Limits to Absolute Power
Eminent Domain and the Right to Land in India

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As the conflict over land assumes a central dynamic within the “growing Indian economy”, forcible acquisition, or the state’s power of eminent domain, is critical to various political and economic calculations. This paper discusses the doctrine of eminent domain in the context of dispossession and emergent land and resource conflicts in India. The origin of the doctrine in pre-constitutional colonial law, the legal mechanisms of land reform and acquisition laws through which it finds expression, and the recently proposed mechanisms for acquisition that expand its power and conflate public purpose with private capitalist interests are discussed. The paper examines the dual nature that lends itself to redistributive justice and the dispossession of already marginalised citizenry. It then examines the vexatious concept of sovereignty animating the doctrine, discusses existing substantive limits to its power that need to be given primacy and the uneven jurisprudence around the doctrine. It argues for contextualised rights to land- and resource-use regimes, concluding with observations on the implications of the doctrine’s continuing and expanded scope.

“Absolute” power in the title of this paper is not totalitarian power but exceptional power operationalised through certain legal provisions in an ostensibly democratic framework, like eminent domain expressed in the Land Acquisition Act 1894 that allows the state to overrule any dissent for land acquisition for public purpose. I would like to thank Usha Ramanathan and K B Saxena for insightful discussions on eminent domain and land reforms, respectively. Thanks are also due to Sanjay Parekh, Albertina Almeida, Krishnendu Mukherjee and other legal experts with whom I consulted and who referred relevant judgments and concepts. Thanks also to the anonymous reviewer for suggestions. Any errors are my responsibility alone.

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Infrastructure across the country must expand rapidly. Industrialisation, especially based on manufacturing has also to accelerate. Urbanisation is inevitable. Land is an essential requirement for all these processes. Government also needs to acquire land for a variety of public purposes (emphasis added; GoI 2011a).

These opening words in the foreword of the Land Acquisition and Rehabilitation and Resettlement (LARR) Bill 2011 introduced by the Ministry of Rural Development (MORD) in Parliament in 2011 disclosed a slippage. Stressing the need for land for infrastructure expansion, industrialisation and urbanisation, the foreword said the government also needs to acquire land for “public purposes” – whereas the bill itself sought to expand the definition of “public purpose” to include activities undertaken by the private sector. Its latest avatar, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (RTFCT-LARR) Bill, 2012 elaborates in detail this expanded scope of land acquisition. As the conflict over land assumes a central dynamic within the “growing Indian economy”, the forcible acquisition of land, or the state’s power of eminent domain, is critical to various political and economic calculations. Indeed, that in West Bengal nearly 35 years of Communist Party of India (Marxist) rule fell to massive electoral ousting following the state’s serious mistreatment of popular resistance to land acquisition is perhaps a bitter pill for many political elite. As protests against forcible land acquisition in states like Orissa, Andhra Pradesh, Tamil Nadu, Maharashtra or Assam or inadequate compensation in Haryana or Uttar Pradesh continue, the power of the state to acquire land forcibly has found itself curtailed by electoral considerations. The RTFCT-LARR Bill 2012 is the latest attempt to resolve this contest over land (and resources) in the legal domain.

This paper examines the doctrine of eminent domain and its evolution in contemporary India from its pre-constitutional colonial antecedents. The legal instruments through which the doctrine has found an expression, redistributive land reforms on the one hand, and dispospossessing development projects on the other, offer an insight into its dual nature with its potential for redistribution and expropriation. The questions around sovereignty and decentralisation of power it summons pose important challenges for democracy. Can the doctrine of eminent domain be done away with? What substantive limits can be posed against the state’s absolute power for land (and resource) acquisition? Today, as equality is made to seem a distant dream, egalitarian agendas need rearticulation. Can
we retain state power for redistributive purpose without the power of eminent domain? Where might we locate such power constitutionally? What form might rights to land and resources for all take beyond private property entitlements? Using material gleaned from legal, archival and ethnographic research, I interrogate concerns critical to struggles over right to land and resources in India today.

The first section of the paper focuses on the doctrine of eminent domain. I begin with existing legal provisions for land acquisition, notably the extant Land Acquisition Act (LAA) 1894, the Coal Bearing Areas (Acquisition and Development) Act (CBAADA) 1957, Land Reforms legislation and the National Rehabilitation and Resettlement Policy (NRRP) 2007. I then trace legal measures recently proposed in the light of the intensifying conflict over land in the country, which include the Land Acquisition (Amendment) Bill 2007, the Rehabilitation and Resettlement (R&R) Bill 2007, the larr Bill 2011 and the rtfctlarr Bill 2012. I then address two critical aspects of the doctrine – the ongoing conflation of public purpose with private (read capitalist) interest in the name of economic growth; and the dilemma over the dual nature of the power of eminent domain.

It should be noted that the speed with which measures have been proposed in recent years to address land acquisition and R&R underscores how critical the conflict over land and resources has become. Conflicts and attempts for legal resolutions have both intensified in the two successive governments of the centre-right Congress Party-led ruling United Progressive Alliance (UPA) since 2004. However, the protests over land acquisition have erupted in left-ruled, centre-right and Hindu right-ruled states alike. That these developments occur in the fullness of two decades of neo-liberal reforms in the country, which include the Constitutional Amendment Act 1992, 74th Constitutional Amendment Act 1993, the Panchayat Extension to Scheduled Areas (PESA) Act 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA) 2006 and must be safeguarded. I then review some judgments of the higher courts to examine their treatment of eminent domain. After this I explore the elements to be considered for securing rights to land- and resource-use for all beyond private property entitlements. Drawing upon the Directive Principles of State Policy (DPSP), I argue that redistributive land reforms are imperative and need not draw upon the doctrine of eminent domain. I conclude the paper by noting the implications of an expanded power of eminent domain.

1 The Doctrine

The term eminent domain is ascribed to have originated in Europe in 1625 in the works of Hugo Grotius and Samuel Pufendorf (Dias 2004). Grotius argued that the property of subjects lay under the eminent domain of the state that may use, alienate and even destroy the property in the case of extreme necessity and for public utility, while making good its loss to those who lose it. The doctrine of eminent domain has its origins in India in pre-constitutional colonial British common law. While not expressly articulated in the Indian Constitution it manifests itself through laws that enable land acquisition by the state. The claim for compensation of loss of property to compulsory acquisition comes from natural law (the supposed “natural right” of a person to enjoy personal property animating the liberal theory of possessive individualism, and thus the right to compensation for its loss). In a 1952 judgment upholding the power of eminent domain for acquisition of land from big landlords for redistributive purposes, the Supreme Court of India thus noted: “the concept of acquisition and that of compensation are two different notions having their origin in different sources. One is found on the sovereign power of the State to take, the other is based on the natural right of the person who is deprived of property to be compensated for his (sic) loss” (ibid: 25). Inasmuch as natural law has little role in the Indian Constitution and the British common law from which the doctrine is drawn precedes the Indian Constitution, the doctrine of eminent domain has extra-constitutional and pre-democratic moorings in India.

A similar argument can also be made for private property entitlements, flowing as they do from natural law and colonial common law precedents. The institution of private property follows a historical trajectory significantly negotiated during British colonial rule, going at least as far back as the Permanent Settlement of Bengal in 1793 and extending into post-independence property regimes. This British colonial legacy is thrown sharply in relief by comparing the context of Goa, for instance, which was under Portuguese colonial rule until 1961. In Goa, private property entitlements were not as pronounced, nor was the power of eminent domain applied for acquisition of land and resources on any noteworthy scale. Instead, land and resources were largely collectively held under the Comunidade Code that codified the traditional gaonkari system in each village. This may well be because of the pre-capitalist nature of the Portuguese colonial state. Post-independence, in India (and subsequently in Goa), the British capitalist-colonial legacy of eminent domain and private property were retained. Land reforms that sought to equitably redistribute landholdings to landless peasants or tenants with ownership rights were also premised on private property entitlements. Interestingly, the power of eminent domain gained constitutional primacy over the right to property in India at the behest of land reforms for redistributive justice (see later). However, the extent and range of the exercise of eminent
domain has historically largely depended upon whom it is directed towards – the more economically, socially and politically marginal the targets, the easier to acquire their land and resources.

1.1 Legal Instruments

Land Reforms and the Land Acquisition Act (LAA) 1894: Immediately after independence, the power of eminent domain was only of a statutory character, operationalised through Land Reforms legislation and the LAA 1894. Land reform laws were enacted from the 1950s to break the concentration of land with zamindars and to strengthen the rights of landless (read title-less) tillers and tenants. They imposed ceilings on large landholdings and sought to redistribute the excess land thus nationalised. Invoking eminent domain for redistributive justice, land reforms soon lost political expediency as they encountered resistance from landed elite with direct electoral implications for political parties. Except in some pockets like West Bengal and Maharashtra, they met minimal success and gradually lost salience in policy formulations. In recent years ceiling laws in urban areas have been entirely repealed and in many states greatly relaxed in rural areas to facilitate large-scale private holdings of land in abject reversal of redistributive motives.

The Supreme Court of India in its early phase (1950-70) struck down land reform legislation on the grounds that it violated the right to property which was then a fundamental right under Article 19 (1)(f) of the Constitution. This triggered a severe reaction by Parliament – land reform laws pertaining to takeover of property by the state were moved to the Ninth Schedule of the Constitution from the First (Constitutional Amendment) Act 1951 onwards, which insulated them from judicial challenge and invalidation. The insertion of Articles 31A-C through the First Amendment and the 25th Amendment saved certain laws related to acquisition from challenge under Articles 14 (equality before law) and 19 (fundamental rights). This elevated eminent domain to a constitutional doctrine, although blanket protection from judicial challenge under the Ninth Schedule was later considered untenable (significantly after the Keshavanand Bharti vs the State of Kerala judgment in 1973). The right to property was removed from the list of fundamental rights through the 44th Constitutional Amendment Act in 1978 by the Janata Dal government, strengthening the power of eminent domain. Even the right to compensation underwent various amendments so that the legislature is now under no constitutional obligation to pay compensation to those deprived of property under Article 300A, except to tillers of cultivated land for land, buildings and structures standing thereon, and to minority educational institutions, excluding all other classes of landowners and landless peasants, wage labourers and others who faced dispossession from livelihoods and homesteads after acquisition (Basu 2008).

The LAA 1894 on the other hand is an extant colonial statute retained post-independence with some amendments and providing for compulsory acquisition of land for “public purpose”. This includes provisions of new and existing villages; town or rural planning; planned development under government schemes or policy; a corporation owned or controlled by the state; residential purposes for the poor, landless or those affected by natural calamities, government projects or development schemes; educational, housing, health or slum clearance schemes; and acquisition for public offices. Its 1963 rules also include acquisition by the state for companies seeking land for providing houses to employees or “for any other public purpose sanctioned by appropriate authorities” (GOI 1985). There are provisions hearing objections of those affected after the first notification, declaration and notice of compensation for acquisition (Sections 4, 6 and 9, respectively), but the “competent authority” (usually the same district collector who sanctions the acquisition) has final say in decision-making.

The constitutional status of the doctrine of eminent domain and the unqualified removal of the right to property as a fundamental right without attention to existing social, political and economic inequalities resulted in making dalits, adivasis, poor peasants and the urban poor most vulnerable to the exercise of eminent domain under the LAA 1894. As the fervour for land reform died down and the state’s “developmental” projects took shape, by 2002, post-independence state-led land acquisition displaced 60 million people (Fernandes 2008), who received little, let alone “just” compensation. Ironically, a more progressive public purpose of equitable redistribution of land facilitated the dispossession of already economically, socially and politically vulnerable people.

Coal Bearing Areas (Acquisition and Development) Act (CBAA) 1957: While other minerals came under the Mining Areas (Development and Regulation) Act with land acquisition under the LAA 1894, special acquisition legislation was enacted for coal, given its historically iconic status as a symbol of nationalism and the working class (Lahiri-Dutt et al 2012). The CBAA 1957, modelled on the LAA 1894, empowers the central government to undertake prospecting and acquisition of any potentially coal-bearing area. In a matter of seven days after serving notice to the occupier of the land, any standing crop, fence or jungle can be cleared for prospecting with compensation paid before or at the time of such prospecting activity. If coal is discovered, the entire area for acquisition could be notified within three years. Any objections to acquisition and amount of compensation are to be made within 30 days of the acquisition notice and the final decision on any such claims and objections, like in the LAA 1894, is to be made by the “competent authority” appointed for the acquisition. The valuation of compensation under the law expressly states that any profits emerging from what is below the surface of the land or any future appreciation of prices must not be considered. Thus, people are to part with land at current prices and cannot hope to partake of the wealth to be generated from it. As most mining areas including coal-bearing areas are forestslands with little “infrastructure and development” and are inhabited by adivasis and other forest dwellers, the valuation of these lands is historically extremely low. As a
result, these areas have been subjected to flagrant cultural, ecological, economic, political and social dispossession and immiseration.11

Since the 1980s, however, the enforced displacement of people for large development projects has been fiercely contested. Anti-displacement movements have raised critical questions regarding social and environmental costs, prior informed consent of project affected including landless people, their legal entitlements and livelihood security and democratic process and accountability of the state. The state’s presumption of public interest has been forced to grapple with vital questions regarding the “development” it undertakes – for whom and at whose cost. Still, years of agitation have not translated into a clear legal mechanism addressing concerns regarding enforced displacement, R&R, recent attempts notwithstanding. There has been in fact a historical disparity between the legal recognition of land acquisition and the lack of any effective legal framework for R&R, even when explicit provisions for the latter in a development project are violated (Ramanathan 2009). While recent attempts seek to address this disparity, the enactment of a law is awaited.

National Rehabilitation and Resettlement Policy (NRRP) 2007: The first central policy on R&R was drafted as late as 2004 and the newest one replaced it by the end of 2007. The preamble to the NRRP 2007 states:

Provision of public facilities or infrastructure often requires the exercise of legal powers by the state under the principle of eminent domain for acquisition of private property, leading to involuntary displacement of people, depriving them of their land, livelihood and shelter; restricting their access to traditional resource base[s], and uprooting them from their socio-cultural environment. These have traumatic, psychological and socio-cultural consequences on the affected population which call for protecting their rights, in particular of the weaker sections of the society including members of the scheduled castes, scheduled tribes, marginal farmers and women (goi 2007a, p 33).

The NRRP’s stated objectives include minimising displacement and promoting non-displacing or least-displacing alternatives; ensuring adequate and expeditious rehabilitation with the active participation of the affected families; ensuring protection of the rights of scheduled castes and scheduled tribes (SCs/STs);12 providing better standards of living with sustainable income to affected families; integrating rehabilitation concerns into development planning and implementation processes; and facilitating harmonious relationships between the acquiring body and affected families. It states:

...There should be a clear perception, through a careful quantification of the costs and benefits that will accrue to society at large, of the desirability and justifiability of each project. The adverse impact on affected families – economic, environmental, social and cultural – needs to be assessed in a participatory and transparent manner (ibid: 34-35).

While these are useful policy directions, they mean little in practice without specific laws mandating them. Despite acknowledgement of concern for the displaced and democratic process, the policy does not make the right to informed consent explicit. Panchayat or other local body resolutions find no mention in ascertaining the views of the affected communities. A key ingredient to minimise displacement is local participation in creating projects that account for local needs and development. But the power of eminent domain envisages projects top-down and guarantees their approval and implementation without regard to local dissent. As Iyer (2007) argues, acquisition needs to be made contestable not merely in regard to compensation, but also in relation to the public purpose.

Existing legal measures have thus compounded inequalities and conflicts over land by giving primacy to the power of eminent domain and overproducing state sovereignty over citizens who are already economically, socially and politically vulnerable. At the same time, eminent domain has met little success in securing redistributive and economic justice. I turn below to some recently proposed legal measures for land acquisition.

Land Acquisition (Amendment) Bill 2007 (Amendment Bill and the R&R Bill 2007: In December 2007, at the height of the controversy around land acquisition and displacement caused by the special economic zones (SEZs)13 and particularly with the violence in West Bengal as a backdrop, the UPA government introduced the “twin bill” – the Amendment Bill 2007 and the R&R Bill 2007. Ostensibly to address the controversy over acquisition for companies, the Amendment Bill expanded the scope of acquisition. Public purpose now included the provision of land for strategic purposes relating to naval, military and air force works or any other work vital to the state. Provision of land: the provision of land for infrastructure projects of the appropriate government; and the provision of land for any other purpose useful to the general public, for which land has been purchased by a person under lawful contract to the extent of 70% but the remaining 30% of the total area of land required for the project is yet to be acquired (goi 2007b). The word “person” included any “company or association or body of individuals, whether incorporated or not”. The expression “infrastructure project” included any project relating to generation, transmission or supply of electricity; construction of roads, highways, bridges, airports, ports, rail systems or mining activities; water supply, irrigation, sanitation and sewerage projects; or any other public facility notified by the goi. With increasing privatisation, public infrastructure projects, for instance, in and around SEZs, are often undertaken by private corporations in the form of public-private partnerships (PPPs) to serve their own needs of transport, power, water supply or sanitation, or to earn profits by levying user charges rather than to secure access to infrastructure services for all14 (Dwivedi 2010). “Any purpose useful to the general public”, vaguely articulated, risked arbitrary assessment largely determined by blinkered top-down and capital list development perspectives and/or the rampant corruption in the execution of government policies, projects and programmes. In the face of strong opposition from peasant and citizens groups as well as some political parties particularly with respect to land acquisition for SEZs, the twin bills were eventually dropped.
The Land Acquisition and Rehabilitation and Resettlement Bill 2011 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill 2012: In another attempt as controversy over compensation erupted in the northern states, the LAA Bill 2011 was introduced in September 2011. Going further than the Amendment Bill, it sought to replace the LAA 1894 and bring R&R for the first time within the ambit of a land acquisition law. This was a welcome move, but the bill clearly conflated public purpose with industrialisation, infrastructure development and urbanisation. That this emphasis came from the MORD, when significant populations facing the brunt of forcible acquisition and fiercely resisting it live in rural areas was ironic.

The third and latest version of the bill was released in December 2012 after several rounds of deliberations between various GOI ministries, especially upset over compensation and consent provisions and facing pressure from industry lobbies. It has ignored many elements proposed by the Parliamentary Standing Committee on Rural Development (like no government acquisition for private parties), and is ambitiously named the RTFCtLaRR, 2012 (for accounts of deliberations see Goswami 2012a, 2012b, 2012c; Ramadorai 2012; Vohra and Das 2012; ET 2012a, 2012b; Firstpost 2012; PTI 2012a, 2012b; Reuters 2012; NDTV 2012) claiming that it is:

...A Bill to ensure, in consultation with institutions of local self-government and gram sabhas established under the Constitution, a humane, participative, informed consultative and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition and make adequate provisions for such affected persons for their rehabilitation and resettlement thereof, and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post-acquisition social and economic status... (emphases added; GOI 2012).

The RTFCtLaRR 2012 defines “public purpose” and thus the scope of eminent domain in unambiguous detail including acquisition by appropriate government (state or central) for (a) own use, hold and control (including public sector undertakings); (b) for PPPs where land continues to vest with the government; and (c) for private companies for public purpose (excluding private hospitals, educational institutions and hotels). Public purpose projects include acquisition for strategic defence purposes; infrastructure projects as notified by the GOI; agriculture related projects; industrial corridors, mining and the national investment and manufacturing zones (NIMZs); water and sanitation, educational, sports, healthcare, tourism, transportation – and space – programme related projects; and housing and development plans of various categories.

The initial draft of the LAA Bill allowed no acquisition of multi-crop irrigated land, but the second version altered this with the qualifier that it could be minimally acquired and never above 5% of the state’s total cultivable area. The RTFCtLaRR Bill states that such land shall be acquired only under “exceptional circumstances” as a “last resort” and shall not exceed limits notified by the appropriate government (state or central depending on jurisdiction which: (a) in the first place initiates acquisition, and (b) eventually determines the appropriateness of public purpose), nor exceed the total net sown area of the district or state! It stipulates that an equivalent area of cultivable wasteland shall be developed or equivalent amount to the value of such land shall be deposited with the appropriate government for investment in agriculture to enhance food security. Given the paucity of agricultural land and population densities, the latter option seems most likely. Given the propensity to encourage agribusiness in current policy, food security can likely be conflated with food production rather than the secure right to food for all, even as land and resources get alienated from local producers for public purpose. A senior bureaucrat15 I interviewed in the course of my research revealed that the opposition to the clause of no multi-crop land being acquired largely came from the chief ministers of fertile green revolution states who felt that they would not be able to “invite” any industry into the state with this clause.

Legal entitlements for R&R for landowners and landless labourers, artisans, fisherfolk, tribal and traditional forest-dwellers were covered by all the versions of the bill which is significant. However, the initial version of the bill was to have retrospective effect for five years, but with criticism and resistance from industry, the subsequent versions dropped this clause. The 2011 bill assumed that conflicts over land acquisition could be resolved by increasing R&R claims – four times the market rate of land in rural areas and twice in urban areas (although whittling down of these factor multiples was in the offering, see Gildiylal 2012), with annuity and additional compensation benefits. Despite its nod to “heightened public concern on Land Acquisition issues”, the bill ignored the fact that unlike in the northern states (and perhaps even there), in many areas whether Nandigram or Singur in West Bengal, Raigad in Maharashtra, or in villages in Goa, Andhra or Odisha, people have tenaciously agitated at great risk to their lives and livelihoods against the acquisition and the project, not for greater R&R. Worse, the RTFCtLaRR dilutes compensation further, leaving it to the appropriate government to determine whether compensation should be at market value of the land or twice that in rural areas, and fixing compensation in urban areas at market value. While compensation includes 100% solatium award plus 12% interest until the date of award or acquisition, the determination of the market value is to be done by calculating the average market value of land transactions in the area for previous three years from half the highest sale transactions. Real estate developers I interviewed candidly disclosed that sale deeds never reflect the real sale price of any area of land as the parties in transaction depress prices to avoid stamp duties. A significant amount of the price is thus paid “under the table”, contributing to the ubiquitously unaccountable and obscure “black economy” of real estate. Besides, the significant escalation of land and property prices in affected areas once a development project is announced is unaccounted for, as awards are to be determined on previous...
rates. The whittling down of factor multiples will thus lead to unjust compensation and dispossession.

The initial bill imposed R&R coverage to land purchased by private parties for any project over 100 acres in rural areas and 50 acres in urban areas. Industry representatives and developers I interviewed claimed that the coverage of the R&R provisions to private purchase coupled with high compensation rates in the earlier bill would render large-scale projects extremely costly, and that the higher compensation at the time indicated the electoral political calculations of the UPA. The RTFCTLARR, at much lower rates, extends the coverage of R&R for private purchase only above an area specified by the appropriate government, or if the appropriate government is approached for land acquisition, to the entire area. While this devolution of decision-making to appropriate government may ostensibly safeguard federalism, competitive bidding by states to attract investment can raise such limits arbitrarily and create spiralling private concentration of land, exempting significant private purchase from R&R obligations. Moreover, with no ceilings on the extent of land that can be acquired for any project in a country, as densely populated, unfettered acquisition will intensify inequalities of ownership, access and wealth. R&R provisions must be extended to private purchase of land and limits determining R&R applicability are unlikely to protect vulnerable populations from destitution.

On the question of government acquisition for private entities, developers I interviewed argued that land must be secured by the government for industry to flourish (so much for the “free market” of willing sellers and buyers). One senior industry representative was of the view that large-scale land acquisition for any ruling party alliance would be difficult in the multiparty democratic political framework of India dependent on alliances and only a “strong” government at the centre could ensure land for investors, pointing out Gujarat as an industry-responsive state with an ideal and “strong” statesman like Narendra Modi. Conversely, senior bureaucrats while addressing meetings and in interviews openly admitted a clear recognition of the political limits to large-scale land acquisition given the widespread agitations across the country. The Parliamentary Committee report also rejected government acquisition for private parties, but the MoRD rejected this advice and negotiated a bargain for industry in the RTFCTLARR.

The second version of the bill envisaged the social impact assessments (SIAs) to determine the appropriateness of public purpose prior to approval and an expert group that would additionally make its recommendation to the committee for land acquisition at the state level. The SIAs or the expert group’s recommendations were not binding, with the entire process potentially just a circuitous route to approval that finally rested with the committee in its “larger wisdom”. The RTFCTLARR also envisages SIAs with participation of affected communities and a public hearing with the appropriate government taking the final decision, at best ensuring only greater awareness of intended projects to affected persons. Objections to acquisition or SIA reports can be heard by the district collector, who will make recommendations to the appropriate government. Objections to compensation awards can be made to a duly established LAA authority that is to function as a civil court with the next appeal to the high court. The appointment of an LAA authority independent of the appropriate government is welcome, but its jurisdiction covers only compensation awards and not the determination of public purpose or consent.

Violating the spirit of the corpus of laws protecting scheduled areas and tribes (see discussion of these laws later), the RTFCTLARR allows for the acquisition of their lands albeit with prior consent of gram sabhas or councils. In all other areas consent is required only for private projects requiring 80% consent and PPPs requiring 70% consent (the difference seems arbitrary) and the SIA is to include the consent process. However, no clear procedure as to how consent may be ascertained is mentioned and while gram sabhas and urban local bodies are to be consulted, resolutions taken by these bodies find no legitimate mention. The steps to be followed if there is no consent are also not mentioned. Considering that the SIA is largely to determine the public purpose of a project and the estimation and award of compensation is to follow once such purpose is established, the inclusion of consent before the estimation and announcement of intended award would fail to establish informed consent. Of course, other than the scheduled and the Panchayat (Extension to Scheduled Areas) Act (PESA), 1996 areas consent is not required for government acquisition for its own use.

How many and what kinds of changes the RTFCTLARR Bill will go through before it is eventually passed remain to be seen. Given the constant parliamentary stand-offs that the UPA is facing, when and how this bill will become law is an open question. In reinforcing the state’s power of land acquisition without consent for its own use for exhaustive public purposes, by legitimising government acquisitions for private entities, by including acquisition in the scheduled areas, by whittling down compensation, vaguely formulating consent clauses for private acquisition and disregarding ceilings for acquisition and concentration of land, the RTFCTLARR extends the scope of the eminent domain alarmingly. And until such time as a new law is enacted, the LAA 1894 continues to operate, its powers in place.

Public Purpose or Private Interest?

The phrase ‘public purpose’ has to be construed according to the spirit of the times in which the particular legislation is enacted and so construed, acquisition of estates for the purpose of preventing the concentration of huge blocks of land in the hands of a few individuals and to do away with intermediaries is for a public purpose. The reference in this 1952 judgment of the Supreme Court upholding the land reform legislation in Bihar to “the spirit of the times” sounds almost ominous in the current context. Since the end of the 1990s, especially, the distinction between public and private purpose in development projects is blurring (Nilsen 2010). For instance, in the initial days of the implementation of the SEZ Act, the transfer of the ownership of land acquired by the state to SEZ developers marked a
decisive shift towards the exercise of eminent domain for private interest justified in the name of economic growth. Intense resistance to acquisition for SEZs lead the government to revise this position and the commerce ministry issued a letter to all state governments in April 2007 that in the case of forcible acquisition for any SEZ, final approval would be withheld (Right to Information (RTI) document available with author). However, legally SEZs continue to be deemed public facility or commercial infrastructure, whereas they are capitalist enclaves dedicated to profit and growth. The letter issued by the Board of Approval of SEZs can always be retracted. In a revealing interview, then Commerce and Industry Minister Kamal Nath in whose tenure the SEZ Act 2005 was enacted noted (in the context of the SEZs preferring locations near urban areas):

If an investor comes and says I want to build my zone here, and I tell him to go build it somewhere else, he will leave. I can’t do that. …We have to be market-friendly. Where the investor wants the zone is his (sic) business decision. Otherwise they won’t come. We must have a model that works. As I said, they do contribute to infrastructure – inside the zone (Gopalakrishnan and Shrivastava 2008).

Contra to the espousal of difficulties in large-scale acquisition, the commerce ministry has recently unveiled the National Manufacturing Policy (NMP) in 2011 that envisages large national manufacturing investments zones (NMIZs) of at least 250 sq km each with integrated townships. The ambitious and speedily progressing Delhi Mumbai Industrial Corridor (DMIC) envisages nine such integrated township NMIZs. At the same time the NMP identifies land as the biggest challenge for the creation of mega industrial and manufacturing zones!

The overall policy environment initiated in the country in recent times includes legislation for not just SEZs and NMIZs, but also Petroleum Chemical and Petrochemical Investment Regions (PCPIRs) of over 250 sq km each as well. A recent notification by the finance ministry to standardise the definition of infrastructure across various ministries and laws is noteworthy, as it deems all private undertakings in the realm of road construction, health, education, electricity, water and SEZs as infrastructure projects (Sikarwar 2011). The grounds for deeming private investments through PPPs, industrial corridors or NMIZs as public infrastructure are flimsy. When private entities undertake projects for private profit, and public purpose is to secure the development and welfare of all citizens and particularly those deprived of access to basic necessities like a regular livelihood, nutrition, housing, health and education, can these essentially divergent motives be conflated? Given its expanded scope and the conflation of private interest with public purpose, the power of eminent domain now seems set to engender large-scale “acquisition by dispossession” (Harvey 2005); its only counter being popular resistance to dispossession.

1.2 Dual Nature

Postcolonial critiques of the role of colonialism in modern law point to the salience of exceptional power19 in shaping it. Indeed, exceptional power was resorted to by the state as much during the Partition of India and Pakistan, as the Emergency rule imposed by Indira Gandhi, and it continues to be applied in the frontier states of Jammu and Kashmir and the northeast or through special security related legislation such as the Unlawful Activities (Prevention) Act 2002 and the Armed Forces (Special Powers) Act, 1957. Exceptional power exercised through the state is a reflex used by political parties of all ideological persuasions. Skirting the critiques of the use of exceptional power, however, is the contradiction that exceptional power in the form of eminent domain was also used to institute redistributive justice through land reforms, albeit weakly. If liberal democracy is understood as class compromise rife with contradictions (cf Sandbrook et al 2007), the dual nature of the power of eminent domain is one such manifestation of contradictions. The dilemma of eminent domain is perhaps best understood as a tension between the forces of power operating through the Indian state. While it is tempting to secure the power of eminent domain for egalitarian redistributive purposes, this potential has at best been marginally realised, and a fundamental challenge is its historical abuse for greater centralisation of power and wealth as the state assumes sovereignty over citizens and aids capitalist accumulation.

Critics have argued for the need to do away with the doctrine of eminent domain entirely (see Ramanathan 2009). Is it possible to do away with the doctrine, however, without settling questions of sovereignty and redistributive justice? Can the power of the state for redistributive justice be guided with substantive limits that flow from constitutional principles and not overproduced state sovereignty over citizens in the doctrine of eminent domain? It has been argued that the strength of a democratic framework lies precisely in its possibilities for the curtailment of abusive exceptional power.20 The rule of law theorists points to the juridical or self-restraining (as when the state restrains itself from forcibly acquiring land in the face of opposition) and cognitive or deliberative (as the law gets reinterpreted and altered in implementation and in practice) dimensions of democracy that help circumvent the absolute power of the state (Dyzenhaus 1999; Scheuerman 1994, 2002). I turn to these questions in the next part of the paper.

2 Limits to Absolute Power

2.1 Vexatious Sovereignty

It cannot be disputed that in every government there is inherent authority to appropriate the property of the citizens for the necessities of the State and constitutional provisions do not confer this power though they generally surround it with safeguards.21

The power of eminent domain “inheres” in the sovereign power of the state. Sovereignty itself emerges in the context of international relations as the right of the sovereign state to determine its own affairs without interference from another state. Recent discussions of multiple and overlapping sovereignties point to the inherent contradictions in the term as states grapple with pressures from international bodies, multilateral and bilateral treaties, transnational corporations,
and to some certain extent, local bodies of self-governance (cf Randheria 2007). The “global war on terror” constitutes multiple cases in point that clearly defy principles of state sovereignty. The doctrine of constitutionalism holds that it is the individual citizen who is sovereign in a democracy. At the same time, the Indian Constitution recognises specific enabling provisions for the entitlements of specific communities like the minorities, SCs/STs over and above individual rights in the interest of social, economic and political justice. Sovereign powers of the state are also invoked by the right-wing fundamentalists towards conservative and often violent agendas. In India, state sovereignty forms a domain rife with contest and challenge as citizens, activists and multiple political parties frequently challenge the powers of the state and shape the rule of law.

In this scenario of complex and contesting forces of power operating through the state, the sovereign power of the state has several valences. In the first instance, it arises as the sovereign power of the colonial state over its “subjects” that finds salience in the application of eminent domain today. In the second instance, post-Independence, it is the sovereign state’s right to self-determination in the international arena, as a guard against aggression. In the current global dynamic, this can also be valued as relative autonomy for the government in skewed fora, say like the World Trade Organisation. In the third instance, in jurisprudence, especially since Keshavanand Bharti, it exists as a somewhat tenuous balance between popular sovereignty and the basic structure doctrine (see Krishnaswamy 2012). In the fourth instance, it arises in the context of rights secured by social movements, more recently like the RTI, the Rural Employment Guarantee or the Forest Rights Act (FRA). Sovereignty is thus a vexatious concept that shifts its source in complex ways, but especially assumes greatest force against more vulnerable citizens. When citizens challenge forcible acquisition by the state, they also challenge its assumption of sovereignty and this is a significant problem for democratic principles governing rule of law. It may be argued that under the Indian Constitution eminent domain is not exceptional power given that the right to property is not a fundamental right. However, is it worthwhile to retain this inherently contradictory concept that allows the state to presume “public interest” and use “absolute” force depending on the vagaries of the forces and ideologies that influence it? Thus, we find the expanded scope of eminent domain currently working towards capitalist growth and private interest. If acquisition for development projects must make prior consent mandatory, the power of eminent domain with inherently overproduced sovereignty over citizens must be done away with. And if equitable redistribution of land and resources may not include consent, the power to forcibly acquire land for redistribution must be specified through clear and stable constitutional principles and mechanisms different from eminent domain. What principles might rights to land- and resource-use for all draw upon and what elements and complementary mechanisms must it consider? I turn below to an examination of relevant legal provisions and principles for curtailing the sovereign power of eminent domain and securing redistributive and economic justice.

2.2 Eminent Domain vs the Third Tier of Democracy

(a) The Fifth and Sixth Schedules to the Constitution: Express recognition of community as a social unit requiring enabling provisions for protection and for social, economic and political justice was envisaged for states with scheduled areas and for states with STs (but no scheduled areas) through the Fifth and Sixth Schedules of the Constitution. While the Fifth Schedule refers to scheduled areas in states other than Assam, Meghalaya, Tripura and Mizoram, the Sixth Schedule refers to the scheduled areas in the latter states.

Under the Fifth Schedule, in each state with scheduled areas or tribes, a tribes advisory council advises on welfare and advancement matters. The governor of the state can direct that particular central or state laws may not be applicable or applicable with qualifications in these areas and may make regulations for peace and good government in the area with the president’s assent and upon consultation with the council for: (a) prohibiting or restricting the transfer of land by or among the members of the STs; (b) regulating allotment of land to members of the STs; and (c) regulating moneylending.

The tribal areas in the Sixth Schedule are administered as autonomous districts or autonomous regions (determined by the governor) with district and regional councils for the exercise of certain legislative and judicial functions. Laws with respect to inheritance, land revenue and other matters relating to village or town administration, social customs, marriage and divorce can be made by the councils, with the governor’s assent. Central and state Acts may not apply to these areas or apply with qualifications provided the president with respect to the former and the governor with respect to the latter direct so. The councils possess civil and criminal judicial powers specified by the governor. Interestingly, royalties accruing from mining licences or leases for prospecting or extracting minerals in a Sixth Schedule district are to be shared with the district council under agreement between the council and the state government, with the governor as the final arbiter in a dispute. The councils also have the power to make laws regarding the management of forests and the allotment or use of land (except reserved forests) with the significant caveat “...that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes in accordance with the law for the time being in force authorising such acquisition...” (Universal 2012). The Fifth and Sixth Schedules potentially offer substantive limits to the power of eminent domain with significant local decision-making powers, if given primacy.

(b) The 73rd Constitutional Amendment Act, 1992 and 74th Constitutional Amendment Act, 1993: Two of the more progressive laws in the country for decentralised governance, the Panchayati Raj 73rd Amendment Act of 1992 and the Urban Municipalities 74th Amendment Act of 1993 entitle the right of
the residents of panchayats or urban municipal wards to determine their own development and function as local self-governing units. These provisions have significant scope and include features like the constitution of the gram and ward sabhas for the preparation and implementation of economic development and social justice plans; the constitution of elected bodies at village, municipal ward and other levels with direct elections and reservations for SCs/STs and women; local body finance through grants-in-aid and state and central development schemes; and revenues through designated taxes, duties, tolls, and fees (GOI 1992).

(c) Panchayat Extension to the Scheduled Areas Act 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: Following quick on the heels of the 73rd and 74th amendments and going further, PESA stipulates that the legislature of a state shall not make any law which is inconsistent with the customary law, social and religious practices and traditional management of community resources and the right of the gram sabha to safeguard and preserve traditions and customs, cultural identity, community resources and customary modes of dispute resolution. It provides for the mandatory approval of plans, programmes and projects for social and economic development by the gram sabha before they are taken up for implementation and mandatory consultation (albeit not consent) with them before the acquisition of land for development projects or for R&R. Recommendation of the local bodies prior to grant of prospecting licences, mining concessions or leases for minor minerals is mandatory. PESA endows the local bodies with powers to prevent alienation of land in a scheduled area and to take appropriate action to restore any unlawfully alienated land (GOI 1996).

The FRA, in addition to securing the right to forestland and produce for forest dwellers along similar lines, further vests the gram sabha with the powers of determining the nature of individual and community forest rights and pass resolutions to such effect. It also stipulates that any resettlement of forest dwellers on account of conservation activity will not be undertaken unless free prior consent of the dwellers has been taken, and provides for penalty provisions against officers that violate the forest dwellers' entitlements.

The power of eminent domain contradicts the spirit of the body of legislation effecting significant local governance and decentralisation of power. This is not to argue that all is well with the implementation of the Fifth and Sixth Schedules, the 73rd and 74th amendments or the PESA and FRA. Indeed, there is a mountain of evidence that discloses the weaknesses and failures in the implementation of these laws that allow vested interests within and outside local rural and urban communities to prevail. The implementation of the 74th amendment in urban areas is considered a failure in even constituting effective ward sabhas. Eminent domain holds sovereign over PESA areas and the rights of indigenous communities are flagrantly violated. Implementation of FRA is rife with failures in recognising the rights of forest dwellers. However, arbitration by the state and law is important to ensure social justice. It also needs constant reinforcement with political organisation on the ground, a vibrant culture of activism unfettered by interest groups, conscientious media engagement, the judicial system and other avenues for justice like commissions for human rights, religious minorities, SCs/STs and women. In principle, and in limited practice, the Fifth and Sixth Schedules, the 73rd and 74th Amendment Acts and the PESA and FRA accord a fundamental third tier to governance that has the potential to bring the affairs of the state and governance more directly under the control of “citizens”. A principle of subsidiarity among the tiers of governance has not been promulgated in the Constitution though, and time and again, local body resolutions are thwarted in confrontation with the state's power of eminent domain. The Pohang Steel Company (posco) SEZ area in Odisha where panchayat resolutions against the project are being consistently disregarded is a case in point. The referendum for Mumbai SEZ (msez) in Raigad in Maharashtra conducted in 2008 by the district authorities was an unprecedented effort in ascertaining consent, albeit post sustained opposition to the project. Yet, even here the results were never disclosed to the public, rendering the legitimacy of the process itself suspect. The third tier of democracy needs to be explicitly enabled to effectively curtail eminent domain.

2.3 Judicial Activism?

Some higher courts have recently been taking a stronger position in upholding the rights of local bodies and in dismissing land acquisition. In Surendra Singh vs the State of UP (2011), the High Court of Allahabad struck down the use of the urgency clause for acquisition for a prison, noting:

…the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State. …The Courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering common [people] homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its [sic] power of judicial review, focus its [sic] attention on the concept of social and economic justice. While examining these questions of public importance, the courts, especially the Higher Courts, cannot afford to act as mere umpires (3-4).

In Jagpal Singh vs the State of Punjab and Others (2011), the Supreme Court noted that common lands of villages have been “grabbed by unscrupulous persons using muscle power, money power or political clout, and in many States now there is not an inch of such land left for the common use of the people of the village, though it may exist on paper. ...This was done with active connivance of the State authorities and local powerful vested interests and goondas”. The case was regarding the acquisition of a village pond in Rohar Jagir village of Punjab where despite the gram panchayat's notice to illegal occupiers, they continued with construction on the pond. When the villagers appealed to district authorities, the collector held that to evict the occupiers would not be in “public interest” and directed the panchayat to seek compensation,
thus colluding in the regularisation of an illegal occupation. The Supreme Court, while dismissing the acquisition in this instance further directed:

...all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorised occupants of gram sabha/panchayat/Parambote [grazing lands]/Shamlat land and these must be restored to the gram sabha/gram panchayat for the common use of villagers of the village. ...The said scheme should provide for the speedy eviction of the illegal occupant, after giving him [sic] a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularising the illegal possession. Regularisation should only be permitted in exceptional cases, e.g., where lease has been granted under some government notification to landless labourers or members of SCs/STs... (ibid: 4).

In these instances, the higher courts have questioned the procedural irregularities and the application of public purpose, the principle of eminent domain per se remains unchallenged. Judicial activism is found wanting in this regard. Singh (2006) argues that the erosion of the right to property is an outcome of a bargain of power in favour of the legislature and executive over the judiciary that violates the doctrine of the separation of powers ensuring judicial review, and has created a unitary centre of power with the state. As such, compensation based on legislated formulae of small private transactions at market value of land regularly undervalue the loss of entire ways of life of affected communities and the state’s liability towards these, overproducing the public purpose of a project. As public purpose is solely determined by the executive, it is vulnerable to rent-seeking capture (ibid). Thus, we find, in Sooraram Pratap Reddy vs District Collector, Ranga Reddy District (2008) the Supreme Court upheld the decision of the high court regarding the acquisition proceedings for an information technology park through a PPP as permissible stating: ‘Development of infrastructure is legal and legitimate ‘public purpose’ for exercising power of eminent domain. Simply because a company has been chosen for fulfilment of such public purpose does not mean that the larger public interest has been sacrificed, ignored or disregarded. It will also not make exercise of power bad, mala fide or for collateral purpose vitiating the proceedings.” Here, the conflation of public purpose and private interest, backed by the power of eminent domain was upheld by the court.

While some judgments cite mounting instance of inequality and dispossession, they reinforce the state’s sovereignty and its power of eminent domain. In Mahanadi Coal Fields Ltd vs Mathias Oram (2010) on the matter of compensation that was not paid to villagers in over 20 years of the acquisition of land by Mahanadi Coalfields, the court ensured a scheme by which the compensation could be speedily awarded to people and added: “Most of the mineral wealth of India is not under uninhabited wasteland. It lies mostly under dense forests and areas inhabited by people who can claim to be the oldest dwellers of this ancient country. Any large-scale mining, therefore, needs not only huge investments and application of highly developed technology but also en masse relocation of the people... But then we have the laws to handle such situations... The law [of land acquisition] is based on the twin sound principles of the eminent domain of the sovereign and the largest good of the largest number” (emphasis added).

The divergent views expressed in these judgments converge in safeguarding the power of eminent domain. The lack of a clear framework for rights to land- and resource-use (or even property narrowly defined) and effective safeguards against dispossession add to jurisprudential unevenness over the rights of people and communities faced with forcible acquisition. These rights cannot be restricted to compensation or the appropriate determination of public purpose and must include prior informed consent. Unless such a framework is elucidated, clearly the power of eminent domain cannot be challenged in a court of law.

2.4 Rights to Land- and Resource-Use for All23

Admittedly, the Land Acquisition Act, a pre-Constitutional legislation of colonial vintage is a drastic law, being expropriatory in nature as it confers on the State a power which affects person’s property right. Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory.24

The imperative for land reforms derives first from the Constitutional mandate for equality before law and the primary duty of the state to ensure redistributive justice. It is reiterated nearly 60 years after Independence in the Common Minimum Programme of the UPA government, declared on 24 May 2004, that ‘landless families will be endowed with land through implementation of land ceiling and land redistribution legislation. No reversal of ceiling will be permitted’ (GOI 2009: i). The Constitutional arrangements have devolved a responsibility upon the Union to oversee the fostering of economic and social justice in the States. Land Reforms remain a means of redistributive justice to the marginalised and, therefore, a part of the Preamble to the Constitution (ibid: vi).

The right to land and resources is at the heart of the current conflict over land acquisition. Even where people are demanding higher compensation, they want the right to some part of the developed property as part of their compensation. To briefly recap, the right to property was initially a fundamental right under Article 19(1)(f) of the Constitution, omitted by the 44th amendment that also inserted Article 300A, such that the right to property could not be alienated save by authority of law. Article 31 of the Constitution was repealed by the same amendment and took with it the constitutional obligation to pay compensation except to educational institutions established and administered by minorities under Article 30(1)(a) and for land personally cultivated by an owner that did not exceed the statutory ceiling inserted under Article 31(a) by the 17th amendment.

But this is not an argument for the reinstatement of the right to property as a fundamental right. What principles must rights to land- and resource-use for all need to draw upon and what elements need to be considered to move beyond a narrowly conceived individual right to property? Article 39 of the Directive Principles of State Policy in the Constitution offers a relevant principle to develop a framework, stating
that the ownership and control of the material resources of a community should be distributed to best serve the common good, and such that the operation of the economic system does not result in the concentration of wealth and means of production. Land reform legislation also flows from these principles and draws upon redistributive and economic justice and the right to life and liberty; a fuller treatment can help us get out of the bind of the dual nature of eminent domain where the temptation of its redistributive potential hangs in the long shadow of its historical abuse.

‘Pro-Poor Land Reforms’

Borras and Franco (2010) sum up key elements of “pro-poor land reforms” that help distinguish pro-poor land policies from the market-led agrarian reforms (MLARs): such policies ensure protection or transfer of land-based wealth and political power in favour of the poor; are class-conscious, historical, gender- and ethnic-sensitive; productivity increasing, livelihood enhancing and rights-securing. In India these need to be complemented with robust and responsive agrarian policies that ensure food sovereignty and the sustainability of local agrarian economies. Identifying the plurality of landless and near-landless rural poor that include peasants, labourers, indigenous communities, artisanal fisherfolk-cum-rural labourers, men and women, etc, Borras and Franco (ibid) argue that formal landownership through reform can be by the state, community or private entity – individual or group, as long as the “bottom-line is about reforming land-based social relations. …[reforming] the terms under which land-based wealth is created, appropriated, disposed and consumed as well as the ways and means by which such processes are effectively controlled by different groups…” (emphasis in original, ibid: 10).

The recently developed “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security” (FAO 2012) endorsed by the United Nations (UN) Committee on World Food Security establish principles for securing the tenure of land, fisheries and forests (albeit not water and minerals) as a fundamental right: human dignity; non-discrimination; equity and justice; gender equality; holistic and sustainable approach to the management of natural resources; and consultation and participation. They call states to provide a legal recognition for legitimate tenure rights, particularly customary and informal tenure rights and their guaranteed legal protection against forced evictions. They also call for the recognition and protection of the commons and their collective use and management and indicate the need for redistributive reforms (see Monsalves 2012).

Land reforms in Brazil in recent times initiated by the Movement of Landless Workers (MST) offers a prescient caution for the Indian context as well. The MST used the constitutional provision that all land must be used for socially productive purposes to occupy unused land. It privileged usufruct rights to tillers to counter the dynamic of commodification under the market-led agrarian reforms (MLARs). However, usufruct rights were embedded in “land to the tiller” arguments and failed to clarify who a tiller was, creating confusion and conflicts among MST communities over their rights (Wolford 2007). Clear and variegated rights and access to land and resources for specific communities and people need to thus be specified. The FRA, for example, recognises the claims of non-aviarsi forest dwellers to forests and their resources but in practice, large numbers of such applications are denied recognition by officials, posing serious challenges for the rights of all forest dwellers (NFPFPW 2011). Many legally recognised rights also do not take into account informal arrangements for land- and resource-use that exist locally and are not officially accounted for. Direct consultations with local communities are imperative and must be developed into any legal framework.

At the same time, the right to shelter needs to be safeguarded. A recent judgment of the Constitutional Court of South Africa struck down the KwaZulu-Natal Slums Act after the movement “Abahali base Mjondolo’s” (Zulu for “people of the shacks”) challenged the eviction of slum dwellers. The Slums Act empowered municipalities to evict “illegal” occupants from state-owned land and derelict buildings, and to force private landowners to do likewise or face fines or imprisonment. The court struck down the legislation because of the Section 16 of the Act that gave provincial housing ministers untramelled powers to instigate evictions of illegal occupants, and held that the Act was in contravention with the constitutional right of every South African for access to adequate housing and was inconsistent with several existing legal instruments (see Tolsi 2009). Historically, the constitutional provisions of the erstwhile Union of Soviet Socialist Republic and China have guaranteed that the state cannot take away an individual’s dwelling house and similar personal property, even by legislation (Basu 2008).

The right to property needs to be viewed as wider than private property and rights to land and resource-use must be secured such that they minimally guarantee rights to shelter, livelihood and flowing from these, life and liberty, to all. The development of rights to land and resources through individual entitlements can lead to the creation of a bigger market for them and their greater concentration by the market’s “invisible hand”. The proposed Land Titling Bill 2011 thus aims at updating land records for greater accuracy, and seeks to ease encumbrances and saleability in land markets (Ramanathan 2011). Struggles for land reforms led by the non-governmental organisations (NGOs) have held national protests and rallies on the issue of land reforms in recent years but need to be attentive to demands that unwittingly enable commodification of land and resources through individual entitlements. At the same time, collective or usufruct rights insensitive to a mixed caste context would lead to the alienation of dalit and other bahu-jan communities and securing private entitlements in such contexts may better safeguard rights. We need a legal recognition of complex and contextualised land – and resource-use rights arrived at with direct consultation with people and communities through state and non-state channels. The possibilities of private, collective, usufruct and other use rights to land and resources thus need to be considered contextually,
sensitive to caste, religious, gender, ethnicity and other forms of disparity prevalent in any given area of the country.

2.5 Eminent Domain, Continued

Law, like the state, works at the behest of social forces, ideology or interest groups, and the limit of a law is defined by the interest it represents (cf Abrams 1982). This limit is broached when resistance to its predefined interest arises, and can be overcome or resolved through special force (exceptional legislation), or through more deliberative, cognitive and self-restraining, juridical processes that also require powerful organised political forces mandating them. In the recent aggressive overreach of capitalists and the state in India for land and resources, we find a willingness to overcome resistance to plunder by resorting to draconian measures through the reinforcement of the sovereign power of the state over its citizens as witnessed in the posco area. The move of a controversial Tata Motors factory in 2009 from the communist-ruled state of West Bengal where popular resistance to land acquisition unleashed a spiral of violence (and eventually led to the defeat of the Communist Party in power in the state), to the Hindu-right ruled state of Gujarat is an ominous example of a resolution reached at the limits of law. Authoritarian political tendencies regardless of ideological persuasions will likely not hesitate in “fixing” sovereignty to back their agenda. On the other end of the spectrum, beyond the limits of law, there is the Maoist resolution that has declared war on the Indian state and has this very plunder of land and resources at the heart of its struggle.25 Given the long democratic tradition of non-violent popular social action, dissent and legal activism in India, the course that potential resolutions for the conflict over right to land, resources, rule of law and social justice will take however, is as yet undetermined and contested; the possibilities remain open.

NOTES

1 Land acquisition always involves other resources like water, forests and minerals attached to the land.
2 By neo-liberal reforms I refer to the specific policies aimed at instituting structural adjustment, liberalisation and privatisation in the economy that intensified in the country from 1991.
3 The State of Bihar vs Kameshwar Singh 1952.
4 See Guha (1981); Dirks (1986); D’Souza (2004); Gidwani (2008).
5 The gaonkars were considered the original inhabitants of a village and the lands and resources of the village were distributed equitably among them through auctions. The Portuguese retained this system as Communitadoes which were not caste, tribe and gender egalitarian (it is unclear but unlikely if original gaonkars included dalits, STs and women as members). In practice, this has meant that states which did not enact their own acquisition laws could use the 1894 law.
6 While land is a state subject (and hence the land ceiling and reform laws varied from state to state); land acquisition is a concurrent subject such that the central legislation on acquisition also applied as a minimal benchmark to all the states. In practice, this has meant that states that did not enact their own acquisition laws could use the 1894 law.
7 This Act also inserted Article 300A leaving the right to property as a constitutional right so that a person could not be deprived of it save by authority of law.
8 This provision can be considered the fulcrum for recently proposed measures for acquisition that seek to incorporate private investment in infrastructure and industry into the definition of public purpose.
9 By peasants I refer to both landowning farmers and landless agrarian workers.
10 The newly proposed Mines and Minerals (Development and Regulation) Bill 2011 seeks to consolidate the mining of all minerals into one law, with registration for coal minerals administered by the GoI. It provides for sharing 26% of the profits of mining coal and lignite and amounts equal to the royalty for other major minerals.
11 Even the PESA (discussed below) and the Samata judgment of 1997 upholding the rights of STs in scheduled areas that expressly prohibits mining leases to non-tribals in these areas have not been able to effectively stop this process of dispossession (see Krishnakumar 2004; Das 2005; Lahiri-Dutt et al 2012).
12 STs and SCs refer to communities recognised by the Indian Constitution as historically marginalised and oppressed by the Hindu upper caste and the non-Hindu communities in a position of dominance.
13 Similar to export processing zones (EPZs) but more ambitious, the SEZ law was enacted in 2005 and aimed at creating export-led enclave economies with competitive tax and duty concessions for foreign global investors.
14 The new PPP policy being drafted by the finance ministry seeks to create Special Purpose Vehicles (SPVs) for the execution of such partnerships between the government and the private sector.
15 Wherever respondents have so requested, I have withheld their identification. A senior bureaucrat would typically be any bureaucrat in a ministry (state or central) at a senior secretary or department director’s level.
16 A senior industry representative would typically be at the chief executive officer or vice president level of a company.
17 Environmental impact assessments under the Environmental (Protection) Act 1986 mandate public hearings as part of the environmental clearance required for certain category of projects. However, the proceedings of these hearings have no legal force and are merely to be taken into account while granting clearance to a project.
18 The State of Bihar vs Kameshwar Singh, 1952: 3.
19 See for instance Husain (2003) for a discussion on emergency rule.
20 While special security legislation is unquestionably a critical feature of the sovereign power of the state over citizens needing critical redress, suffice it to merely flag it here in the interest of the focus of this paper on eminent domain.
21 The State of Bihar vs Kameshwar Singh, 1952: 42.
22 Thanks are due to Albertina Almeida for pointing out land- and resource-uses that are not recognised by law but form local practices and livelihood resource-bases and thus must be accounted for while securing rights to land and resources.
24 Food sovereignty commonly refers to locally ecologically appropriate and sustainable food, agriculture, livestock and fisheries systems and must not be confused with state sovereignty.
25 For the Maoist position on the plunder of land and resources see Azad (2010).

REFERENCES


– (2012c): “Jairam Ramesh Tries to Dispel Apprehension about Land Bill before GoM Meeting”, Firstpost, 26 September.


NFFPFW (2011): “People’s Forest Rights Rally Demanding Community Rights Over Natural Resources”, email communication.


Sooryam Pratap Reddy vs District Collector, Ranga Reddy district, 2008, 9 Scc 552.


Survey

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Revisiting Communalism and Fundamentalism in India

by

Surya Prakash Upadhyay, Rowena Robinson

This comprehensive review of the literature on communalism – and its virulent offshoot, fundamentalism – in India considers the various perspectives from which the issue has sought to be understood, from precolonial and colonial times to the post-Independence period. The writings indicate that communalism is an outcome of the competitive aspirations of domination and counter-domination that began in colonial times. Cynical distortions of the democratic process and the politicisation of religion in the early decades of Independence intensified it. In recent years, economic liberalisation, the growth of opportunities and a multiplying middle class have further aggravated it. More alarmingly, since the 1980s, Hindu communalism has morphed into fundamentalism, with the Sangh parivar and its cultural politics of Hinduva playing ominous roles.

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