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ON EMINENT DOMAIN AND SOVEREIGNTY

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On eminent domain and sovereignty

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THERE are a range of ideas in the conservation and development arenas that have spiralled into significance: eminent domain and sovereignty are two such. Conservation has captured the imagination of a diverse group of people, gathering in its train persons of differing, even conflicting, political and ideological persuasions. There are distances that have been set up between the 'severe' conservationist who views the human as a threat to other species, and those who consider coexistence of the human with other species as a possibility, perhaps necessity, even wisdom.

These distances shelter a continuum of differences – in principle, perception, policy and practice – but at the core, the concern is not contradictory. The contest is not over whether conservation is a good or a bad thing; it is the means, especially expulsion, and keeping out, which may foster contention.

Development is different. It is a term that conjures up images that are

*Thanks are due to Maya Ratnam for keeping animal rights in the discussion.

often incompatible with each other. Dams, industry, SEZs, mines, airports, resorts have both been promoted as development, and damned as destruction. The reality of mass displacement, and the transfer of land and resources to corporations, challenges the idea of growth as virtue. Not surprisingly, the experience of eviction and impoverishment has raised the pitch of resistance and protest. This, in turn, has invited the sobriquet 'anti-national' to those who condemn such a model of development as being anti-people.

Both conservation and development are intricately dependent on the doctrine of eminent domain. In its classical sense, eminent domain is the power of the state to take over private land for a public purpose. Compensation changes the nature of this take-over from appropriation to acquisition. This doctrine is embedded in the Land Acquisition Act 1894, and over time a jurisprudence has developed around the text, and use, of a law which privileges the power of the state while making it more or less invulnerable to challenge from within the law. It is this appreciation of the power of the state

that has been responsible, at least in part, for making project sites, and the street, a locus of contest with the state in its use of the power of eminent domain.

Independence from colonial rule, and the promulgation of the Constitution, failed to alter the existence of this power. In the '50s and '60s, eminent domain was asserted against zamindars and feudal landholders, in turn giving it a validation which helped consolidate the power. In the mid-1980s, when the romance of 'sacrifice in the larger interest' had begun to wear thin, amidst experiences of state apathy and incompetence in dealing with the marginalization that was a by-product of projects, it was not the existence of the power of eminent domain that was denied, but its use that was challenged as lacking in public morality, and constitutionality.

The effect of displacement – the break-up of communities, immiseration, impoverishment, instability and illegalising of peoples that the projects produced – set the context for contestation. That the multitudes being displaced – such as those who were part of the community but did not own or have 'interest' in land – were outside the concern of the Land Acquisition Act, and whose losses were not reflected in the process dictated by law, only added to the amalgam. That the same power drawn upon to carry out land reforms, and make redistribution possible, could be deployed to place swathes of land at the disposal of corporations, equally, textured reactions to the use of the eminent domain power.

In the process, what has lain largely unattended is the assumption that eminent domain not merely gives the state the capacity to compulsorily acquire land for a public purpose, but that it is an expression of the absolute power

of the state over all land in its territory. This assumption has precluded debate on what defines the nature of state power in relation to land which is not held privately. Is there, for instance, no need in such cases to declare and defend a 'public purpose'? How are 'persons interested' in the land to be identified, and consulted? There is the question that was raised in one of the early cases on zamindari abolition: is the state a super landlord? Or, taking it on from there, is the state an owner, a trustee, a land holder, occupying a state of exception, where ordinary laws and rules do not apply, a protector of public interest as it deems right? There have been no answers yet; and these become important when considered in the context of conservation.

Conservation demands state intervention on behalf of a range of species. The capacity of a species to protect itself from natural, human and bureaucratic acts, silences and excesses is intended to be protected, and enhanced, by conservation. The possibility of exclusion, fencing, regulating access and use, illegalising activity such as felling and poaching, are all aspects of conservation that may derive their effectiveness from the power to control, and convert, land and related resources. The declaration of an area as a forest, a national park or a sanctuary is facilitated by the existence, and exercise, of the power of eminent domain.

That there is an overlap in the identity of conservationists, and those challenging mass displacement and the taking away of land and resources from communities, is significant to a debate on eminent domain. It would seem that what is in question is not whether any power in the nature of eminent domain should exist, for conservation, especially, offers scenarios where the exercise of the state's

authority becomes imperative. The question, instead, is about the extent and scope of the state's power. How is it to be exercised so that it does not slide down the steep slope of descent into absolute power? What is the state in relation to land, resources and territory? The question that hangs in the air – is the state a super landlord, an owner-without-boundaries, a trustee, or whatever else may characterise it – is still to find an answer.

While engaging in this investigation, it may be useful to revisit the language in which the laws are framed. The Forest Act 1927, for instance, speaks of 'property of government', that 'government has proprietary rights', that 'government is entitled' to forest produce. It speaks of the 'extinction' of rights; of 'control over forests and lands not being the property of government', 'expropriation of forests', being 'deemed to be property of government', 'presumption that forest produce belongs to government' and, in section 34 says, 'whenever it appears to the state government that any land is required for any of the purposes of this Act, such land shall be deemed to be needed for a public purpose ...' The width of this deeming provision should be sufficient reason to set off an enquiry!

The idea of property in anything being with the government features not only in the 1927 Act, but in the 1972 Wildlife (Protection) Act too. So, 'plants (are) to be government property', as are wild animals that have been hunted. When section 65 of the Wildlife (Protection) Act 'protects' the 'rights of scheduled tribes' in the Nicobar Islands, it suggests that rights which are not expressly recognized by law may not otherwise exist.

The control that law enables the state to have, and exercise, over a people provides meaning to the term

'sovereignty'. Sovereignty is a concept drawn from international law, based on the principle of non-interference. It is, then, an attribute that influences the relationship of one state with another. The idea that sovereignty is also about the state's relationship with land and other resources in its territory has expanded the contours of the concept. The evolution of eminent domain reflects elements of this version of sovereignty.

It is becoming increasingly clear that this notion may extend to recognizing power, control and authority over peoples' lives. Decisions about the location of risks posed by nuclear and chemical industry, mining in tribal areas, being in denial about asbestos as a silent killer among workers in a shipyard – can all be seen as instances of assertion of sovereignty over the bodies and lives of the people in India. That a court can order the eviction of forest dwelling communities, despite protections promised to them in the Constitution, indicates the extent to which institutions and agencies of state may recognize the sovereignty of the state over people and their lives. This understanding of the power of the state has to be deconstructed, and recreated in a different image, if sovereignty is not to become a strut to acquire absolute power.

The issue of sovereignty has acquired another sheen after the emergence of the state as a contracting party. Increasingly, the state has been signing memoranda of understanding (MoUs) and entering into contractual relationships. MoUs, and contracts, demand that the state deliver on promises made in these documents to speed up the processes of land acquisition, environmental clearances and forest permissions. This changes the role of the state as a regulator, to the state as a party to a contract with performance of the terms

of the contract as its elevated concern. The MoU between the government of the state of Orissa and POSCO for establishment of an integrated steel plant at Paradeep is illustrative.

POSCO proposed to set up an integrated steel plant with a capacity of 12 million tonnes per annum in the state of Orissa at Paradeep, in Jagatsinghpur district. The Government of Orissa explained that, 'desirous of utilizing its natural resources and rapidly industrializing the State, so as to bring prosperity and well-being to its people, (it) has been making determined efforts to establish new industries in different locations. In this context, the Government of Orissa has been seeking to identify suitable promoters to establish new integrated steel plants in view of the rich iron ore and coal deposits in the State.'

The Government of Orissa undertook to 'identify, acquire and transfer a suitable tract of land between 20 and 25 acres for this purpose, in accordance with the specifications provided by the company' to set up its offices. 'The company will require approximately 4,000 acres of land... for the purpose of setting up the steel project and associated facilities, including the port facilities and a storage yard for coking coal... In addition, the company will require approximately 2,000 acres of land for township development, recreational activities and all related social infrastructure development (collectively, the 'Integrated Township Development'). Out of this, approximately 1,500 acres would be identified adjacent/near to the steel project and another 500 acres (approx.) near the mining project. State government will facilitate all clearances and approvals of the central government, if required.'

In addition to the land required for the core activities of the overall

project, 'the company may require additional land pockets for development of the 'transportation project', the 'water project' and any other project-related infrastructure facilities', and the Government of Orissa agreed 'to acquire and transfer all the above-mentioned land required for the overall project, free from all encumbrances through Orissa Industrial Infrastructure Development Corporation (IDCO) on payment of the cost of land.'

On its part, the Government of Orissa agreed to 'expeditiously and within a reasonable time frame, hand over to the company non-forest government land for which the company has completed all formalities. Acquisition of private land will be taken up on priority. ... For rehabilitation of displaced families, a rehabilitation and resettlement package would be implemented as per prevailing guidelines and practices.'

The Government of Orissa agreed to recommend to the central government and 'use its best efforts to obtain the central government's approval within the minimum possible time for the grant of prospecting licences and the captive mining leases for the iron ore mines.' The Government of Orissa agreed to recommend such areas as are free from litigation as well as encumbrances. 'In the event of litigation at any stage, Government of Orissa will diligently defend their recommendations made in favour of the company in the appropriate judicial, quasi judicial fora.'

The Government of Orissa will, the MoU reads, 'assist the company in obtaining all clearances, including forest and environment clearance and approval of the State Pollution Control Board, and the Ministry of Environment and Forest, Government of India under Forest (Conservation)

Act, 1980 and Environmental (Protection) Act, 1986 for opening up the iron ore mines, laying roads, constructing township, etc.’ The Government of Orissa agreed to ‘provide all possible assistance to the company for acquiring mineral concession for limestone and dolomite within the ambit of the Mines and Minerals Development and Regulation Act and Mineral Concession Rules. ‘Government of Orissa will make best efforts and provide all possible assistance to POSCO for expeditious clearance of applications relating to mining lease and related matters such as forest, environment, etc. so as to enable POSCO to start its mining operations in time to synchronize with the commissioning of its steel plant.’ The Government of Orissa would ‘facilitate the process of obtaining various approvals expeditiously for the company.’

The commitments it makes in contractual deeds such as this may tempt the state to exercise its power over people to ensure that its obligations in the contract are met and to rework its priorities, including concerns like the protection of the interests of tribal communities, or the preservation of the habitat of endangered wildlife. The manner in which the notion of sovereignty is evolving would make this a distinct possibility. It is also disturbing that as a party to a contract, the state may be swayed to breach the laws it makes in its legislative capacity.

These are interesting times when conservation, the exercise of the power of eminent domain, and the idea of sovereignty over the people are currently being shaped by various ways in which democracy is being played out among affected people, their supporters, conservationists, processes that have been set in place to prevent the flouting of norms and laws with impunity, and the wielders of state power.