been effectively used to justify strong property rights. In the 21st century, wealth maximisation principles of law and economics have been emphasised by Hernando De Soto to argue for formalization of property ownership in developing countries, that would in turn provide much needed collateral for lending and borrowing.¹¹

For many thinkers on the subject, property is no longer the most crucial precondition for individual self-determination; livelihood, health, education and housing are certainly more fundamental prerequisites of individual freedom and self-determination. ¹²The guarantee of

⁹ See. Bandhua Mukti Morcha v Union of India (194) 3 SCC 61; Unni Krishnan, J.P v State of A.P (1993) SC 2178

¹⁰ Article 37 of the Constitution puts bar on the enforceability of the Directive principles (DPSPs) by any court.

¹¹ HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE, 42-50 (Blackswan 2003)

¹² See generally, Joseph William Singer, *Democratic Estates: property Law in free and Democratic Society*, 94 CORNEL LAW REVIEW, (2009)

these socio-economic rights was at the heart of the social democrat's movement that struck first major blow to the dominant liberal conception of property.¹³ Against commonly held Blackstonian view on property, social democrats saw 'compensation' in terms of distributive justice. Therefore, the choice of adequate compensation depended on the relationship of the duty to satisfy basic human needs through public projects.¹⁴ The rise of the social democrats had strong influence in the drafting of constitutions in contemporary Europe.¹⁵ The drafters of the Indian Constitution shared the concerns of social democrats regarding detrimental impacts of unregulated business cycles on individuals. But, unlike their European counter parts, they did not incorporate social democrat values based on the obligation and solidarity into the conception of property under the Constitution.

Nevertheless, property plays a vital role in empowering people as it provides people some sort of control over various tangible and intangible resources. Taking into consideration these multifaceted accounts of property, the emerging liberal theories too advocate for pluralistic architecture of property law within the framework of relational justice.¹⁶ The heterogeneous property laws are structured through advanced institutions that facilitate various forms of interpersonal relationships and at the same time plurality of laws develop more types of property, especially in the contexts of housing and the workplace.¹⁷

In recent times, the emergence of progressive property theories present significant challenges to law and economics as the theoretical model of property law analysis.¹⁸ The proponent of progressive theory argues in favour of property laws and institutions that further the ability of individuals to attain basic resources required for human flourishing; the ability to acquire education, make choices...wealth, happiness and other aspects of individual well-being.¹⁹ Thus, progressive property rights framework has been applied in housing justice campaigns in many countries to determine the issues regarding permissibility of inclusionary zoning policies.²⁰ The progressive framework doesn't provide a single correct answer to such contentious issues but it does provide a systematic theoretical response at the core of which lies the argument that the

¹³ See generally, Tom Allen, *Liberalism, Social democracy and the Value of Property under the European Convention on human rights* 59(4) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

¹⁴ Id

¹⁵ See Article 43, Constitution of the Ireland 1937; Article 14, Basic law for the Federal Republic of Germany 1949.

¹⁶ HANOCHE DAGAN, A LIBERAL THEORY OF PROPERTY, at 6 (Cambridge University Press 2021)

¹⁷ id

¹⁸ Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer, Laura S. Underkuffler, *A Statement of Progressive Property* 94(4) CORNELL LAW REVIEW 743-744 (2009)

¹⁹ Id

²⁰ Brandon M. Weiss, Progressive Property Theory and Housing Justice Campaigns 10 (1) UC IRVINE LAW REVIEW 269 (2019)

property rights do not exist independent of the societies in which they exist. Therefore, in societies where existing property laws exclude swathes of communities from basic survival needs such as decent housing, policies like inclusionary zoning can help in achieving certain normative ends.²¹ These developments on dynamic nature of property law have been traced to some of the leading progressive property cases in the United States of America.²² Nevertheless, scholars have highlighted the challenges of converting progressive property rules into substantive rights. They demand for corrective transfers and recognition of positive rights in order to address the exclusionary effect of property rights on the propertyless.²³

Progressive property theories can provide certain theoretical grounding to diverse sets of positive rights including right to housing. However, mere recognition is not enough and it is doubtful as to what extent progressive property arrangements may help in the actual realisation of these positive rights. Proposals to include justiciable social and economic rights into the Constitution often meets the objection related to judicial review (the “Institutional objection”); the concern regarding over-extension of the judiciary where Courts might find themselves unable to make an assessment of state’s compliance or non-compliance with socio-economic guarantees.²⁴

III. FORCED EVICTIONS AND RIGHT TO HOUSING AND SHELTER

Effective realisation of socio-economic rights involves indexing of different correlative duties-to respect (avoid depriving), to protect (protect from deprivation) and to fulfil (aid the deprived) rights.²⁵ In concrete terms, government driven forced eviction is inconsistent with the duty to respect a housing right. Government’s failure to regulate the security of tenure for informal settlements implies the duty to protect the housing right, and the inadequate provisions for affordable housing facilities reflect a failure of the duty to fulfil a right.²⁶ Thus, ‘positive’ rights for instance right to housing entails both positive and negative obligations on the state. The duty to fulfil is often expressed in terms denoting ‘progressive realisation’ which is subject to state’s resources. Therefore, generally the duty to respect and protect (for instance, cases of forced evictions) require more active involvement by the courts. Since independence, the government

²¹ Id at 270

²² Ezra Rosser, The Ambition and Transformative potential of Progressive Property, 101(1) CALIFORNIA LAW REVIEW 152-154 (2013), In particular paper discusses the cases of State v Shack (277 .2D 369 N.Z 1971) & Matthews v. Bay head Improvement Association (471 A.2d 355 N.Z.1984)

²³ Id at 171

²⁴ Frank I. Michelman, *The constitution, social rights, and liberal political justification*, 1(1), INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 15 (2003)

²⁵ HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 52 (2ND ed. 1996).

²⁶ Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33(1) YALE JOURNAL OF INTERNATIONAL LAW 154 (2008)

has adopted various policies to fulfil its obligation of affordable housing towards its people.²⁷ However, in order to assess as to what extent the benefits of housing have been enforced as a constitutional guarantee, it is important to look into the jurisprudence evolved by the Constitutional Courts on the subject of housing rights.

The Supreme Court on multiple occasions has held that, the right to life under article 21 of the constitution also protects the right to adequate housing and livelihood. In *Olga Tellis*²⁸ Court laid down the content of the minimum protections for slum dwellers with precarious titles to their dwellings. One of the major arguments raised by the petitioner was about the social function of the property in the welfare state that must promote the common good especially right to life and livelihood. While acknowledging the right to livelihood as an essential aspect of right to life, the Court's focus was mainly on the fair and reasonable procedure; at the same time it directed the government to provide alternate accommodations to those meeting certain criteria, though not as condition precedent for their evictions. Primarily, the focus of the Court was on the state's duty to respect right to livelihood. The remedy was carefully circumscribed, as the judgment did not confer any proprietary rights. It clarified that there was no positive obligation on the state to provide people with shelter or means of livelihood.²⁹ Nevertheless, despite some shortcomings, the judgment reflected some of the thinking that characterised the social democrat vision of right to property. Even though the case did not directly relate to property but it suggests that the Court was driven by the ideas of social obligation and awareness of the interrelatedness between access to space and capacity to lead a meaningful life.³⁰

The dicta of *Olga Tellis* was followed in the case of *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*³¹ where the Supreme Court allowed the eviction of pavement dwellers by the government on the condition that alternate accommodation is provided to those evicted under state scheme. Court stated that the state was under an obligation to secure adequate shelter to its citizens. However, Court's focus was more on the fair procedure of hearing; it clarified that each case of eviction requires consideration on given set of facts and no single rule for remedy can be laid down in such cases. Similar rulings were also held in some other cases of eviction where distribution of alternate sites was directed.³²

²⁷ See generally. Piyush Tiwari & Jyoti Rao, *Housing Markets and Housing Policies in India* 565 ADBI WORKING PAPER SERIES (2016)

²⁸ *Olga Tellis v Bombay Municipal Corporation* 1986 AIR 180 [hereinafter “*Olga Tellis*”]

²⁹ S.P SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS: TRANSGRESSING BORDERS AND ENFORCING LIMITS 118 (OUP 2002)

³⁰ Tom Allen, *The Revival of the Right to Property in India*. 10(1) ASIAN JOURNAL OF COMPARATIVE LAW 24 (2015)

³¹ (1997) 11 SCC 121

³² K.Chandru v State of Tamil Nadu 1986 AIR 204; Ram Prasad v. Chairman, Bombay Port Trust, A.I.R. 1989

Some High Courts have also shown due adherence to the evolving jurisprudence on the right to housing and shelter. For instance in *Maula bux v State of West Bengal*³³ Calcutta high court held that -demolition of residential places amounted to deprivation of right to shelter and livelihood, and hence required procedural safeguards like hearing. In *Sudama Singh v Government of Delhi*³⁴high court observed that the removal of their jhuggies without ensuring relocation would amount to gross violation of their fundamental right to shelter. Court has cited the judgement of “Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others” from South African Constitutional Court.³⁵

The Apex Court’s benevolence was missing in some other cases of slum demolition where the taking for public purpose was redefined with a view to cleaning up the cities.³⁶ For instance in *Almitra Singh Patel v Union of India* Supreme Court observed that -the government’s promise of free land, at the taxpayer’s expenses, in place of a jhuggi, leads to more land grabs, and giving free alternate sites is like giving a reward to a pickpocket³⁷In another case of slum demolition in the national capital, the Delhi High Court has dismissed the resettlement policy proposed by the government, and while doing so it absolved the government of its obligation to provide/assist slum dwellers with their shelter. It was made clear that no alternative shelter is to be provided in future for removal of people who are squatting and encroaching on the public land.³⁸ These line of cases show that even though the judiciary has played a vital role in the evolving jurisprudence on the socio-economic rights of the urban poor, but the constitutionality that ensured every citizen the fundamental rights to livelihood, housing and shelter was revised, reinvented and supplanted by a legality that sees the urban poor as encroachers and a threat to civic existence.³⁹

This approach is in clear contrast to some of the South African Constitutional Court's judgments on housing rights. South African judges too expressed the concern regarding the illegal occupation of land but at the same time they balanced this against the terrible circumstances in which the individuals concerned were living and the length of time for which they had been waiting for lawful housing. The remedy declared in South African case also laid down certain conditions that were to apply for temporary accommodations for instance

³³ S.C. 1306.

³⁴ AIR 1990 Cal. 318

³⁵ MANU/DE/0353/2010

³⁶ Id, at para 52

³⁷ Vinodh Jaichand, *Finding common ground: Rights arising from land reform in South Africa, India and Brazil in TRANSFORMATIVE CONSTITUTION* at 472 (PULP)

³⁸ (2000) 2 SCC 166.

³⁹ Okhla Factories Owners Association v Government of NCT Delhi 108 (2003) DLT 517

⁴⁰ Usha Ramanathan, *Illegality and the Urban Poor* 42(29) ECONOMIC AND POLITICAL WEEKLY 3193 (2006)

provisions related to water, sanitation, and protection from bad weather⁴⁰

Writing in the context of Olga tellis, Namita Wahi argues that -in light of the Court's judgment in the Saghir Ahmad case⁴¹ a more progressive Supreme Court might have protected petitioner's right to livelihood and housing within the guarantees of right to property and not right to life. Relief on the grounds of right to property was possible, given that the petitioners had established the possession in their dwellings.⁴² However in many of these demolition cases, it appears that no claims based on the property entitlements were pressed because of the non-justiciable character of the right to property after 44th constitutional amendment.⁴³ Perhaps that's the reason why right to property was not argued in the largest forced eviction case of Narmada Bachao Andolan⁴⁴. Balakrishnan Rajagopalan convincingly argues that the constitutional provisions like right to trade, business and property are recognised by Courts only for rich, and not for the poor who often lack the formal entitlements under the law.⁴⁵

IV. RIGHT TO PROPERTY AND ARTICLE 21 OF THE CONSTITUTION

Cases discussed in the previous section were mainly concerned with the demolition and eviction of the persons living as slum/pavement dwellers with no title or imperfect title of the property. The pro-life jurisprudence on article 21 now recognises a range of socio-economic rights including right to livelihood and right to shelter. In many cases the enjoyment of these rights would directly or indirectly depend on the control of an individual over their property. Therefore, would it be a coherent argument to make that in some respect the right to property is also an essential attribute of overarching right to life and hence it deserves protection under article 21? Responding to the similar arguments in Ambika Prasad v state of UP⁴⁶ Supreme Court acknowledged that -the proprietary personality was an integral part of the personal liberty but article 21 protection is not available where only property is sought to be taken by the state. In Basantibai⁴⁷ it was observed by the Court that since the case is not where the deprivation of property would lead to deprivation of life or liberty or livelihood, therefore the law in question cannot be challenged on the grounds of article 21. These two cases can be distinguished from an important decision of Karnataka High Court in Gadigeppe Mahadevappa v state of

⁴⁰ Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005(5) SA 3 (CC)

⁴¹ 954 AIR 728, 1955 SCR 707

⁴² Wahi, *supra note 8 at 148*

⁴³ Id 149

⁴⁴ 10 SCC 664

⁴⁵ Balakrishnan Rajagopalan, *Pro Human Rights but Anti -Poor? A Critical Evaluation of the Indian Supreme Court from Social movement perspective* 8(3) HUAMN RIGHTS REVIEW 12 (2007)

⁴⁶ A.I.R. 1982 S.C. 1762

⁴⁷ State of Maharashtra v. Basantibai, A.I.R. 1986 SC 1466

Karnataka⁴⁸ case, where it considered deprivation of livelihood to be a serious challenge to the validity of land acquisition proceedings. Ishwara bhat has used the examples of these cases to show that it is possible for courts to make a decision which recognizes need based protection for the right to property by examining the question of right to life and livelihood under article 21.⁴⁹ However, by and large courts have refrained from carving out right to property under article 21. The approach suggested by Ishwara bhat takes us a step further in the direction of progressive property rights framework and it may be helpful in protecting housing rights in some cases. But, the jurisprudence on the enforcement of socio-economic rights under article 21 is still in its nascent stage and adoption of such an approach may require a largescale constitutional manoeuvring. Moreover, it is noticeable from Court's decisions that the right to property has been revived by ensuring stronger protection under article 300 A itself.⁵⁰ Unfortunately, none of such decisions reviving right to property protected land garbs aimed at weaker parties; instead as in pre-Kesavananda period, the revived right to property is more likely to be invoked by extensive property holders.⁵¹

V. CONCLUSION

Property and socio-economic rights are inextricably linked to each other. This paper has presented only a small fraction of this interrelationship. The meaning of the "property" cannot be confined to the definitions in the ordinary dictionary, rather it goes deeper than it appears on its face. In this new era of human rights, property rights have to be reconceptualised in order to make them consistent with the goals and vision of democratic societies. Evolving theories on property rights have advocated for the inclusive property rights regime which are responsive to the socio-economic needs of all the people. However this shift in the theoretical understanding of the property has not fully translated into actual practice when it comes to the enforcement of socio-economic rights. As far as jurisprudence in India is concerned, right to housing and shelter has been recognised as fundamental right under article 21 but Court's practice on its enforcement does not reflect a consistent approach. The 'minimum core' of the right to housing and shelter has not been ascertained. At the most, the recognition of the right has availed some procedural safeguards to those who complained about their deprivation of right to housing and shelter.

⁴⁸ A.I.R. 1990 Ker. 2.

⁴⁹ P. Ishwara Bhat, *Tracing Right to Property in the Bosom of Right to life and Personal Liberty : Comparative reflection on recent Constitutional Developments in America, Canada and India*, 38(1) JOURNAL OF THE INDIAN LAW INSTITUTE 31 (1996)

⁵⁰ See K.T. Plantation Pvt. Ltd v. State of Karnataka (2011) 9 SCC 1

⁵¹ Tom Allen, *supra note* 32 at 52

One of the reasons for this incoherent jurisprudence on socio-economic rights in general and housing rights in particular may be the absence of express provisions for socio-economic rights under fundamental rights chapter. On the other hand, in South Africa, where Constitution enshrines these rights in detail, Constitutional Courts have been hailed for their rich jurisprudence on the socio economic rights. Nevertheless, this reason is not very convincing as the Supreme Court on the other occasions have gone quite far to recognise and enforce the rights that were not expressly mentioned as fundamental rights; take for example various orders and judgments on environment related cases. Property rights and socio-economic rights are not inherently in conflict with each other; property rights not only coexist with socio-economic rights, but they also rest at the core of the social and economic justice. However, in order to make this possible, the policy makers and Courts will have to develop and adopt the transformative understanding of property and the allied rights based on the property.
