PROPERTY RIGHTS AND SOCIAL AND ECONOMIC RIGHTS TO LAND, FORESTS AND NATURAL RESOURCES

This panel was convened by Dr. Namita Wahi, Fellow at the Centre for Policy Research and Director of the Land Rights Initiative, and featured presentations by Dr. Usha Ramanathan, independent researcher, who has served on several governmental committees investigating land and forest rights of marginalised communities, Dr. Jackie Dugard, Director, Gender Equity Office & Associate Professor of Law, University of Witwatersrand, South Africa, and Dr. Danie Brand, Associate Professor of Law, University of Pretoria, South Africa. The presentations were followed by comments from Professor Frank Michelman, Robert Walmsley University Professor Emeritus at Harvard Law School.

The panel focused on the complexities of property and social and economic rights to land, forests and natural resources in countries like India and South Africa, both developing countries that have emerged from a colonial past. In introducing the panel, Dr. Namita Wahi, spoke about how property entitlements during the colonial period were designed in favour of a state apparatus which did not represent the people, and stated that significant legal and institutional continuities persist between the colonial and post-colonial states in both India and South Africa.

In the first part of her discourse, Dr. Wahi traced the chequered trajectory of the individual right to property as seen through Indian history-its evolutionary path from being a ‘legal right’ first, against the state’s power of eminent domain, that culminated in the Land Acquisition Act of 1894, to becoming a ‘fundamental right’ as per the Constitution of India in 1950, and later, being stripped of its fundamental right status in 1978. Dr. Wahi owed this evolution to judicial interpretation, legislation and constitutional amendment over the years. She emphasised the critical role played by the State, in easing limitations on its power to acquire property and the pushback against this through popular and widespread resistance, culminating in the recently enacted Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. This Act sought to give some protections to peoples’ right to property against eminent domain. However, recent attempts by the government to amend the LARR Act, 2013 by an ordinance, later replaced by a bill have not garnered parliamentary support, a fact that testifies to the intense social and political contestation around the individual right to property, both as a legal and constitutional right. The second part of Dr. Wahi’s discourse focussed on the concept of property rights being the cause of contestation between different competing groups with conflicting rights and interests, owing it to different property clause iterations in the Constitution over the years, favouring the rights of certain groups over others. In this regard she referred to the conflicting interests of adivasis/the tribal (Scheduled Tribes) and the State, where the former claims a right against displacement and eviction, but the latter aims for economic development, requiring exploitation of land and natural resources for agriculture and industry. She stated that the latter tends to succeed because the STs are placed outside the dominant mainstream narratives of development, representation and rights to land. Dr. Wahi concluded by stating that the economic development narrative in India dominates the distribution of rights. She ended by suggesting a three-fold intervention for protection of interests of vulnerable groups- safeguarding constitutional protections against competing legal regimes, strengthening the institutional apparatus that implements rights of these groups, and resisting the hegemonic influence of a particular narrative of economic development.

Next, Dr. Usha Ramanathan, offered a forest rights perspective on property. This perspective was viewed from the standpoint of ‘sovereignty’ seen in light of the concept of ‘eminent domain’. Sovereignty, she said, is an uncomplicated notion, especially with regard to the Indian Constitution which holds the people of India as sovereign. But she pointed out that the State, in spite of this constitutional proclamation, by virtue of the various forest laws that it has framed since the 1800s, has leveraged its position of sovereignty over land on the pretext of ‘eminent domain’, irrespective of peoples’ occupation,
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Next, a South African perspective on land and property rights was provided by Professor Jackie Dugard. Prof. Dugard spoke of an issue that India too has been struggling with- the idea of land restitution, and flowing from it, providing a definition for fair compensation.

In this regard, she posed a vital question- How do you restore what was lost, especially given the current context of market domination? Marking the year 1994 as the turning point for land rights discourse in South Africa, she spoke of the racially discriminatory history of land entitlements in the country and how the Restitution of Land Rights Act, 1994 was crucial in making amends for past injustices suffered by people of colour with respect to rights to land and property. Citing case law, she noted however, that the effects of the Act were not as expected, due to executive inefficiency and lack of will to enforce the spirit of the Act. Reflecting on the crucial idea of ‘compensation’, she said that even courts define it on the sole basis of market value of the land/property, instead of taking into account the five holistic considerations given by the South African Constitution to determine the value of compensation. Dr. Dugard concluded by questioning a problematic trend as per which a ‘commercial’ logic has to be given to make a case that the restored land would bring one out of poverty. She observed that the same was a problem for a country in which agricultural land is being completely denuded.

Another South African perspective was presented by Prof. Danie Brand, who gave a first-hand practitioner’s account of the post-colonial discourse on land rights using an ‘eviction’ case that he recently litigated. In this case, a private company sought to evict a family from a piece of land which was ‘owned’ by the company, but was ‘occupied’ by the family for several decades. Using this case as the point of reference, Prof. Brand posited a question as to what extent in the context of land and property, can constitutional social and economic rights address all of the diverse problems associated with access to land in post colonial South Africa. Admitting that since his client- the family living for decades on the company’s land- had no legal defence as per existing law, he stated that they had based their claim on customary law by arguing that this was equal to common law as per the South African Constitution. Further to his argument, he applied the law of ‘vedustas’ which is the Roman common law on mode of acquisition of property, as per which when the particular use of a land is ‘lost in the mist of time’, and no implication of an original agreement is made, a presumption of a right is made in favour of the occupier of the land by virtue of ‘public servitude’. Prof. Brand’s concluding remarks stressed that displacement of one world view over the other needs to be paid heed to when carrying out a rights discourse on land and property.

Professor Michelman offered an apt summation of the different country-wise and issue-wise perspectives on land and property rights put forth in the panel, followed by his insights on the complexities inherent in the rights discourse on land and property, especially in the post-colonial regime of South Africa. Titling his discussion as ‘The Incredible Complexity of the Idea of Property as a site of Political Contestation in the Post-Colonial Context’, he began by dividing the concept of Property under three heads, namely, Individual Aspects and Conflicts (discussing property as a human right and constitutional right); Collective Aspects and Conflicts (discussing property as a social practice and in the context of development) and finally the cross-cutting conflicts pertaining to property between individual aspects and collective aspects. Within this framework, he made observations about the South African discourse presented by professors Dugard and Brand. Regarding Prof Dugard’s views, he observed that while it was true that the South African Constitutional provisions don’t interfere with and in fact commit to redistribution of the right, the conflict between redistribution and retention is very much present and politically potent. On the views presented by Prof Brand, Prof Michelman observed, in fact almost prophesied that the two, simultaneously progressive causes, that is, regard for indigenous, traditional and customary ways of accessing land on the one hand and the individual-oriented socio-economic rights on the other would lead to a deep ideological discontinuity that has the potential for a future practical conflict.

In conclusion, the deliberations at the panel brought out tensions between (a) individual and collective property entitlements, (b) traditional v. modern forms of property arrangements, and (c) the retentive and redistributive aspects of constitutional property clauses in text and context. The panelists also raised a dichotomy between the sovereignty of the “people” (if indeed there is a singular conception of “the people” and the sovereignty of the state. The panelists spoke about how various institutions, the legislature, the executive and the judiciary, in post colonial, developing countries like India and South Africa, engage with these dichotomies, and manage these tensions with varying outcomes for different groups of people in such societies.