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Land Acquisition, Eminent Domain and the 2011 Bill

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The displaced and their advocates have been campaigning for a law that will limit the coercive power of the State in taking over land. The Land Acquisition Rehabilitation and Resettlement Bill 2011 adopts some of the language and concerns from the sites of conflict. But by beginning with the premise that acquisition is inevitable and that industrialisation, urbanisation and infrastructure will have lexical priority, the LARR Bill 2011 may have gained few friends among those whom involuntary acquisition has displaced, and those for whom rehabilitation has been about promises that have seldom been kept.

In its 117 years of existence, the Land Acquisition Act 1894 (LAA 1894) has influenced the expansion of the power of the State to acquire and take over land. It has helped institutionalise involuntary acquisition. Premised on the doctrine of eminent domain, it presumes a priority to the requirements of the State which, by definition, is for the general good of the public, over the interests of landowners and users. The doctrine of eminent domain invests power in the state to acquire private land for public purpose on payment of compensation.

The language of “public purpose” has lent a touch of public morality to involuntary acquisition and dispossession which, especially since the 1980s has been facing serious challenge. Mass displacement posed an early threat to the legitimacy of the project of development. This phenomenon defied the logic of eminent domain in demonstrating that the link between “public purpose” and acquisition was incapable of acknowledging the thousands, and hundreds of thousands, who would stand to lose their livelihood, security, support structures when land was acquired and whole communities uprooted. The LAA, 1894 was trained to acknowledge a “person interested” in the land who could, therefore, become a “claimant”. Even this limited right did not vest in the wider multitude who would face the consequent forcible eviction.

Unresolved Question

An unresolved question has hung in the air since the early years after Independence when laws were passed to dispossess zamindars: What is the relationship of the state with land? Is it a landlord? A super landlord? An owner? A trustee? A holder of land? A manager? Even as this remains in the realm of debate, the state has, among other roles, emerged as an agency

that facilitates the transfer of land to companies in their pursuit of projects and profits. This has been the second, dominant, challenge to the legitimacy of involuntary acquisition. In 1984, when the LAA 1894 went through elaborate amendment, the role that the State had taken on in acquiring land for companies was re-inforced. The neo-liberal agenda, or the reforms agenda as some term it, forged a partnership between the state and companies. The state casts itself in the role of a facilitator; as the “public” in public-private partnerships (PPP); as party to contracts with corporations where it guarantees certain conditions and terms that would make projects friction free while guaranteeing profits; as agents in procuring land and providing clearances; as disinvestors, through which process the transfer of assets would occur. The alignment of state interest with corporate interest, which has the state acquiring and transferring land to corporations, has had dispossessed and displaced persons and communities seeing the state as adversarial to their interest.

In 1984, the Statement of Objects and Reasons (SOR) of the Amendment Act referred to the “sacrifices” of the affected population. “The individuals and institutions who are unavoidably to be deprived of their property rights in land need to be adequately compensated for the loss keeping in view the sacrifice they have to make for the larger interests of the community”, the SOR read. The widening rift in the meaning accorded to “the larger interests of the community”, and the determination not to become “sacrifices” in the interests of the corporatisation of resources has become the theme song of the past decade and a half.

A model of development that requires extraordinary sacrifices, that is ecologically and in socio-economic terms of questionable repute and which is linked with such phenomena as marginalisation, exclusion and impoverishment has not been able to cross the credibility barrier to convince those who are sometimes referred to as “victims of development”. Macroeconomic projections of growth and prosperity have not succeeded in convincing the project affected that their sacrifice

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has value that they must respect; and this is in evidence in the many sites of pitched conflict and resistance where projects venture. A challenge to the development paradigm has in addition emerged from concerns that the avidity with which choice land is being handed over to corporations to be diverted from its designated use would compromise food security, with agricultural land disappearing into domains of non-agricultural uses.

Laws and Policies

The decades since the development project got underway in the 1950s has caused “development-induced displacement”. Laws and policies that dealt with rehabilitation have been around since the 1960s and 1970s. The T N Singh formula of a job to each family displaced to make way for public sector mines and industries is of 1967 vintage.¹ Since 1976, Maharashtra has had a law on rehabilitation which in its current form is the Maharashtra Project Affected Persons Rehabilitation Act. The most discussed is the 1993 draft policy put together by the Ministry of Rural Development.² States and public enterprises have sporadically produced policies. It was not till February 2004 that a National Policy on Resettlement and Rehabilitation 2003 was notified, to be replaced in 2007 by the National Rehabilitation Policy 2006. The prescriptions in policy, the possibility of performance, and sanctions for non-performance are at the heart of the problem. “Retrospectivity”, which acknowledges displacement through decades past, has been a crucial element in the validation, or unacceptability, of law and policy.

There has been an escalating demand to replace the LAA, 1894 with a law that recognises the perils of mass displacement, accounts for those who have been dislodged and dispossessed through the decades, restrains companies from benefiting from involuntary acquisition and forced eviction, and reconsiders a model of development that could demote agriculture and, consequently, threaten food security. The Land Acquisition Rehabilitation and Resettlement Bill (77 of 2011) (LARR 2011) introduced in the Lok Sabha on 7 September 2011 will have to be tested to see if it meets these expectations.

Lexical Priority

There is a problem even at the outset. A “Foreword” to the draft bill that Union Minister for Rural Development Jairam Ramesh displayed on the ministry’s website on 27 July 2011 begins with these words: “Infrastructure across the country must expand rapidly. Industrialisation, especially based on manufacture, has also to accelerate. Urbanisation is inevitable. Land is an essential requirement for all these processes.” Having set these out as priorities which the law is to adopt, it is then said: “In every case, land acquisition must take place in a manner that fully protects the interests of landowners and also those whose livelihoods depend on the land being acquired”. This sets up a lexical priority for industry, urbanisation and infrastructure, and introduces pragmatism into issues of displacement and rehabilitation. This approach runs through the entire LARR 2011. In the bill introduced in the Lok Sabha, the preamble uses adjectives such as “humane”, “participatory”, “informed”, “consultative”, “transparent”, but the juggernaut of “development” is not to be slowed down; the process of dealing with its wake may be modified.

The attempt to reconcile conflicting interests has, however, produced some interesting elements. So,

- the idea of “legitimate and bona fide public purpose for the proposed acquisition which necessitates acquisition of the land identified” (Clause 8(2)(a));
- that “only the minimum area of land required for the project” can be sought to be acquired (Clause 8(3));
- that “minimum displacement of people, minimum disturbance to the infrastructure, ecology and minimum adverse impact on the individuals affected” should be ensured (Clause 8(3)).

These capture some of the causes of discontent. Yet, these are not justiciable standards but indicators to be used by an expert committee in its appraisal of the social impact assessment which is to be carried out as a prelude to acquisition.

The LAA 1894 was concerned exclusively with acquisition; it was innocent of the need for rehabilitation. In 1984, “public purpose” was redefined to include the provision of land for residential purposes “...to persons displaced or affected by

reason of the implementation of any scheme undertaken by government...” (Section 3(f)(v)). There was no procedure prescribed, and no entitlements created. It was among the purposes for which the state had the power, under the Act, to acquire land.

Beyond the 1894 Act

The LARR 2011 has had to move beyond the perimeters of the LAA 1894. Since the mid-1990s, the demand has been for any law of acquisition to include within it provisions that ensure rehabilitation. That explains the move from a “Land Acquisition Act” to a “Land Acquisition, Rehabilitation and Resettlement Bill”. The applicability of the law accordingly extends to situations where land is acquired for purposes connected with the government and private companies including public-private partnership projects. The notion of the “affected family” (Clause 3(c)) has been introduced, and this is distinct from the “person interested” who was, and continues in this bill to be the person entitled to compensation. “Affected family” includes agricultural labourers, tenants, sharecroppers, artisans, those working in the affected area for three years prior to the acquisition, “whose primary source of livelihood stands affected by the acquisition of land” as also the person who loses land.

It includes those whose primary source of livelihood for three years prior to the acquisition was “dependent on forests or water bodies and includes gatherers of forest produce, hunters, fisherfolk and boatmen and (those whose) livelihood is affected due to acquisition of land”. It includes too families to whom land has been assigned under any government scheme and which land is to be acquired. In urban areas, it would include a family residing on the land for the preceding three years, or where their livelihood is linked with it. This expanded idea of the affected family could, if the law is seriously implemented, work to prevent indiscriminate and wanton dispossession. The inclusion of “tribals and other traditional forest dwellers who have lost any of their traditional rights recognised under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest

Rights) Act 2006 due to acquisition of land” (Clause 3(c) (iii)), however, should bring us to a screeching halt if we are otherwise finding room for optimism.

Diluting Forest Rights Act

The Forest Rights Act 2006 was an outcome of concerns about the increasing insecurity of tribals, forest dwellers, and forest dependent communities. The threat of eviction, or alienation, from the forest was looming in the early years of the first decade of this century. That tribals and forest dwellers had no legally ascribed rights, and this was making them vulnerable to exclusion from their habitat. The Forest Rights Act 2006 was not about vesting property rights in the individual; it was about protecting the interests of the tribals and forest dwellers in relation to their habitat. It was not about creating rights; it was about recognising rights. In including the rights created under the 2006 Act among those that may be “acquired” through what, at its root, is a coercive law, it reduces the Act to merely creating transactable property rights. The LARR 2011 does carry a caveat: that the law relating to land transfer

in scheduled areas shall be followed. The weakness of this protection is revealed when we consider that the transfer of land from a tribal to non-tribal in scheduled areas is generally overseen by a collector, or some agent of the state, whose job it is to ensure that the interests of the tribal is protected. If the state is itself to be acquiring the land, then the protection is diminished to that degree. If the state is legally permitted to acquire the land to be handed over to a private company, that dilutes the protection further.

Bringing forest areas, and Fifth and Sixth Schedule areas, within the law of involuntary acquisition does not conform to the hard-fought norms recognised in the Samatha judgment.³ The idea of recognising rights so that they can be monetised and taken over could be viewed as amounting to a fraud on the tribals and forest dwellers. If land has to be diverted for the purposes of industry or infrastructure in scheduled areas and in areas in the Fifth and Sixth Schedules, some route other than the coercive power under the land acquisition law will have to be found.

There are provisions that have been introduced in the LARR 2011 which have drawn on the debates and disputes around displacement. Change of public purpose – where acquisition is based on one purpose but it is used for another purpose – has been among the practices that brought coercive acquisition into disrepute. It revealed a casualness about state power. The LARR 2011 reads: “No change from the purpose or related purposes for which the land is originally sought to be acquired shall be allowed” (Clause 93). “Or related purposes” does allow for some leeway, but it still becomes a qualified power. Transacting on land and on projects between corporations has raised questions which, in part, is addressed in clause 94: “No change of ownership without specific permission from the appropriate government shall be allowed”. Importantly: “No land use change shall be permitted if rehabilitation and resettlement is not complied with in full” (Clause 42(4)). There is no clarity on what would constitute such compliance, and setting that out would be necessary prerequisite to this provision acquiring meaning.



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A government, embarrassed at being seen as an agent for corporations, has stepped aside and is seen to be encouraging corporations to buy land from landowners, with the State stepping in when a substantial portion – LARR 2011 sets it at 80% – has been bought. The rehabilitation aspect of LARR 2011 would apply where the State steps in, and also where a project exceeds 100 acres in rural areas and 50 acres in urban areas, whether or not the state has had a role in the purchase of land.

Few Rights

For years now, “market value” as a basis for compensation has been sought to be replaced by “replacement value”. LARR 2011 falls far short of considering that standard, even as it provides the calculus that will increase the total amount received as compensation. The possibility of other forms of compensation, such as shares in the enterprise for which the land is being acquired, is built into this bill. But land for land, jobs in the enterprise, annuities, fishing rights are alternatives only as the rehabilitation authority deems practical. There are few rights and entitlements in this construction of the law.

The retention of the “urgency” clause is inexplicable. It is true that there is a significant contraction in the LARR 2011 of the reasons that can provoke the use of the urgency power. Unlike the LAA 1894 which vests vast discretion in what is considered urgent, and which has resulted in indiscriminate use of this power,⁴ the LARR Bill 2011 restricts it “to the minimum area required for the defence of India or national security or for any emergencies arising out of natural calamities”. These situations may require immediate possession, but the permanent severance of the relationship between the land and persons interested in the land is excessive. “Requisitioning” land or property,⁵ and taking it free of all encumbrances, are two distinct processes. This power does not belong in a land acquisition law.

Clause 59 of the 27 July draft allowed for imposing a penalty for obstructing acquisition of land with imprisonment that could extend to one month or a fine of

Rs 500 or both. This provision, which was a carry-over from LAA 1894 (Section 46) fortunately finds no place in LARR 2011. In another context, the 27 July draft had provided for the “return of unutilised land” and this seems to have quietly slipped out of the LARR 2011. This is a significant omission, which has been replaced by the idea of a “Land Bank” (Clause 95). The perception of the state as a rightful holder of land is in evidence not only in this notion of the land bank. Clause 2(1) (a) recognises an interest in the government to acquire land “for its own use, hold and control” – each of these terms recognise an extraordinary interest, and power, in relation to land which conflicts around this power have sought to tame. The LARR 2011, in reinforcing this broad sweep of power and interest, keeps the conflicts alive. Fuelling the conflicts further is the expansion of this law to give priority to “use of private companies for public purpose (including public-private partnership projects)...”, and acquisition “on the request of private companies for immediate and declared use by such companies of land for public purposes” (Clause 2(1) (b) and (c)). The prioritising of infrastructure projects, which is then defined to include “educational, sports, healthcare” and even “tourism” are unlikely to lull the fears of those who anticipate large-scale transfer of land to follow if this bill were to become law. More bluntly stated, these are likely to draw the lines of conflict more sharply still.

There is an interesting departure from the LAA 1894 in Chapter XII which attempts to set out “offences and penalties”. Producing a false document, making a false claim for rehabilitation are made punishable. In a departure from common practice, the LARR 2011 suggests that “disciplinary proceedings” may be drawn up against a government servant who “if proved guilty of a mala fide action in respect of any provision of this Act, shall be liable to punishment”. This, and other provisions in this chapter, though, are non-specific and, so, not likely to be enforceable as they now read. Clause 79, for instance, provides a punishment “if any person contravenes any of the provisions relating to payment of compensation or rehabilitation and resettlement”. It is

not clear if this refers to officials, affected families or any others; or whether it will cover such acts as “overacquisition”. Considering the serious consequences of involuntary acquisition and forced eviction, “offences” are a component that can usefully have a place in this law; but it clearly needs inputs assisted by imagination and experience. A special mention of the diversion of land from multi-cropping to other uses employs the language of “exceptional circumstances” and “demonstrable last resort” when such diversion is to occur, and percentages prescribed for the maximum extent that may be allowed (Clause 10).

Land Titling Bill

There is another bill which must be seen in conjunction with the LARR 2011. The Land Titling Bill 2011 which has been released by the Ministry of Rural Development in draft form, connected law. That bill is an attempt at commoditisation of land, making it tradable in the land market. The long title says that the law is to create a “conclusive property titling system”. It is to “prepare a record of all immovable properties”. It shifts the onus from the state to the individual to keep the records updated on pain of punishment, and even loss of acknowledgement of title to the land or interest in the land (Chapter VI, “Compulsory Intimations to Land Titling Authority”). Clause 36(3) cautions: “All persons are deemed to have notice of every entry in the Register of Titles”. Indicating that the purpose of the bill is simplifying transactions on land, it says: “Any title recorded in the Register of Titles in accordance with the provisions of the Act, shall be considered as evidence of the marketable title of the landholder” (Clause 41).

Indemnification in transactions on land is an idea that is undertaken by insurance companies as part of their business activity: they indemnify land titles and bear the cost of litigation and ancillary matters if they were to arise. The idea of introducing an “indemnification” clause, where the government indemnifies a person who acts on the basis of the title as it is recorded in the Land Registry (Clause 42), is a case of the government taking over the role of an insurance company. They indemnify

land titles and bear the cost of litigation and ancillary matters if they were to arise.

The draft Land Titling Bill is not about updating land records. It is not about the accuracy of land records, but about its finality for purposes of determining encumbrances and saleability. It is about deciding on a means by which land may be easily dealt with in the market.

The displaced, project affected and dispossessed and their advocates have been campaigning long and hard for a law that

will limit the coercive power of the state in taking over land. The LARR 2011 adopts some of the language and concerns from the sites of conflict. But, in beginning with the premise that land acquisition is inevitable and that industrialisation, urbanisation and infrastructure will have lexical priority, the LARR 2011 may have gained few friends among those whom involuntary acquisition has displaced, and those for whom rehabilitation has been about promises that have seldom been kept.

NOTES

- 1 Ibid. See also, *Butu Prasad Kumbhar vs SAIL*, 1995 Supp 2, *Supreme Court Cases*, 225.
- 2 Walter Fernandes and Vijay Paranjpye (1997), *Rehabilitation Policy and Law in India: A Right to Livelihood*, Indian Social Institute.
- 3 *Samatha vs State of Andhra Pradesh* (1997) 8, *Supreme Court Cases*, 191.
- 4 See for e.g, Ashish Tripathi, "HC Quashes Acquisition of 600 Hectares of Land in Greater Noida", dated 19 July 2011 found at http://articles.timesofindia.indiatimes.com/2011-07-19/noida/29790697_1_urgency-clause-land-acquisition-act-greater-noida-authority.
- 5 See, for instance, Requisitioning and Acquisition of Immovable Property Act 1952.