

Land acquisition, development and the constitution

NAMITA WAHI

FOR the leaders of the Indian independence struggle, the adoption of a Constitution constituting a sovereign democratic republic was the first important step in marking a break from the past of colonial domination and subordination. However, in addition to the desire to control their destiny, the Indian independence movement was also driven by the desire to achieve a new social and economic order premised on rapid economic development and social redistribution.

The question before the Constituent Assembly was how to ensure the transition to a liberal democratic legal order which guaranteed rights to liberty, equality and property, while simultaneously embarking on a transformation of the economic and social order considered by Nehru as imperative to prevent a revolution. This transformation was pegged on a development strategy involving a move from a feudal agrarian to a capital intensive industrial society. A major component of this transformative agenda was land reform, involving *zamindari* abolition and redistribution of land

amongst the peasants. Equally important, however, was state planned industrial growth and encouragement of growth of private industry.

Charged with the task of balancing the interests of the individual with those of the community, the Constituent Assembly debated both the inclusion and content of a fundamental right to property for two and a half years before adopting Articles 19(1)(f) and 31. Article 19(1)(f) guaranteed to all citizens the fundamental right to 'acquire, hold and dispose of property.' Article 19(6) made the right subject to 'reasonable restrictions in the public interest' by the federal and state legislatures. Moreover, Article 31 of the Constitution provided that any state acquisition of property must only be upon enactment of a valid law, for a public purpose and upon payment of compensation. This provision was taken almost *verbatim* from Section 299 of the Government of India Act, 1935 with exceptions for certain zamindari abolition laws. The paradox implicit in guaranteeing a fundamental right to property, while simultane-

ously embarking on a socialist developmental project of land reform and state planned industrial growth, predictably resulted in tensions between the legislature and the executive on the one hand, that sought to implement this development agenda, and the judiciary on the other, which enforced the fundamental right to property of those affected.

Article 31 codified what is often described in political and legal parlance as the 'eminent domain' power of the state. This power inherent in the exercise of a state's sovereignty allows the state to compulsorily acquire property belonging to private persons for a public purpose upon payment of just compensation. The twin requirements of public purpose and just compensation are based on the rationale that no individual should have to disproportionately bear the burden of supporting the public good. 'Acquisition and requisitioning of property' was included as a subject in the Concurrent List enabling both Parliament and the state legislatures to enact laws on the subject.

Article 31 was drafted with a view to reaching a just compromise between various competing interests. On one end of the spectrum were the *zamindars* and industrialists who sought protection for their property interests and, failing that, payment of market value compensation for acquisition of their property. On the other end were the socialists who wanted zamindari abolition without compensation, land redistribution and nationalization of key industries, which militated against the recognition of a fundamental right to property. Also represented in the Constituent Assembly were those who believed that property rights, particularly those of industry, should be protected even as they believed in the legitimacy of zamindari abolition. The views of the last group were ultimately

reflected in the compromise that was reached. Predictably, however, the compromise failed to please both the zamindars and the socialists and merely shifted the battle arena from the Constituent Assembly to the courts.

The distinction between zamindari and industrial property reflected in the compromise adopted in Article 31 was derived from the prevailing development discourse in the post-War period with its focus on economic growth through greater industrialization and capital formation. The adoption of such a strategy of economic development based on the rejection of feudal tenure systems in an agrarian society, and the acceptance of a 'mixed economy' capitalist model of development in an industrial society, required protection of the property rights of industry. The following decades saw conflict between Parliament and the Supreme Court, with the court invalidating acquisition laws for violating the fundamental right to property and Parliament responding with numerous amendments to the Constitution that redefined property rights. This conflict culminated in the 44th Amendment to the Constitution, which abolished the fundamental right to property in 1978. The same amendment however, inserted Article 300A in the Constitution, which provided that no person shall be deprived of his or her property without the authority of a valid law.

Over the last sixty years, as India pursued a strategy of economic development and social redistribution, more than a hundred land acquisition laws were enacted to achieve these goals. A majority of these laws were enacted in the first decade post-independence and dealt with issues like zamindari abolition, town planning, slum clearance and development, and resettlement of refugees etc. Acquisitions also continue to be made under colonial

laws that have remained in force post the adoption of the Constitution pursuant to Article 13(2). The most important of these colonial laws is the Land Acquisition Act, 1894, which amended frequently by Parliament and state legislatures post-independence, continues to govern land acquisitions today. This law originally enacted for the territory of British India was, following independence, extended to cover the entire territory of India except for the state of Jammu and Kashmir.

Moreover, apart from the laws that dealt directly with land acquisition, a number of other colonial and post-colonial central and state laws contained provisions for acquisition of land. The colonial laws included for instance, the Telegraphs Act, 1885, the Railways Act, 1890, the Electricity Act, 1910, and the Forest Act, 1927. The Railways and Electricity Acts have now been repealed and replaced by the Railways Act, 1989 and the Electricity Act, 2003, both of which also contain provisions for land acquisition. Laws enacted post-independence included, for instance, the Damodar Valley Corporation Act, 1948, the Slum Areas (Improvement and Clearance) Act, 1956 and the Coal Bearing Areas (Acquisition and Development) Act, 1957.

Since independence itself, there has been widespread acquisition of land by the state for dams, infrastructure, and industrial projects. However, following the 1991 economic reforms involving liberalization of foreign investment laws, there has been a surge in such acquisitions of land by federal and state governments keen on attracting foreign capital. In 1999, a Disinvestment Ministry was created and specifically charged with the privatization of state owned industries. Finally, with the enactment of the Special Economic Zones Act (the 'SEZ'

Act) in 2005, the acquisition of land by the government to hand it over to private industry, which had happened in an *ad hoc* manner in previous decades, became official government policy.

The massive displacement and dispossession of poor peasants and traditional communities like forest dwellers, cattle grazers, fishermen and indigenous tribal groups, and extensive environmental damage have led to land conflicts in many states. Given public outrage regarding such land conflicts, since 2007 there have been moves for comprehensive amendment of the 1894 Act followed by attempts in 2011 to repeal and replace this act by the Land Acquisition Rehabilitation and Resettlement Bill, 2011. This bill is currently pending in Parliament.

The Land Acquisition Act, 1894 outlines the 'purposes' for which land may be acquired, the 'procedure' for acquisition, and the payment of 'compensation' for such acquisition.

Public Purpose: The act provides that land may be compulsorily acquired by the government for a public purpose. Section 3(f) of the act defines 'public purpose' to include the provision and planned development of village sites, provision of land for a state owned or controlled corporation, residential development for the poor and landless, people displaced by calamities, educational, housing, health or slum clearance schemes and premises for public offices. Section 39 of the act provides that land may be acquired for the use of companies for the above purposes, or if the work is 'likely to prove useful to the public.'

Procedure: The procedure for acquisition of land includes notification of land to be acquired (Section 4), hearing of objections (Section 5A), final declaration of acquisition (Section 6) and payment of compensation (Sec-

tions 23 and 24). All disputes are to be settled in civil courts (Section 18).

Compensation: Section 23(1) of the act further provides that compensation for land acquisitions must be computed at the market value of the land acquired.

In addition, it must include payments for any damage sustained by the 'person interested' as a result of the acquisition, for instance due to the severing of land from other land, the drop in profits or earnings of the person, and reasonable expenses for relocation if that becomes necessary as a result of the acquisition. Further, Section 23(2) provides that a solatium of 30% of the market value of the land should be paid in addition to the compensation in light of the compulsory nature of the acquisition. Finally, the value of any property such as buildings, irrigation works, trees, etc, must be paid. Section 24 of the act however, expressly prohibits the intended value of land from being taken into account for computing market value. That is, if agricultural land is being acquired for commercial use, the compensation will be based on the prevailing market price for agricultural land.

The working of the Land Acquisition Act, 1894 over the last hundred years has revealed four major problems that have led to widespread public discontent. First, the act only recognizes the rights and interests of land title holders. In doing so, it fails to take into account the interests of those who while not holding title to the land are nevertheless dependent on it for their livelihood. Interestingly, in 1958, the Bihar government had raised this issue before the Law Commission during the commission's review of the 1894 Act. The commission noted that this was an 'important question of policy' that deserved careful consideration inasmuch as the loss suffered by the person was a 'direct result of the acquisition

of land.'¹ However, the commission's recommendation was until recently not acted upon, and no amendments were made to the 1894 Act to broaden the definition of 'persons interested'.

Second, the 1894 Act contains only an inclusive definition of 'public purpose' and courts have consistently deferred to legislative determination of what constitutes a public purpose. In successive cases, the Supreme Court has held that the expression 'public purpose' was 'elastic and could only be developed through a process of judicial inclusion and exclusion in keeping with the changes in time, the state of society and its needs.'² Moreover, courts have held that acquisitions benefiting particular individuals or entities could satisfy the requirement of public purpose so long as they were in furtherance of a scheme of public benefit or utility.³

Consequently, even before 1978, when the right to property was a fundamental right, state acquisition of land for private industry was routinely upheld as a valid public purpose. Over time, the list of public purposes has been continually expanded to include acquisitions for SEZs, cooperative societies, private recreational projects and residential development, all of which have been upheld by the Supreme Court. Till date, the Supreme Court has never found a law unconstitutional for violating the requirement of public purpose.

The third problem derives from the legal requirement that those deprived

1. Tenth Report of the Law Commission of India, 1958 available at <http://lawcommissionofindia.nic.in/1-50/Report10.pdf> (visited on 20 December 2012).

2. *Surya Pal Singh v. State of Uttar Pradesh*, [1952] SCR 1056, at 1073; *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252.

3. *Thambiran Padayachi v. State of Madras*, AIR 1952 Mad 75; *State of Bombay v. Nanji*, [1956] SCR 18; *Bhagwat Dayal v. Union of India*, AIR 1959 Punj 544.

of their land and livelihood must be paid a fair equivalent of the value of the land as compensation. Unlike their approach on 'public purpose', the Supreme Court took the compensation requirement seriously, insisting in its early decisions that the compensation payable in case of compulsory acquisitions be the market equivalent of the value of the land. However, through a series of constitutional amendments, Parliament has substantially ousted judicial review of the quantum of compensation payable in individual cases.

This has resulted in the payment of less than market value compensation in many cases. The fourth problem relates to the procedure involved in land acquisition under the 1894 Act which has been criticized both by the government for delays in acquisition, and by the people for their lack of participation in the government's decision to take over their land, as well as delays involved in the determination and payment of compensation.

A fifth problem arises because, as noted in the Tenth Law Commission Report, there exists wide variation in the provisions for acquisition in various state laws, including on the definition of public purpose, the relevant date for determination of the market value of the land, the principles for determining compensation, and the appointment of tribunals to determine the compensation and adjudicate disputes. This creates a situation whereby the central and state governments can apply differential principles of compensation for acquisition of land situated within the same state depending upon the object of acquisition.

In 2007, following public outrage regarding land conflicts involving widespread displacement of poor peasants and traditional communities, an attempt was made to comprehensively amend the 1894 Act. Consequently,

two bills, the Land Acquisition (Amendment) Bill and the Rehabilitation and Resettlement Bills were introduced in Parliament. In 2009, the bills lapsed with the dissolution of the 14th Lok Sabha. Following elections, the government for the first time proposed repeal of the 1894 Act and its replacement by the Land Acquisition Rehabilitation and Resettlement Bill, 2011. This bill is currently pending in Parliament.

The proposed LARR Bill attempts to address all four issues noted above with varying degrees of success. First, by defining 'persons interested' [Section 3(x)] as those having an interest in the land as opposed to actual title and 'affected family' [Section 3(c)] as those dependent on the land for their livelihood, it seeks to broaden the group of people to be compensated in case of acquisition. But the definition of 'persons interested' excludes landless labourers and others like fisherfolk and cattle grazers, which are included within the definition of 'affected families'. Since only 'persons interested' can raise objections to the acquisition of land (Section 16), this definition must be amended to include all those who are affected by the proposed acquisition.

Moreover, the practice of land acquisition has revealed that government officials often deny the very existence of these people or their dependence on the land in question, insisting upon documentary proof of their association with the land, which these people do not usually possess. Therefore, the current bill must be amended to ensure that all affected persons are not only rehabilitated and compensated but are also consulted in the process of acquisition.

Second, Section 3 (za) of the LARR Bill contains a more detailed listing of 'public purposes' than the 1894 Act. However, the bill's retention

of a broad residuary definition of public purpose as any purpose that 'benefits the general public' vests the government with considerable discretion in its decisions regarding land acquisition. Moreover, the bill contains an extremely expansive definition of 'infrastructure' [Section 3(o)] to include not just 'electricity, railways, defence' etc., but also 'education, sports and tourism'.

It is true that an exhaustive definition of public purpose might be unduly restrictive for government activity. However, given the current development discourse, wherein any kind of industrial or infrastructural development is justified by the government as being useful to the general public irrespective of its short-term and long-term consequences, the bill's provision provides no safeguard against expansive government interventions for private projects, which is one of the primary reasons for discontent with the current law. Importantly, the Parliamentary Standing Committee that reviewed the LARR Bill recommended deletion of the 'infrastructure' clause.

Third, in its commitment to payment of fair compensation, currently computed at approximately four times the value of the average of registered sale deeds (Sections 26-29), the bill marks a positive reversal of government policy. Predictably, however, the bill has faced resistance from state governments and industry accustomed to acquiring land at less than its market value. The bill also contains some provisions for addressing delays in payment of compensation.

Fourth, the LARR Bill states that while government may acquire land for private companies 'for the production of goods for public or provision of public services', it will do so only if at least 80% of the affected people have

already consented to such acquisition. Moreover, in case of such compulsory acquisition, the private company shall be bound by the resettlement and rehabilitation provisions contained in the bill. This clause has been strongly opposed by private industry and according to news reports the clause has now been amended by the government to require consent by only 70% of the affected people before the government steps in to compulsorily acquire land. Further, industry has argued that the compensation and rehabilitation and resettlement provisions would make land acquisition extremely costly. However, no detailed statistics have been made available to back these assertions. A comprehensive study of the cost of land acquisition vis-à-vis the total costs of running an industrial or service operation is necessary to credibly assess this claim.

Fifth, in its inclusion of requirements for Social Impact Assessment (SIA) of large projects (Sections 4-8), the LARR Bill acknowledges the need for public participation in assessing the governmental need for land acquisition. However, according to Section 7 of the bill, the committee in charge of conducting the SIA shall be composed of bureaucrats and not independent experts, which renders the provision nugatory. While the bill provides for appraisal of the SIA report by an independent expert group, which has the capacity to make recommendations, such recommendations are not binding on the committee (Section 7(3)). Furthermore, land proposed to be acquired under the bill's urgency clause will be exempt from social impact assessment and the provisions relating to rehabilitation and resettlement may not apply (Section 38).

Sixth, Section 98(1) read with the Fourth Schedule of the bill exempts sixteen laws from the application of

the acquisition and rehabilitation provisions contained in the bill. These include the Electricity and Railways Acts, the Coal Bearing Areas Act, as well as the Special Economic Zones Act. However, as discussed previously, since significant land acquisition occurs under these and other laws exempted from the purview of the bill, the impact of the LARR Bill in redressing the problems noted above will be limited. Moreover, Section 98(2) gives unfettered power to the central government to add laws to this schedule merely by executive notification. Consequently, this provision greatly limits the possibility of genuine redress of grievances related to land acquisition among peasants and traditional communities.

Article 46 of the Constitution requires the state to promote the educational and economic interests of the weaker sections of the society and, in particular, of the Scheduled Castes (SCs) and Scheduled Tribes (STs) and to protect them from social injustice and all forms of exploitation. Recognizing the special relationship of the indigenous communities (*adivasis*) to the land, the Constitution made special provisions for protection of their property rights to the land. Article 244 read with the Fifth and Sixth Schedules of the Constitution provide protection to the adivasi people living in the Scheduled Areas. The Fifth Schedule covers central India and it mandates the creation of Tribes Advisory Councils, consisting of three-fourths representation from the Scheduled Tribes. The schedule also requires that laws be passed to regulate land transfers in these areas. The Sixth Schedule covers Northeast India, and provides for elected Autonomous District and Regional Councils in these areas.

Pursuant to these constitutional provisions, land transfer regulatory laws have been enacted in nine states

in peninsular India (Andhra Pradesh, Himachal Pradesh, Orissa, Jharkhand, Rajasthan, Madhya Pradesh, Maharashtra, Karnataka and Kerala) and four states located in the Northeast (Assam, Meghalaya, Tripura and Mizoram). These laws prohibit the transfer of tribal land to non-tribals. However, due to serious discrepancies in the demarcation of Scheduled Areas within these states, many villages with a majority tribal population that are contiguous to the existing Scheduled Areas have not been given the same status. Consequently, they are excluded from the protection of the state land transfer laws, which enables alienation of tribal lands in these areas. Moreover, the Tribes Advisory Councils in the Fifth Schedule states are often non-existent, dysfunctional, or simply ignored by the state governments.

Much of the land in the Scheduled Areas is rich in mineral resources. The need to fuel the development engine based on the exploitation of these resources has resulted in violations of the rights of the Scheduled Tribes witnessed in cases like POSCO and Vedanta in Orissa. This has occurred in spite of the Supreme Court's judgment in *Samatha v. State of Andhra Pradesh*,⁴ where the court held that government lands, tribal lands, and forest lands in the Scheduled Areas cannot be leased out to non-tribals or to private companies for mining or industrial operations. However, the Supreme Court in a later judgment in *BALCO Employees' Union v. Union of India*,⁵ limited the application of the Samatha judgment only to the state of Andhra Pradesh. The court also expressed its reservations about the correctness of the Samatha decision

4. AIR 1997 SC 3297.

5. (2002) 2 SCC 333.

and suggested that the matter be decided by a five judge constitution bench. However, till date, no such reference has been made.

The Panchayat Extension of Scheduled Areas Act, 1996 (the 'PESA') and the Forest Rights Act,⁶ 2006 ('FRA') empower the Scheduled Tribes to exercise some influence on the disposition of natural resources in the areas where they live. According to Section 4(i) of the PESA, the gram sabha or panchayat must be consulted before land acquisition for development in the Scheduled Areas. However, the views of the sabha or panchayat are not binding on the government. Simultaneously, Section 3 of the FRA recognizes the rights of forest dwelling Scheduled Tribes and other traditional forest dwellers to use, residence and livelihood within forest land even without legal title. However, serious governance and implementation failures plague both the PESA and the FRA.

The Statement of Objects and Reasons of the LARR Bill asserts that the bill is fully compliant with the PESA and the FRA and land transfer regulations in areas notified under the Fifth and Sixth Schedules. Entry 11 of the Second Schedule to the bill provides that the acquisition of land in Scheduled Areas must only be upon consultation with the gram sabha or panchayat. The schedule also contains provisions for rehabilitation and resettlement of the Scheduled Tribes. However, the bill contains no stipulation that exploitation of resources in Scheduled Areas must be with the consent of and for the benefit of the Scheduled Tribes, which is mandated by the concept of trusteeship underlying the Fifth and Sixth Schedules.

Land Acquisition is inevitably a controversial issue in countries with land scarcity that are trying to achieve rapid economic development through greater industrialization. Clearly, trade-offs must be made. However, it is imperative and certainly possible that land may be acquired for public purposes in a participatory manner that not only compensates those who are dispossessed but also enables them to share in the benefits from the projects which occasion their displacement. The LARR Bill is a step in the right direction of ushering in a culture of justification wherein the government is required to explain and engage with the people it dispossesses of their lands, livelihoods and ways of life, of the legitimacy and necessity of such dispossession. But it must be suitably amended to limit possibilities of expansive government intervention and unfettered discretion in exempting particular acquisitions from the scope of the bill's provisions, if the government's promise of enacting an equitable and transparent land acquisition law has any chance of becoming a reality.

Finally, perhaps the most serious problem with the conduct of land acquisition proceedings in India has been arbitrariness in the manner in which these provisions have been implemented. In particular, there has been significant crony capitalism and collusion between the governing class and industry in the way land has been acquired and used, and an almost complete abdication of judicial review of acquisition cases since the late 1980s. While the proposed bill contains some positive provisions for safeguarding the rights of the dispossessed, legal reform must be backed by institutional reform, including greater judicial review of acquisition proceedings in order to bring about meaningful change on the ground.

6. Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Dwellers) Act, 2006.