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DISPLACEMENT AND THE LAW

Usha Ramanathan

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The paradigm of development that has found favour with planners makes displacement of large numbers of people, even whole communities, an unavoidable event. The utilitarian principle of maximum happiness for the maximum numbers has been invoked to lend respectability to making the lives of communities into a cost in the public interest. The law is ill-equipped to counter this attitude and in fact abets it by lending the force of state power.

THIS is an essay on displacement as witnessed in the law. In it is a recognition that displacement, and the related concerns of rehabilitation and resettlement, are not familiar to vast areas of the law which affect the rights and lives of the displaced person. 'Public purpose' emerges as the justification; the doctrine of eminent domain gives to the state an enormity of control over land and related resources, and so over the lives of the people; acquisition provides the process; and compensation is the limited replacement of the rights of the displaced person. The essay will attempt an understanding of these concepts as they exist within the law.

Further, the law has been constructed on the acknowledgement of the individual dislocated person: experience has revealed the inadequacy, and inequity, inherent in this approach. For it does not accommodate the implications it has for displaced communities, and in circumstances of mass displacement. The presumptions of what constitutes it gives 'development' a priority which is denied to the large-scale, and often traumatic, displacement that it entails. The calculation of cost-benefit externalises these costs. A study of the law reveals that it endorses, and reinforces, this position.

Statute law determines the process by which the relationship between a community and its resources may be affected, even as it redefines rights. It also is the context from which the substantive right of the affected person – often in the form of money compensation – is derived. The power of the statute, however, goes further: it has a profound influence on judicial understanding of the problem of displacement. The statute, it will be seen, insidiously but definitely, determines judicial interpretation of constitutional mandates. It is to this that the lack of empathy may partially be attributed, when a court finds that 'preferential' treatment of displaced families would be against the equality promised in the Constitution – even while accepting the poverty of the displaced.[1] Expediency, proferred as an argument by the state, has struck a responsive chord in the court. Judicial hands-off on matters of policy has given power to the state beyond legitimated challenge. The relevant concerns, in the context of displacement would then be, justiciability, the nature of legal imagination, the finality which is an integral part of the character of justicing, and the development of a relationship between law and justice.

There is an inevitability about the regression into poverty that is seen in the law — not only the law directly effecting displacement, but also laws of labour, of crime and of illegal living.[2] A representation of this impoverishment demonstrates the dramatic effects that displacement has on the lives of those uprooted, and calls into question the morality, constitutionality, and justice that seems to evade the law.

The paradigm of development that has found favour with planners makes displacement of large numbers of people, even whole communities, an unavoidable event. The utilitarian principle of maximum happiness for the maximum number has been invoked to lend respectability to making the lives of communities into a cost, in the public interest. The law is ill-equipped to counter this attitude and in fact abets it by lending the force of state power. This is the focus of this essay.

I
The Statutes

The legislation at the centre of the debate is the Land Acquisition Act 1894. It is of some significance that the act is of colonial vintage. What is also of the same vintage is the rule of law. This is an overarching principle that was held out as the antithesis of arbitrary state action. The statute was one of the more definitive expressions of the rule of law. The prescription contained in a statute – whether of procedure, of substantive rights or of sanctions – acquired a legitimacy which was not easy to dislodge, something which continues to this day. And such a statute is the Land Acquisition Act 1894 [LAA].

The LAA is a statutory statement of the state's power of eminent domain, which vests the state with ultimate control over land within its territory. It denies to the person from whom the land is acquired the right to exercise choice as to whether to part with the land or not so long as the acquisition is avowedly for a public purpose. The definition of public purpose in the act is inclusive, not exhaustive; and the 1984 amendment which was an attempt to update the law only increased the inclusive categories. The state is, however, only to acquire the land: the act therefore provides for payment of compensation. And, again, in the interests of justice and fair play, the Act lays down a procedure by which the land is to be acquired: an endorsement of the principle of processual justice.

The act is essentially concerned with the acquisition of rights over land from individuals who have legally recognised, and compensable, rights. These conservative notions of individual ownership and state acquisition have been stretched unrealistically to envelop the displacement of whole communities. (The inclusion of companies as performers for carrying out the public purpose is a definitive statement of alignment and priority.) Compensation, as a measure to take the edge off dislocation following compulsory acquisition, retains its market value connotation, the statutory responsibility of the state ceasing upon such payment. The inadequacy of this law to deal with the problems thrown up by large-scale displacement has not affected the thoughtless regularity with which the law is invoked. For a law that does not acknowledge displacement and its traumatic overtones, does not mention resettlement, and is unwilling to take the responsibility of rehabilitation, what can be seen in its rooted presence in this field of human suffering is expediency, callousness or arrogance. This view is only reinforced by a reading of the 1984 Amendment which recognised a public purpose in providing for 'persons displaced or affected' by projects: which yet continued to ignore the existence of displaced communities. And even while it recognised no rights in the displaced persons to rehabilitation through state intervention, it unabashedly used the displacement caused as further justification for state power in compulsory acquisition.

The LAA is not isolated in its relevance to displacement. There is the Forest Act of 1927 which anticipated the displacement of people from forests in which the state declared an interest. Quite unlike the LAA which was premised on private ownership of property, the Forest Act was aware that long, established user and an intricate mesh of dependency characterised the rights it would dislodge. Yet, the continuance of the rights

of the people depended on individual determinations made by a state functionary. And the rights, where recognised, could be involuntarily replaced by compensation. It is an ill-kept legal secret that the original intent of the Forest Act was to serve the commercial interests of the state. The law has hardly changed. Yet – even as the language of the law, the process, the power structures and the remedies remain unchanged – it is sought to be given a new-found morality: the state is projected as the protector of the tree. As for the displaced people, they are placed in an adversarial position with the conservation and environment ethic. While development is the larger good which is invoked to justify displacement for projects, the Forest Act rests its case on conservation and the environment.

The security of the state demands that open spaces be available to the army for its field firing and artillery practice. Here is cause again for displacement. It is in the 'interests of safety' of the persons likely to be harmed, and to 'regularise' the procedure by 'putting it on a legal basis', that the Manoeuvres, Field Firing and Artillery Practice Act 1938 was avowedly enacted. Field firing and artillery practice needing to ensure more total 'exclusion or removal from any place declared to be a danger zone of persons or domestic animals', this act provides for the 'removal' and 'exclusion' of persons from the danger zone. There is, under the LAA, a permanence in the severance of the relationship between a person and his property which may be seen as absent in its essence from this legislation. The displacement is, in reality, a mere dislocation for the period that the army needs it: it may be re-habited thereafter. If, in the process, any harm is sustained by person or property, there is statutory provision for the payment of compensation. In common with other legislations which facilitate displacement, this act concentrates power in the state, with but a passing thought to what effect it might have in the lives of the displaced people. It is this reluctance to acknowledge the extent of the responsibility involved that makes the law suspect.

Hidden in the folds of statutes which appear to have little relation with displacement can be found extensive powers enabling state authorities to take over control of land and related resources. For the purposes of constructing or maintaining a railway, a railway administration may construct 'in or upon, across, under or over any lands, or any streets, hills, valleys, roads, railway, tramways...' "as it thinks proper". This discretion to decide and to act is tucked away in the Railways Act of 1989. The extent of the powers is vivid in the clause which would have it 'do all... acts necessary for making, maintaining, altering or repairing and using the railway'. Interestingly, the one limitation on this power omnibus is when it is government property that is involved: the administration can then act only with the consent of the concerned government. With this one exception, these transactions are treated as acquisitions for a public purpose within the LAA. Displacement, while inevitable, is neither in the statement of the law, nor is it its apparent concern.

The expedient of compulsory acquisition is again in evidence in a legislative exercise of even more recent origin. Even as the immensity and immediacy of the problems of displacement was acknowledged – and the attempt at articulating a policy was engaging the attention of at least six departments of the government, among others – the Airports Authority of India Act was passed in 1994. The habits of law-making introduce a reiterative quality to the law; and laws all too often are reproduced in their own image. This perhaps is at least a partial explanation for the power of compulsory acquisition of land that has been prescribed for the statutory authority. The land required 'for the discharge of its functions under this act' is 'deemed' to be for a public purpose; and the LAA is invoked to effect the acquisition. Again, the presumption that public purpose is a priority of an irrebuttable superior order, and that the statement by the state that a purpose is a public purpose is conclusive.

These are but instances of a statutory order which is so constructed as to legitimate, and facilitate, the displacement of persons, as of communities. In its ordering of priorities, it has not reckoned with displacement. Instead, it has attributed a cost to the acquisition process, and displacement is an unstated incident in this process. Law depends, for its legitimacy, on popular acceptance. The patent injustices that have resulted from employing the extant statutory regime to situations for which it could never have been intended – and mass displacement is an outstanding example – and the popular condemnation that has followed, have cornered the law into rethinking its propositions. To get the law to revise its priorities, to relocate expediency, to redefine development, to reassess the meaning of costs requires a liberal dose of legal imagination, political will and the induction of empirical knowledge.

II
Public Purpose

The morality of the law which effects displacement is posited on the 'larger public good'. It is couched in the language of 'public purpose'. It reasons that the state will have to act to protect, and advance, generally, the interests of the people. There is an impracticability about detailing every circumstance which may need state action under these laws; the field is then left deliberately open, with the power essentially resting with the state to determine what constitutes public purpose.

Experience with public purpose has demonstrated its utilitarian potential. Utilitarianism is a pragmatic philosophy, advocating the seeking of the greatest happiness of the greatest number. It does not actually advocate the marginalisation of those who get excluded from the benefits of the system; yet it is implicit in its very statement. Public purpose works to similar effect. What is public purpose for a category of persons may represent the trauma of displacement for another. The exercise of state power is governed by the identification of the public purpose, without the constraint of addressing the adverse impact it may have on the affected population. Differently from utilitarianism, pursuing state understanding of public purpose may cause relatively more distress in real terms than the benefits it generates. The large scale of displacement accompanying the progress of the projects across the Narmada – from those who made way for the ritual of the inauguration in the 1960s, those displaced for the township, the dam affected, those to be dislodged as the canal progresses, including in their number those recognised by the state as being related to the project and those ignored – illustrates this possibility.

There are incompatibles that continue unresolved in the law of public purpose. The use of the law to further one public purpose may result in creating conditions which may deserve a further invoking of the acquisition law. In 1984, the grinding wheels of the law grudgingly transported displacement into legal recognition. The LAA was amended to bring displacement into the inclusive definition of public purpose. The express provision of the law, while it limited its concern to making land available for residential purposes, did admit to the reality of displacement. In the company of the "poor or landless or ... persons residing in areas affected by natural calamities" the law places "persons displaced or affected by reason of the implementation of any scheme undertaken by government, any local authority or a corporation owned or controlled by the state". The language of vulnerability is unmissable. The expedient of limiting public purpose to restoring some manner of shelter is a commentary on the state's admission of inability to commit itself to greater responsibility. Yet the nature of the problem of displacement, and the difficulty in resolving it equitably, have not caused the law to re-work the meaning of public purpose, or to device a procedure which will require the state to consider the totality of the public good involved. If there is a reluctance in the law to interpret state power so as to account for its responsibility where displacement may occur, the reason

is obvious: for it would amount to a whittling down of state power. Also, it would impel a redefinition of priorities, as it would call for a reorientation of the presumptions that have influenced the course of the law.

III
Eminent Domain

The doctrine of eminent domain asserts the right of the state over land and related resources within its territory. It is perceived as a necessary right, to be invoked to further public good. In consequence, the right of any person or community to refuse to permit the intervention of the state, or to dissent from the state's perceptions of public good is considerably eroded. The process of assumption of control is prescribed by statute. The only concession to this power which causes 'great legal injury' is the entitlement to compensation.

The situations which may prompt the state to acquire private rights may result in permanent, temporary or partial acquisition. The LAA, for instance, envisions acquisition of land which sunders the relationship between the private holder and the land. Any change in the status of the land which may occur after the completion of the transaction of acquisition will have no effect on the rights of the person who has lost his land to the acquisition. Illustratively, the over-acquisition of land, in excess of that needed for the purpose for which the power is exercised, would not restore to the displaced person any right to the land.

Field firing and artillery practice is facilitated by a law which provides for the exclusion of persons, for a period, from land on which they may live and work. The nature of the activity which provokes temporary displacement may make outright acquisition inexpedient. The compensation is then computed on an understanding of the demonstrable loss, harm and injury sustained. It is not without significance that this temporary displacement inevitably occurs in areas which are removed from what may be called, the mainstream.

Where the purpose for exercise of the eminent domain power could be served as well by acquiring only partially the rights over land, the state may decide to restrict the nature of its acquisition. The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) act 1962 is a case in point. It is interesting that this act was conceived because of the resistance that invariably attended acquisition under the LAA. "Although land can be acquired outright for laying down pipelines under the LAA 1894, the procedure for such acquisition is long-drawn and costly", read the statement of objects and reasons that accompanied the Bill. "Since the petroleum pipelines will be laid underground, outright acquisition of land is not necessary. Therefore, in the case of these pipelines it is considered sufficient to acquire the mere right of user in the land...". This partial acquisition vests the right to use the land in the government; the owner or occupier of the land is, however, entitled to continued use of the land. The damage, loss or injury that may result is compensated under the law.

The wisdom of the law in not acquiring more than the purpose needs, is founded on expediency. It is not the limited extent of the need, but the experience of costs and delays involved in the process that has influenced the lawmaker. It becomes apparent that where the costs of acquisition are effectively contained with the law's help, and the obstacles to the process are not sufficient to deter the state, the incentive to minimise the take over of rights is lacking.

In limiting the extent of dislocation, partial acquisition represents a lesser loss than outright acquisition. Yet, it may not be an unmixed blessing. It is an attribute of eminent domain that the consent of the dislocated person is irrelevant to the process. It is also in the nature of this power, as it has evolved, that the state cannot be required to acquire, and compensate, the totality of the rights: the invasion of rights is the prerogative of the state.

The doctrine of eminent domain ensures to the state access to all land and related resources. Public purpose, the moral high ground of acquisition, has a wide, sometimes contradictory, reach: from the construction of dams to the resettlement of displaced people; from the conservation of wildlife and forests to the promotion of tourism; from industrial growth to slum clearance. There is little answerability in the law of acquisition, based as it is on the possibilities engendered by eminent domain and public purpose. The environmental priority of a sanctuary may give way before a revised economic priority of tourism: the excluded people however are entitled neither to reenter their land, nor to question the changed priority. A revised rendering of the law would have to remedy this attitude to displacement. The perception of displacement as a tragic choice,[3] would have to replace the established status of displacement as a necessary ritual for the furthering of 'public interest'.

Acquisition

Acquisition effects the transfer of rights from a person to the state. The law is concerned with the individuals whose rights are to be acquired. Breakdown of communities and mass displacement are not within this recognition.

The acquisition process provides a degree of participation to the individual. Procedural opportunities – to protest the acquisition, or the extent of the acquisition, to establish a claim to interest in the rights under acquisition, to contest the quantum of compensation – are provided in the law. The non-recognition of the displacement of large numbers, and of rights of collectives, or of individuals as part of a collective, permits the state to neglect all but the defined rights of individuals as individuals.

Statute law, in defining rights and prescribing powers, reduces the recognition of a problem to manageable proportions. It would then ignore all that falls outside this recognition. What is not within the law's ken cannot be addressed by the law. The process prescribed for the identification of holders of rights, and of the rights themselves, externalises mass displacement. State laws[4] which have acknowledged mass displacement and speak of rehabilitation, are reluctant to make acquisition dependent on the restoration of just standards which will avoid using the displaced population as scapegoats.

Statute law has a binding effect which has to be enlisted to minimise displacement, to reduce the trauma of displacement where it occurs and to introduce justice and fairness into this transaction. The content of the law would require drawing upon empirical knowledge, providing an understanding of poverty, acknowledging the impoverishment through law that mass displacement has caused, and recognising the inequity of powerlessness.

IV
Compensation

If the law of acquisition were to possess a conscience, it may be found in its provision of compensation. Perceiving the effect of eminent domain as "exacting greater sacrifices for the purposes of the state from one rather than from the other",[5] compensation is seen as the means for reducing the injustice inherent in acquisition. Every law that dispossesses carries a provision for compensation which is intended to soften the blow.

Yet, the limited understanding of compensation has eroded its moral base. The notion of total compensation being unknown to the law, it is ill-equipped to internalise the immiseration which acquisition may entail. The process of impoverishment is inevitably set in motion, except in cases where the displaced persons are able to use the system to their advantage – an unlikely event where poverty or powerlessness characterises the population.

The meaning given to compensation has been dominated by its equation with the market value, or the notional value in the market. This treats the displaced person as a willing seller. It does not account for the part that coercion plays in the law. Compulsion is tempered by a solatium, which, being a percentage (now fixed at thirty percent) of the compensation amount,

is also dependent on the market value. The option of compensating land for land merits a mere mention in the law; it is not, in any event, a binding obligation of the state.

With its defective vision distorting displacement, there are significant absences in the law for computing compensation. For one, it does not take responsibility for providing for the replacement value of the land, or rights, lost. For another, mass displacement often affects populations whose lives are not constructed around formal legal rights, making market value an irrelevant criterion. The difficulties in attributing a value to the costs of displacement have not been addressed by the law: they have merely been externalised. The costs of displacement have been artificially, and unjustly, suppressed. The focus of the acquisition process being the individual, compensation is not sensitive to the displacement of communities, or of large numbers of people. The trauma involved in displacement, the fragmentation of communities, the breakdown of support structures, the indigence of displaced populations, the increased susceptibility to exploitation where protected populations are dislocated... none of this inhabits the law of compensation. It is of significance that, having spoken to the possible poverty of displaced populations,[6] and to the public purpose involved in providing for them, it is *not a right to compensation but a discretion to care* that has been prescribed.

With the exception of the occasional state legislation, the law which enables displacement neither recognises displacement as creating altered rights, nor does it use the language of resettlement, relocation or rehabilitation. Multiple displacement – and none can deny that it extracts an unconscionable cost – has not excited the compassion of the law, nor engendered a sense of community. Neither the decision to acquire, nor the computing of compensation, takes responsibility for this disproportionate burden on the displaced.

The presumptions of public purpose, the implications of eminent domain, the power of acquisition, and the containing of costs in computing compensation have conspired to relegate displacement to the position of a non-concern. Particularly where they reorder hierarchies of legal concern, changes in the law are a response to pressures that cannot be ignored. This is reflected in the gradual, even if reluctant, introduction of the recognition of displacement into the law. Yet, the law being essentially conservative, it will take unrelenting determination to build the gravity of displacement into the law.

Law and Policy

The law's attention has not been engaged by the possibility, and effect, of large-scale displacement. Its concern has been to provide a process for the exercise of the eminent domain power. Unintentionally perhaps, yet inexorably, the law has been activated to effect mass displacement in the cause of development, what is compendiously termed the national interest, economic imperatives of the state and planned growth. With the restricted meaning imported into compensation, displacement has not been a legally recognised cost. The escalating crisis of displacement has been aggravated by the displacement of whole communities and hosts of villages as an invariable part of implementation of projects.

The emerging dimensions of the problem, the awareness that priorities identified by the state threaten further and increasing displacement, the unimaginative and inadequate remedies provided by the law, and the impossibility of displaced populations resurrecting their lives, have together impelled the state to publicly reconsider its options. It is witnessed in token changes to the LAA, as in the introduction of the displacement dialect in defining public purpose, in the enactment of rehabilitation legislations by some states, and in the mushrooming of policies of rehabilitation. However, displacement is itself not questioned.

Policies of displacement and rehabilitation, speak to concerns beyond income replacement. Recognising the characteristics of the displaced population, which explains the consideration shown to them by the policy, they prescribe norms of replacement. This is intended to temper the patent injustice of asking populations who have little, to pay for the public good. A policy may go something like this:[7]

> The projects involved, it may say, are located in remote areas. Requiring large stretches of land, it may go on, it may displace people. Where it does, it may promise to resettle and rehabilitate the displaced in consonance with the norm that they improve or at least regain their previous standard of living. Recognising the discontent and alienation that may result from improper resettlement and rehabilitation, and acknowledging the involuntary nature of the transaction, it may commiserate with the forced eviction, the loss of a traditional social system, and the fundamental changes where an agricultural economy is replaced by changes in land use that the project brings. It may place a priority on regaining the economic base, expeditiously. A listing of entitlements of the displacement population may follow, including land for land, house sites, employment and self-employment opportunities. Rehabilitation measures may include compensation for losses in terms of land, cash and other forms, and assistance to start a new life in terms of opportunities, training, credit and community services for schooling and health. With its commitment to discharge social responsibility, it may assert its intention to making a conscious effort to rehabilitate persons displaced by earlier projects.

Yet, with this testament attesting to its humanity, when the displacing entity is challenged in a court for not conforming to the pledge of the policy, it may counter with a simple expedient – that the policy 'has no statutory force' – it cannot therefore be made the ground for action! Or that the policy being under revision, it cannot be entertained as a basis for determining rights.[8] The distinction between law and policy therefore acquires considerable significance.

Statute law is enacted by parliament; policy is the creation of the executive.

Statute law, where it defines (or denies) rights, is binding. Policy, on the other hand, has at best a persuasive value. Courts are bound by the statement in the law, but are free to be guided by policy, or to ignore it.

The life of a statute begins on the date prescribed by Parliament, and stretches till it is either repealed, is modified by a later statute, or is struck down by a court for being in violation of the Constitution. Policy is not so constrained: it may subside into non-use, or become outdated, or be replaced by a later policy, or even just be discarded.

Where there is a conflict between a statute and a policy, the latter yields to the statute. There may be a difference between the effect of the law and the stated intent of policy. Again, it is not unknown for law's prescription to be restrictive, where policy may be generous. To the extent that it is not in contradiction, policy may assist in the interpretation of a statute; it cannot however replace the statute.

Decades of experience with the acquisition laws has determined the contours of judicial and executive understanding. Judicial construction of statute law being characterised by a desire for continuity and certainty, the influence of policy on the acquisition laws is not likely to affect them in any fundamental way. Where displacement is enabled by law, and rehabilitation is sketched by policy, the inequality in the two instruments gives the compulsion of acquisition a status that rehabilitation does not possess. The difference that the law perceives between the rights of an owner or occupier and others affected by the displacement has been softened by policy. Yet, it would need a change in the law to lend it enforceability.

The neglect of displacement in the law of acquisition, then, cannot be righted by policy alone. The protection against over-acquisition, the right to return to lands acquired but not used as proposed, the safeguards which may work to minimise displacement – these are instances of the need for changes in the law. Rehabilitation, resettlement, relocation and compensation have to be defined and made operative by the law; while the right has to inhabit the statute, policy may be employed to realise the potential of the law. The advantage of

policy lies in its flexibility, and this could be put to purpose in providing the experiential backdrop for understanding the possibilities of the law.

Impoverishment

Mass displacement, without infusing meaning into rehabilitation, is a prescription for impoverishment. Baxi's concept of 'impoverishment'[9] distinguishes it from 'passive words' as poverty and the poor. It is 'a dynamic process of public decision-making in which it is considered just, right and fair that some people may become or stay impoverished'. It is a feature of the process of impoverishment "that people are not naturally poor but are made poor". It is in this sense that the word impoverishment has been used.

The compulsory exaction of land, and the limited commitments of compensation which do not account for the problems that displacement brings to the displaced population, lead to the regressive road to poverty. The law, in its myriad manifestations, shows an awareness of the possible destinies of the affected populations. The fact which is relevant here is that the displaced population, which is inadequately protected from the vicissitudes of displacement, is easy prey to the forces of impoverishment.

Impoverishment through the law attributes to law the role of a causative agent, impelling those whom it affects on to the downward slide to poverty. The laws of acquisition house one example. Impoverishment in the law is the recognition of the events of poverty as disparate and static conditions, inviting, variously, rebuke or paternalistic concern, both commonly denying autonomy and denuding rights. The laws of beggary which punish, and the law to protect interstate migrant workmen are instances.

The process of impoverishment may be depicted to determine the extent to which the law is responsible for, or assists, this process. It is not intended as a demonstration of the path trodden by every victim of displacement; indeed it is an indication of the common dangers that confront those who enter the vortex of impoverishment. It represents the law's latent statement of the injustice of displacement.

This representation[10] is illustrative of the relationship between law, impoverishment and poverty. This ability of the law to effect impoverishment, and the experience with mass displacement, would justify a reworking of priorities and presumptions that are inherent in law.

Judiciary on Displacement

Acquisition and displacement, with their constitutional implications, have, inevitably, reached the courts. The petitioners have invariably been those affected by projects – dams, reservoirs, firing ranges, industry and power generation causing people to lose their assets and their capacity for subsistence, leaving them to an uncertain future, with mere promises of executive largesse to sustain them. Where the administrative process exaggerates the inequality between the displaced and those exercising the authority to displace, the judicial process is trained to the possibility of neutralising such inequality in having the rights of the displaced considered. The provision in the law for representative petitions, which enables the grouping together of rights of persons similarly situated, and Public Interest Litigation (or Social Action Litigation as it is more appropriately termed)[11] are relatively user friendly – they provide relatively easy access to courts, and acknowledge the existence of a community of interest.

The reliefs that the courts have been petitioned to provide range from the scrapping of projects as they are based on a misconception of what is in the public good; to halting project work till the displaced are rehabilitated in a manner that does not treat them as a cost of the project; to holding the project authorities to the promises made in their endeavour to find acceptability during the planning process; to assert a right to spaces for participation in the process; to considerations of equity, and for infusing into the process of displacement a recognition that there are fundamental rights which are non-negotiable, even where eminent domain and public purpose may be invoked; or for enhancement within the law of compensation which will make the compulsory exchange less inconsonant with justice.

The reasoning of the court is influenced by the statute. The displaced, whose rights have been represented but marginally in the law, have had to resort to the assurances of policy; and policy has no more than persuasive effect. Also, courts are reluctant to adjudicate on the exigencies of policy implementation. Acquisition, on the other hand, is a well entrenched state power, reiteratively reinforced by the judiciary.

In considering the petition of a people displaced by the Rourkela Steel Plant, their claim for jobs of the adult population, and for a preferential right to employment was rejected by the Supreme Court.[12] Apart from not being able to discover the infringement of a fundamental right, the court found the process of acquisition validated by conformity to the process prescribed in the LAA.

> 'Their land', the court said, 'was taken under the LAA. They were paid compensation for it. Therefore, the challenge raised on violation of Article 21 is devoid of any merit.'

The constitutional mandate that a deprivation of life (and livelihood and dignity) will have to be only by procedure established by law was believed to be fulfilled by applying the LAA.

It is possible that the court found the claims for total absorption in, and preferential right to, employment, through the generations of the displaced, impossible of performance and therefore unreasonable, apart from striking it as excessive. Yet, the indignation of the court testifies to definite judicial attitudes.

> The government has paid market value for the land acquired', it said. 'Even if the government or the steel plant would not have offered any employment to any person it would not have resulted in violation of any fundamental right.

The irate court went so far as to say that "Acceptance of such a demand would be against Article 14", implying that displacement does not constitute a rational basis for positive discrimination!. The distance between the perception of injustice of the displaced population, and the statutorily circumscribed understanding of the court are testimony to the importance of initiating amendments to the law. The existence of policy is no substitute.

There are instances of an empathetic court relying upon policy to assist it in finding answers to the problem of displacement. The NTPC policy for rehabilitation, for instance, was the basis of directions which went out from the court on how displacement was to be effected, and the displaced treated.[13] There is however no right to the promises of policy.

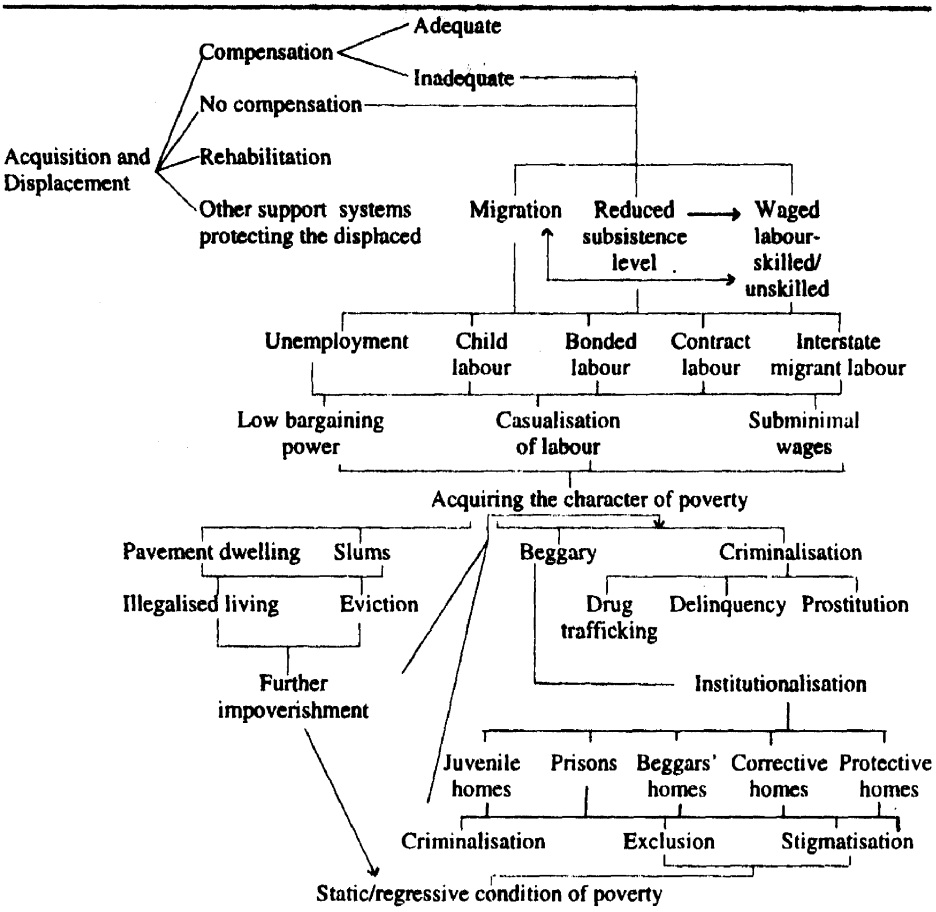
There is a pragmatism that the court then permits. Policy may account only partially for the displaced, or for only some of them – so long as the requirements of the acquisition process have been complied with. Since it is only the rights in the law that are perceived to be enforceable, and policy deals not with the individual but with the totality, the standard of compliance of policy is more relaxed than it is for the rights derived from law.[14]

Episodes from the courts carry their own lesson:

The test firing range near Itarsi uprooted tribals. Rehabilitation of the displaced tribals having apparently failed, it was found that they were, with regularity, risking their lives while collecting the spent, and unexploded, ammunition from the prohibited areas in the acquired land. By the government's own admission, 81 persons had lost their lives between 1972 and 1993. An order of the court in a public interest petition, designed to prevent the recurrence of such deaths, confined itself to the mechanics of barbed wire fencing, which would 'assure efficacy in containing trespass'. The unanswered questions about displacement and rehabilitation continued unaddressed.[15]

The anomaly of an interpretation of the law of compensation which converts a protection into a disability was witnessed in the case of the tribals in Andhra Pradesh. Resident in an agency area, they were

FIGURE



displaced to make way for the Jelluru and Yerrakavla reservoirs. The transfer of land in an agency area may only be from one tribal to another – a measure to ensure protection. As is often the case, the rightness of the displacement was not in challenge: it was the enhancement of compensation that was sought. But, the high court found that the market value of the land, being the norm in determining compensation, would be affected by the incapacity of the tribal to enter into open market transactions. A tribal in an agency area may only part with his land to another tribal. And the buying capacity of the tribals being, generally, limited, the compensation would have to be computed accordingly![16] The Supreme Court thought it fit to dismiss it merely with a remark that this "is not a correct approach". The difference between the market value and the reinstatement value was disposed of on the understanding of solatium as making up the difference.[17]

Juristic activism, which evolves modes of thought, and fashions rights and remedies to bring law in consonance with justice, has passed displacement by. Restrained attempts at judicial activism, which has the court acting to protect the interests of the displaced, have occasionally dotted the judicial horizon.[18] The law of acquisition, and the expediency of policy, continue to determine judicial understanding and treatment of displacement.

In Conclusion

Displacement is not on the wane. In fact, the planning process presumes that displacement is inevitable. There is an attempt to justify it as a cost of development, and to project it as an opportunity to improve the living conditions of the displaced. The creation of internal refugees, the impoverishment of the displaced, the incapacity of the state to rehabilitate them and avoid making them the sacrificial lambs of the development process – these are explained away as unfortunate side-effects of the process of economic growth. The initial deprivation of the displaced has been conveniently used to suggest that development could only benefit them.

The law has been instrumental in entrenching this perspective. A reassessment of the human costs of development projects is the first requirement of improved legislation. Legal reform is essential to curb state powers in this field, and to give tangible rights to the victims and potential forgets of mass displacement.

Notes

[A companion piece has appeared in Usha Ramanathan, 'Displacement and Rehabilitation: Towards a National Policy', *Lokayan Bulletin*, Special Issue on Displacement and Rehabilitation, March-April 1995, 41-56.]

1 See Butu Prasad Kumbhar v SAIL 1995 Supp 2 SCC 225 at 229, para 6.

2 For example, the Interstate Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, the anti-beggary acts extant in some states, and the illegal status accorded to, pavement dwelling which has got immortalised in the judgment of the Supreme Court in Olga Tellis v Bombay Municipal Corporation (1985) 3 SCC 545.

3 The phrase is borrowed from the title of a book by Guido Calabresi and Phillip Bobbitt, where the authors address the agony of the choices that a society has to make in what they term the 'allocation of tragically scarce resources': *Tragic Choices* (1978).

4 For example, see the Maharashtra Project Affected Persons Rehabilitation Act 1986.

5 G C Mathur, V G Ramachandran's Law of Land Acquisition and Compensation 1 (1995:8th edn).

6 The definition of 'public purpose' in the LAA as amended in 1984: Section 3(f)(v).

7 This description has drawn, in large measure, on the Resettlement and Rehabilitation Policy of the NTPC (May 1993).

8 Counter affidavit of NTPC filed in the Allahabad High Court in the matter of Gramin Kalyan Sangharsh Samiti v District Magistrate, Sonebhadra (CMWP No 4358 of 1995) dated August 17, 1995, paras 9 and 11.

9 Upendra Baxi, 'Introduction' in Baxi (ed), *Law and Poverty* vi (1988).

10 This representation draws upon the LAA 1984, the Interstate Migrant Workmen (Regulation of Conditions of Employment) Act 1979, the Minimum Wages Act 1948, the Contract Labour (Abolition and Regulation) Act 1970, the Bonded Labour System (Abolition) Act 1976, the Child Labour (Prohibition and Regulation) Act 1986, the Juvenile Justice Act 1986, the IPC 1860, the Immoral Traffic Prevention Act 1956, state anti-beggary laws, the NDPS Act 1985 and municipal laws.

11 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in ibid, 386-415.

12 Buta Prasad Kumbhar v SAIL, 1995, op cit.

13 Banwasi Seva Ashram v State of UP (1992) 1 SCALE 407.

14 Supra note 1 at 230: '...in the meantime another dam has been constructed and the persons who have been displaced have also been required to be accommodated and, therefore, a scheme has been framed in which 80 per cent displaced in consequence of Mandira Dam and 20 per cent out of 247 are being given employment since 1993. He stated that nearly 50 persons out of 247 have already been absorbed. We are of the opinion that giving employment to 20 per cent may take longer time and since the age bar has been put at 35 it would be appropriate if the SAIL expedited the absorption of these persons by increasing their number from 20 per cent to 40 per cent each year.'

15 Sudip Mazumdar v State of MP 1994 Supp 2 SCC 327.

16 Special Tahsildar v Kabbidi Posayya CA Nos 1341, etc, of 1992 decided on March 2, 1994 (AP High Court).

17 K Posayya v Special Tahsildar (1995) 2 SCALE 683.

18 Baxi 1988 op cit.