STATE POWER OF EMINENT DOMAIN AND TRIBAL LAND RIGHTS IN INDIA: A CRITICAL ANALYSIS OF THE CURRENT LAWS

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ABSTRACT

Land acquisition in India has traditionally been the subject of widespread disputation due to the multitude of dimensions that the significance of land occupies within Indian society. As the importance of land and the conflicts relating to it take a more central and important role in our country's politics and growing economy, the state's power of eminent domain becomes critical to analyse in light of its capability to simultaneously effectuate redistributive justice and have a detrimental effect on already marginalised communities. Over the last few years with the increase in protests ensuing in states like Orissa, Andhra Pradesh, Assam and Maharashtra over the forceful land acquisition by the government and the inadequate compensation provided for the same, it becomes important to analyse the doctrine and understand its legal and political basis in India. In an attempt to analyse the same, this paper enters into a discussion on the doctrine of eminent domain and traces its origin in India, through a study of pre-constitutional law and the colonial philosophy behind the development of the doctrine. It questions whether the doctrine of eminent domain as it stands today mirrors its colonial roots and traces the dominant colonial outlook portrayed through the land acquisition laws in India. The paper also dwells on the land rights of Indigenous tribes and Adivasis in India, who continue to suffer dispossession of their land, displacement and destruction of their tribal way of life. Lastly, the paper attempts to examine the adequacy of the current laws in addressing the tribal question and provides a glimpse into a possible way forward.

Keywords: Tribal land rights, Eminent domain, Land Acquisition, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013.

INTRODUCTION

The state's power of eminent domain, stemming from its role as the sovereign of the land, permits the state to forcibly acquire property belonging to private individuals for a 'public purpose' upon the recompense of an 'equitable compensation' in accordance with the procedure laid down by the law. The rationale behind the two quintessential elements, namely that of 'public purpose' and 'equitable compensation', is to ensure that no individual faces the unreasonable burden of bolstering the 'public good' to their own detriment.

Land acquisition in India has traditionally been the subject of extensive disputation. Land and its uses have a multitude of dimensions within Indian society, with it being not just a vital economic resource but also being central to the cultural, historical and ethnic identities of many communities. Additionally, it also serves as a major source of income for many in the country. It is hence not surprising that land acquisitions are so widely contested within India. In exercise of such powers of land acquisition, the Indian state has usually failed in balancing the economic interests of the state vis-a-vie the rights of the people. At the end, as will also be pointed out further into the paper, the weakest sections of society, who do not have a voice are the ones who end up bearing the 'burden of the public good.'

This paper attempts to dwell into the question of one such community namely that of the tribal or Adivasis so as to analyse whether these laws have a disproportionate impact on their communities. In the interest of clarity this paper is divided into four parts, including the current section. Section II of the paper traces the history of eminent domain and its inception into pre-independent and Independent India, Section III addresses the issue of tribal question with respect to land dispossession and dwells into a legal analysis on the current legal framework. Lastly Section IV concludes and provides a glimpse on the possible ways forward.

LAND ACQUISITION AND EMINENT DOMAIN IN INDIA

Indian jurisprudence on Eminent domain draws its origins from the works of Hugo Grotius,[i] and legitimises its application based on the postulation that:

> *"The property of the subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in cases of extreme necessity... but for ends of public utility, to which ends those who found civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property."* [ii]

This doctrine as propounded by Grotius, formed the basis of the land acquisition laws in the country which were first enacted by the British during the colonial rule and subsequently inherited by the independent Indian government. While property rights in India have been a constantly debated and transient field of law, the current laws on land acquisition in India, as will be pointed out through this section, mirror their colonial roots and continue to perpetuate their injustice.[iii] This section traces the development of the doctrine in India to portray the colonial undertones which influence the current legal discourse on land acquisition laws.

For the purposes of clarity this Section is subdivided into two parts, namely on [A.] Land acquisition laws in Pre-independent India; and [B.] Land acquisition laws in Independent India.

Land Acquisition Laws in Pre-Independent India

Land acquisition was always a contested matter due to the social, political and economic significance of land. Much like as is done in current times, the colonial state also attempted to quell these contestations by legitimising the practice through the creation of a series of land acquisition laws. The genesis of land acquisition in India began with the passing of Regulation I of the Bengal Code in 1824, with the purpose of enabling land acquisition at a fair price for "roads, canals or other public purposes",[iv] and for "manufacturing of salt".[v] This legislation grounded the doctrine of eminent domain for the first time in India and legitimised the acquisition of land by the state for the decades to come. While the law only applied to Bengal,

a multitude of other laws such as those that were enacted in Bombay[vi] and Madras[vii] were also created to legitimise its application in other states. Following the advent of the railways in India, there emerged an urgent need to amend the legislations to facilitate the development of the railways which demanded mobilization of a larger amounts of land.[viii] Hence, to fill the void the precursor laws were repealed and replaced by an act which subsequently featured a Pan-Indian application, namely the Act VI of 1857. This act applied to the whole of British India and was a consolidation of various laws on land.[ix] This act served as the precursor to and formed the basis of the Land Acquisition Act, 1894,[x] which replaced all previous laws on land acquisition and was also subsequently adopted even by the independent Indian government.[xi]

The two main goals of the British through the introduction of the plethora of laws as referred to earlier, were mainly to empower the state to acquire private property while simultaneously keeping compensation to be paid to a minimum.[xii] In order to do so, they introduced intricate and arbitrary rules which prevented effective methods and grounds for redressal.[xiii] Following the Independence of India in 1947, no real change was brought about in the law and the application of the same continued into post-colonial Indian jurisprudence as well, its presence being legitimised by Article 372 of the constitution.

Land Acquisition Laws in Independent India

On May 23rd, 1948, through the Indian Independence (Adaptation of Central Acts and Ordinances) Order 1948, the Independent Indian government adopted the Land Acquisition Act 1894. While doing so, the only amendment made was to its application through the replacing of the words "the whole of British India" with "the whole of India". This decision of the Independent Indian government was quite absurd as it allowed for the application of an act in India which was used by the British to impoverish and exploit the masses. While the government initially did stress heavily on the development and upliftment of the masses in the country, they contradicted their own intentions by adopting the same laws which were used by the colonizers to exploit the masses, into the post-independence Indian legal system. By not amending the arbitrary and flawed legislation, the government perpetuated the injustice faced by the masses due to the act. This implied that they merely took over the position vacated by the colonial authorities and asserted complete and unquestionable control over the land in the country. As best pointed out by Priya S Gupta,[xiv] through the process of mechanically adopting

the act, the state merely 'replicated the colonizers' form' and in doing so 'allowed eminent domain to persist without any checks or balances.'[xv]

Over the last seventy years, while the independent Indian government attempted to pursue a policy in favour of social redistribution and economic development, a plethora of laws relating to land acquisition were enacted. Post-independence, many amendments were also made to the Land Acquisition Act, with the last major amendment being in 1984. Yet, not much of a change was brought about and the act as it stood still did not address many of the issues such as that of the inadequate compensation, the absence of consultation with the people who would get displaced, the exclusion of those who were not land owners but dependant on the land, lack of clarity on key terms such as public purpose, etc. The Act also suffered rampant instances of misuse and manipulation.

Following the 1990's, which saw a drastic increase in civil movements and public outrage over the nature of the status quo, the need for a legal reform with respect to the same, emerged. This finally translated into legislative efforts in 2007 which ended with the introduction of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, (here in referred to as LARR) in place of the former colonial LAA. While the act itself did address and remedy a lot of the previous issues, its real efficiency can be gauged only by analysing how the same addresses the question of the weaker sections of society, namely those of the tribal populations, who have traditionally been the most affected by land acquisition laws and development projects.

TRIBAL RIGHTS AND LAND DISPOSSESSION

'Land as a social justice concern for Adivasis has a long historical precedent in rebellions and struggles across India.'[xvi] While laws do exist on paper to protect tribal land rights, the lack of implementation and variation in laws in the states have led to the displacement and exploitation of the tribal populations. As per a 2014 government report,[xvii] tribal communities face the largest brunt of 'development induced displacement', with them constituting almost 31% of

the total number of people displaced while only constituting 8.6% of our population. Over the decades post-independence, the increased need for development and creation of modern infrastructure, led to an increased need for land and resources. [xviii] Minerals being the main source of economic growth in the country, was hence in high demand. Unfortunately, most mineral deposits could be seen to overlap with tribal areas.[xix] Over the years, these mining projects and other such development projects have emerged as the principal hazard to the existence of tribal societies with many such tribal communities being displaced using questionable statutes such as the Coal Bearing Areas (Acquisition and Development) Act 1957, which did not conform to international law standards.[xx] The largescale exploitation of natural resources of such areas through the creation of mines and other such development related projects, have had a detrimental effect on the Adivasis, who as a result of the same have been systematically evicted from their land and disposed of their means of production.[xxi] Many communities also lose their political autonomy, after being dismantled under the garb of "national interest or "development".[xxii] In addition many were displaced without proper compensation or rehabilitation. As studies have shown, for every 1% the mining industries contribute to the GDP of India, it displaces around 4 times more people than all the other types of development projects put together.[xxiii]

As best stated by B.K Roy, on the state of tribal areas within India:

> *"In India, the under-developed area is exploited by the developed areas as colonies, as are the underdeveloped by the developed people….. the natives of the internal colonies are not only the victims of underdevelopment but of development as well, as this development does not mean the development of the people there but their displacement and replacement by the colonies of the developed people, the clever people, the politically connected people coming from the developed areas."*[xxiv]

This issue tends to be problematic as the state, which is supposed to function in the public interest (which includes that of the tribal), is the one exploiting the tribal population's rights in the name of economic development.[xxv] Hence, the debate as to whether the state under the garb of development and modernization could forgo the welfare state principles became one of a

contested nature. This was finally addressed by the Supreme Court in 1997 in the case of *Samatha v State Of Andhra Pradesh*.[xxvi] The case being one on tribal land rights and mining operations was held in favour of the tribal land rights, with the Supreme Court stating that tribal private and forest land could not be sold or leased out to non-tribal individuals, including private industries as the same would be in contradiction to schedule 5 of the constitution.[xxvii]

While this was a big step in the recognition of tribal rights, the case did not address the state's right to eminent domain with respect to tribal land to undertake development projects for the 'greater good of society', hence leaving a contested aspect without a discernible legal answer. This has been taken advantage of by the states on multiple occasions. One such example is seen through the case of the Andhra Pradesh Government, where they were able to displace more than 2 lakh people who were mostly Adivasis without any legal contestation to the same.[xxviii] Additionally, the advancements made in tribal land rights protection through the case were also undone only a few years later in subsequent judgments, where claims for rehabilitation of tribal individuals displaced by the Sardar Sarovar dam was adjudicated in favour of the industrialists.[xxix] This formed a precedent that has not been invalidated till date.[xxx]

While many laws have subsequently been introduced to help secure the land rights of the Adivasis, the state has continued to exploit them and has acquired tribal lands in the name of the national interest much against the guarantees supposedly provided under the constitution. As is quite evident at this point, most of the previous laws have been ineffective to a large extent. In light of this it becomes more important to analyse the more recent Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, to see if the same remedies the existing complications in the legal system.

Analysis of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

While the LARR can be said to largely confer more rights to individuals, to obtain a clearer understanding of its exact effects on the tribal population, this section of the paper will deal with a section by section analysis of its important provisions to understand its effect on the tribal population followed by an analysis of the situation on the ground. For the purposes of this paper, the relevant sections which will be analysed are Sections 2, 3, 41, 42 and 45.

i. Analysis of Section 2

Section 2(2) of the act which delimits the application of the act states that all provisions of the act would apply,

> *'Provided also that no land shall be transferred by way of acquisition, in the Scheduled Areas in contravention of any law (including any order or judgment of a court which has become final) relating to land transfer prevailing in such Scheduled Areas.'*

This in essence attempts to overcome the loophole present in the previous legislations by explicitly stating that the present act would not override any of the other pro-Adivasi land laws in force. Hence bringing about a very much required change by allowing the recognition of their land rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

ii. Analysis of Section 3

Section 3(c) of the act deals with defining affected persons. As per 3(c)(iii), "Scheduled Tribes and other traditional forest dwellers who have lost any of their forest rights recognized under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 due to acquisition of land" would also be considered as affected persons entitled to remedies.

Section 3(r) which defines land owner, under clause (ii) provides that "any person who is granted forest rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 or under any other law for the time being in force" would also constitute land owners under the act.

Section 3(x) which defines a person interested, under clause (ii) includes that, "the Scheduled Tribes and other traditional forest dwellers, who have lost any forest rights recognised under

the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006'" would also be included under its definition.

By doing so, the amended act caters for a multitude of legal issues faced by the Adivasi's in the recognition of both their individual and community forest rights, and makes it easier for them to obtain compensation, rehabilitation, and resettlement.

iii. Analysis of Section 41

Section 41 of the act is probably the most important section with respect to tribal population's as it provides the special provisions for SC/ST. As per the clause (1) and (2), no acquisition of land can be made in Scheduled Areas unless it is done as a "demonstrable last resort."

Clause (3) states that to acquire land in a "Scheduled Areas, the prior consent of the concerned Gram Sabha or the Panchayats" must be obtained in "all cases of land acquisition including acquisition in case of urgency" before the issuance of a notification under this or any other act. The stark feature of this act compared to its predecessors is the fact that it requires consent and not mere consultation and prevents circumventing the provision by even making it applicable to cases of urgency.

Clause (4) provides that projects involving land acquisition which would result in the involuntary displacement of tribal families, must devise a plan to ensure the settling of unsettled forest right issues and restoration alienated land to the tribal before land acquisition. This ensures that the final recipients of the compensation, rehabilitation, and resettlement are the tribal themselves. This is further reinforced via clause (9) which makes any alienation of tribal lands in contravention to the current laws as null and void and explicitly states that in the case of acquisition of such lands, the rehabilitation and resettlement benefits shall be made available only to the original tribal land owner.

Clause (7) and (11) deal with relocation and gives preference to relocation within the same district. Unlike previous laws it also takes cognisance of the importance of ensuring the preservation of the tribal ethnic, linguistic, and cultural identity.

iv. Analysis of Section 42

Section 42(l) ensure that all benefits, available to the tribes in the affected areas shall continue in the resettlement area. This is a very important clause and fixes another major loophole that existed earlier as many ST categories from one district or state are not recognized in another district or state. Hence, this allows them not to lose the benefits given to them upon being relocated to another district/state.

v. Analysis of Section 45

Lastly, we analyse Section 45(2)(r) which ensures that the "Rehabilitation and Resettlement Committee shall contain a representative the Scheduled Tribes residing in the affected area.' This provides a voice to these communities and helps ensure the securing of their interests.

Reality on the ground

While on paper the laws seem adequate, the ground reality is that they are hardly ever implemented and when they are, they are done in a half-hearted manner. This is best seen in the case of the Polavaram Irrigation Project, where in out of the 56,495 tribal families displaced, only 1,317 families were shifted to resettlement colonies.[xxxi] Additionally, while the Andhra Pradesh government had stated that they had, in compliance with the 2013 Act, provided the displaced families with only cultivable lands,[xxxii] a study by the National commission of Schedule tribes in March 2018, found that the tribal displaced were given uncultivable land in place of agricultural lands acquired from them.[xxxiii] There have also been many cases of forging of documents to show that consent was taken from the panchayat.[xxxiv] This aside, most times the remedies are also wrongly denied, as has also noted by the Supreme Court in its recent stay order on the eviction of tribal families (whose claims under the Forest Rights Act were rejected), where it was found that out of the two million claims rejected only a few hundred were legitimate rejections.[xxxv] This is indicative of the inefficiency of the current law in actually securing the tribal land rights.

CONCLUSION

Hence as can be clearly seen, while strong laws do exist on paper, the lack of implementation coupled with the lack of voices of these weaker sections of society has led the tribal populations bearing the brunt of the development projects in the country. While judgements such as *Orissa Mining Corpn. Ltd.* v. *Ministry of Environment and Forests*[xxxvi] *did attempt to ensure that the tribal populations did not face the brunt of such development process, the same could not bring about much of a change on the ground as seen in many cases.*[xxxvii] *While the current legal reforms were no doubt required, as is indicative from the ground realities, they are not nearly enough. For an actual change to be brought about and to ensure greater efficiency and justness in the land acquisition process, such legislative reforms or judicial pronouncements must be coupled with administrative and procedural reforms to ensure the implementation of the laws. This becomes especially important in the case of such marginalised and vulnerable parts of society, who are susceptible to exploitation. Hence without the same, the LARR Act will never be able to adequately address the tribal question and the inequalities will continue to persist where in such weaker sections of society continue to face the brunt of the development initiatives within the country.*

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