International Environmental
Law Research Centre

THE QUESTIONS WE SHOULD BE ASKING FREQUENTLY - ABOUT THE LAND ACQUISITION ACT

ANSWERS FROM AN EXPERT

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Published in: *Grist Media*, 30 January 2015.

This paper can be downloaded in PDF format from IELRC's website at
http://www.ielrc.org/content/n1502.pdf

The Questions We Should Be Asking Frequently About the Land Acquisition Act

And answers from an expert

GRISTMedia By Usha Ramanathan | Grist Media – Fri 30 Jan, 2015

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In the course of my work as part of a team set up to look into the socio-economic status of Adivasi communities, there were several things I learned about the Land Acquisition Act, 2013, and the amendments to it. Here are some important questions about land and the Act that we should be asking:

What is the State's relationship to land and its citizens?

This a key question – and one that remains unanswered. Is the State a landlord? Is it a trustee? Is it a super-landlord? Is it an owner? A super-owner? Is it above the law?

We cannot defer these questions any longer.

It was in 2003 that the Supreme Court reintroduced the idea of citizens as 'subjects'. It said: "So long as the public purpose subsists the exercise of the power by the State to acquire the land of its subjects without regard to the wishes or willingness of the owner or person interested in the land cannot be questioned." But surely we have moved way beyond the idea of subject-hood. There are citizens in this country, and the State is bound by the law. This needs to be reasserted.

Is the present government's approach to the land and the environment any different from the previous Congress government?

Like the Manmohan Singh government before it, the Modi government sees forests, air, water and the protection of tribal interests instrumentally, in the context of its plans for the economy. Where it is a hurdle to the objectives that the government has set for itself, it uses its authority to sideline environmental and tribal interests. While the earlier government sidestepped the law if it came in the way of implementing its projects, the present government seems to be looking at the ordinance route to derive temporary legality, in the confidence that it can find a way to propel the law through Parliament. In the process, the reason why laws were made to safeguard the environment, acknowledge and address situations of mass displacement, and to care for tribal interests, is getting lost.

Take, for example, the Cabinet Committee on Investment that the Manmohan Singh government set up in January 2013. Under the law, the government cannot take over land or make decisions about environmental and forest clearance without following the process that was set in place to ensure that the environment and local populations do not pay too heavy a price when development projects are being implemented. The Forest Rights Act (FRA) of 2006, under which the rights of the forest dwelling and forest-dependent communities were "recognized", had to be implemented before any project could be happen in those areas. What the Committee did under the UPA was to decide that, for projects worth Rs 1,000 crore or more, there would be no need to worry about laws, whether they had to do with forest rights, or with pollution or with land acquisition. The Modi government now seeks to dilute these laws and to leave the final decision about whether a project should go ahead or not with the government.

Take another example: when it comes to forests, particularly Fifth Schedule Areas populated by people from the Scheduled Tribes, there are restrictions on land transfer and land alienation, and the State has been given the responsibility of safeguarding the interests of Adivasis and their relationship with the land. As this is seen as standing in the way of a number of projects that were a priority for the Manmohan Singh government, an exception was made to the Forest Rights' Act and Provisions of the Panchayats (Extension to the Scheduled Areas) Act (PESA),1996, bypassing public hearings and consent when it came to linear projects (roads, canals, highways, broadband, electricity etc). The present government is demonstrably impatient about the idea of consultation with affected communities, and with getting consent from tribal communities when planning on locating a project in their midst.

In May 2014, the Ministry of Environment and Forests was renamed the Ministry of Environment, Forests and Climate Change in May 2014, but there is nothing to indicate what this is supposed to mean. Especially when the Minister for Environment says he will not let environment be animpediment to development.

Has Parliament approved the new changes to the Land Acquisition Act?

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 is being amended through an ordinance. When a government with a solid majority in one of the houses of Parliament feels that it has to take the ordinance route, there is a serious problem. And we have a senior minister like Arun Jaitley declaring that whatever happens while an ordinance is in force becomes irreversible, even if Parliament were not to pass the ordinance into law. This means he can push through the changes while the ordinance is in force, and worry later about whether the law gets passed or not.

Some believe it's all right to have an ordinance, because once it's issued or promulgated, it has to be passed within six weeks once Parliament meets, or it ceases to be effective. It may

then be re-promulgated. But, as the Supreme Court said in the 1986 case of DC Wadhwa, re-promulgation of ordinances would amount to a fraud against the Constitution.

The ordinances they have brought in now threatens to bring matters to a point where changes on the ground can be wrought through executive fiat.Ordinances are meant for emergencies, and there is no emergency now that can justify changing land acquisition laws without debate in public and in Parliament.

What changes does the current government want to make in its amendment-by-ordinance to the Land Acquisition Act, 2013?

Under the previous Land Acquisition Act of 1894, once land was acquired by the State and compensation was paid, the land belonged to the State. If the State did not go ahead with the project they were meant to and the land lay fallow, it would not be returned to the person from whom it was acquired – it remained State property.

In two instances where people challenged this in court, the court ruled that the land could not be returned to the original owner, and ought not to be. For, the specious argument went, if it were auctioned in the open market, it would fetch the treasury more money. So, returning the land to the original owner would amount to cheating the treasury!

When the 2013 law was being negotiated, a clause was introduced which said that if the land acquired for a certain public purpose remained unutilized for a certain period, it would have to return the land to the original owners. Initially, when the 2013 Act was being debated, it was proposed that that period would be five years. By the time the law was passed, there were changes made to this clause – it was decided that if the land remained unutilized for a period of five years it may either be returned, or put into a land bank. The land would then continue to vest with the State through the creation of land banks. Even though it was, in a sense, acquired illegally because it was not used for the public purpose for which it was meant. The present ordinance says that if land acquired remains unutilized for five years or any other period that may be specified, whichever comes later, that clause will come into play. This unspecified period could mean anything – five years or even 25.

On one hand, it is said that there must be a shrinking of all procedures: no need for assessment of displacement or of families that will be affected by the project; no requirement of consent; no need to assess impact on food security. Then, the ordinance is brought in to say that the land may lie unutilized for even longer than five years. There's a fundamental contradiction here.

The amendment is expansive about the exceptions from social impact assessment and from the requirement of consent for projects in defence and defence production, rural infrastructure, affordable housing, industrial corridors and social infrastructure projects, including public-private partnerships, where ownership rests with the government.

The government believes social impact assessment is time consuming and disruptive. Under the 1894 Act, it was the Collector's role to listen to all objections and report to the State on whether the acquisition should go ahead. The 2013 Act introduced professionalized social impact assessments. That was an aspect that certainly needed more debate: for, contemporary history is replete with experience about what happens when private firms such as Pricewaterhouse Coopers or Arthur Andersen are left to audit and report on how projects are run, and of their implications. Under the amendment, it is not just social impact assessment that will be done away with, but the very idea that the affected people and the

consequences of the project on their lives matter. The 2013 law required consent from 80 percent of affected people before land was acquired. This will be rendered otiose.

What is 'strategic importance'?

It is the Subramanian Committee Report that created this category – projects of 'strategic importance'. What 'strategic importance' means is anybody's guess. We know now that phrases such as 'national interest' and 'anti-national' have acquired meanings that attack whatever is inconvenient to the government. So, if for the project in Mahan forests in Madhya Pradesh, there was actually fraud practiced in procuring the consent of the villagers, that is not the problem; it is the fraud getting exposed and getting talked about that becomes the anti-national activity. This is a cynical use of power that pretends to derive its legitimacy from the law.

In the 2013 Act, after much debate, it was decided that multi-crop agricultural land was not to be diverted for purposes that are non-agricultural, in order to protect food security. Now, in the amendment-by-ordinance, they want to change this. Under the ordinance, multi-cropping agricultural land can now be acquired for certain projects in the interests of national security and defence.

Can't we have some sort of compromise?

The 2013 Act was spurred by the multiple sites of conflicts where people had been pushed to the wall when threatened with dispossession. One of the problems with the 2013 Act is that it tries to do something for everybody: for industry, for the farmer, for the State, for the Adivasi, for those concerned with food security. It also aimed to address the conflict and distrust caused by these projects. The extent of displacement without rehabilitation has been enormous. So, any law that aims to reduce distrust and conflict has to work to achieve that effect. Instead, what we see in the ordinance is the executive government giving short shrift to those affected by the project, going back to the idea that such people are merely obstacles to growth. Where in this is there room for compromise?

Was the 2013 Act ideal to start with?

The 2013 Act was brought in to deal with the pitched battles around the country contesting mass displacement. The Narmada Bachao Andolan, although a key example of this, was neither the first, nor will it be the last.

The 2013 law provides for compensation to people whose land is to be acquired. But to the extent that this was based on the understanding that those who resist displacement are always holding out for more money in compensation, it was deeply fallacious. There are people in multiple sites who do not want acquisition because they see the project as destroying their lives. This is a very different perspective from that which may have prevailed in Noida, for instance, when many were asking forenhanced compensation and a chance to get jobs in enterprises that may be set up on the land acquired. The introduction of consent was an important element that revealed a glimmer of understanding of what ails forced acquisition and mass displacement.

In tribal and scheduled areas, the fundamental thing is for the State to ensure that land is not transferred away from Adivasi communities. So, for a long time, the only entity that could take such land for a public purpose was the State. Now, the government is revealing a changed understanding of its role in relation to tribal communities and their land: if the law works for the government, then the law may stay. If the law does not support the

government's objectives, there is the route of executive ordinances. And then there is brute force.

The 2013 Act is an improvement on the 1894 Act in terms of recognizing affected families beyond land owners and speaking the language of rehabilitation. But it legalizes the taking of land from people whose land ownership has been recognized under the FRA. Consent is required from 80 percent of people, which leaves 20 percent amenable to forcible acquisition. In the Tribal Committee Report we prepared, we've had to acknowledge that consent can be manufactured, sometimes by fraud, sometimes by coercion and duress, sometimes by misinformation. We also often hear it said that there can be no acquisition for a project until the FRA process of settling rights is completed, and this is often understood as being only about individual rights. The understanding of traditional and customary rights in the forest, community rights and access to resources – which staves off the vulnerability of tribal communities – is still very sketchy. The FRA was enacted in recognition of the historical injustice done to forest-dwelling and forest-dependent communities – they had had to lead shadowy existences as they were rendered illegal and cast as encroachers by forest laws until the Act was passed in 2006. To suggest that all that is required before they can have the land taken from them is that the rights should have been settled, and that this is about individual rights, is extremely cynical and overly pragmatic. Now, of course, the ordinance wants to dilute even that.

The 2013 law also does not require the company acquiring land for a project to rehabilitate those displaced – it only has to bear the cost for the State to rehabilitate them. Where they get this confidence that the State can perform this task is baffling – how will a State that has never delivered on this do it now? Under the 2013 law, if rehabilitation is not certified to be complete, there cannot be change of land use. The amendment ordinance leaves this intact. But there's an important question here – who is going to do the certification?

Moreover, according to the Vijay Kelkar Committee report on fiscal deficit, in 2012, excess land acquired by government agencies – for ports, or public sector corporations, for instance – can be sold to help deal with the fiscal deficit. Much of this land was originally purchased coercively under land acquisition proceedings. Dealing with fiscal deficit was never the purpose of the Land Acquisition Act, and it points to a worrying trend – that there's been over-acquisition of land which, the Kelkar committee suggests, may be auctioned off. In November 2014, the Comptroller and Auditor General submitted a report to Parliament which found that much of the land acquired for Special Economic Zones invoking the 'public purpose' clause was later sold or used for other purposes by corporations in the private sector such as Pepsico and Cadbury. According to its audit, "Out of 45,635.63 ha of land notified in the country for SEZ purposes, operations commenced in only 28,488.49 ha (62.42 percent) of land."

Is the relationship between the State and private companies too close for comfort?

Another continuing trend from the old government to the new has been the State becoming a contracting party with corporations. In the course of our work in Orissa and Chhattisgarh, for instance, we found MoUs being signed in large numbers. Chhattisgarh has 168 MoUs for various kinds of projects, and sometimes multiple MoUs are with the same company. This MoU culture talks very little of what the companies have to deliver. It talks a great deal about what the State has to deliver to the companies.

The State makes environmental laws, and then finds that the law is a bother. So it signs an MoU with a company promising to expedite environmental and forest clearance. Increasingly, we've found that in the MoUs, the State has also started promising to help in the

maintenance of law and order in the project area, which is basically about taking sides in conflicts between local populations and corporations.

And, of course, we are hearing more and more voices speaking from the State about how the changes in law and policy will make industry happy, as though that is what should be the State's primary concern.

Can government officials be held accountable for misuse of the Land Acquisition Act?

Several legislations include a 'good faith' clause – words to the effect that anything done by any official acting under the law will be presumed to have been in good faith. If you want to challenge what they have done or prosecute someone under that law, you have to be able to establish that it was not done in good faith. The Land Acquisition Act has a bizarre and extreme provision: Section 197 of the CrPC, a provision that is severely contested for the impunity it produces, which says that no public servant may be prosecuted without the sanction for prosecution being given by the government. To my knowledge, this is the first time that Section 197 has been placed in an administrative law. It has so far been part of the criminal law apparatus and 'public order' laws, where the use of force is sanctioned by law. It is no secret that the State does not give sanction for prosecution often, for this provision is most often used to protect officials – who act at the behest of the State – from prosecution.

There is a certain logic that underlay the good faith clause. It was to meet the apprehension that administrators' work would get stalled if they were susceptible to being challenged for their acts, at least those done in good faith. Ironically, this is not dissimilar to the experience that activists have accumulated over the years, when case after case is foisted on them, dragging them into the courtroom for dissenting or resisting the actions of the State or of corporations.

The sanction power has been challenged for some years now, especially where wrongdoers are seen as being shielded by it. The Prevention of Torture Bill (2010) made major strides when the Parliamentary Standing Committee endorsed the recommendation that the law be changed to say that requests for sanction must be dealt with by the State within a period of three months. It also recommended that rejections be accompanied by reasons, and the rejections should be subject to judicial challenge. So, while we have been battling to tame this provision and to do away with impunity, it is now being introduced in the Land Acquisition Act.

Basically, this gives officials a free hand and promises them the protection of the State when they commit a wrong within the law!

Usha Ramanathan works on the jurisprudence of law and poverty. She was a member of the High Level Committee set up in August 2013 to report on the socio-economic status of tribal communities. The report was submitted to the government in May-June 2014 and can be found here.