

OF PLATITUDES AND MILLION-DOLLAR PROMISES – A CRITIQUE OF THE LAND ACQUISITION, REHABILITATION AND RESETTLEMENT BILL 2011

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“Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to men and animals.”

- Isapo Muxika or Blackfoot, 19th Century Chief of
Siksika First Nation Tribe in Current Day Canada¹

Compulsory acquisition of land not only leads to loss of economic assets and livelihood but also disrupts communities, cultural identities, local markets for goods and labour, consequently placing the oustees in a “spiral of impoverishment”. However, the existing statutory regime on state acquisition of land, driven by the colonial-era Land Acquisition Act, 1894 (hereinafter LAA) has neither recognised these traumatic consequences nor minimised cases of such coercive acquisition. Moreover, its silence on resettlement and rehabilitation have fomented a bureaucratic culture of apathy towards reconstruction of the standard and mode of living enjoyed by the oustees prior to acquisition. In this context, the Land Acquisition, Rehabilitation and Resettlement Bill 2011 is undoubtedly a long overdue attempt to address these inadequacies. With its explicit linkage of acquisition and

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rehabilitation, incorporation of Social Impact Assessment (SIA), enhanced compensation and partial recognition of the importance of consent of the affected, the Bill incorporates the lessons of subaltern experience with the LAA led-regime and promises to usher a new paradigm of land acquisition in India. At the same time, the Bill suffers from a penchant for cosmetic rhetoric at the cost of adequate details; thus reducing its preambular promise of 'humane, participatory, informed, consultative and transparent process of land acquisition' to a mere trope. As a result, the Bill fails to make a complete break from the legacy of LAA and leaves tremendous scope for its widespread governmental abuse.

I. INTRODUCTION

The exercise of the power of eminent domain² or the compulsory acquisition of land by state results in myriad social, cultural, economic and psychological trauma for the affected communities.³ Such acquisition and the consequent displacement not

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¹ *Quotes on the Land*, LAND WATCH MONTEREY COUNTY, <http://www.landwatch.org/pages/perspectives/quotesontheland.htm> (last visited May 10, 2012).

² The term "eminent domain" refers to the power of the sovereign to take property for public use without the owner's consent. *See, e.g.*, *State of Bihar v. Kameshwar Singh*, (1952) 1 S.C.R. 889 ("The concept of the public use has been inextricably related to an appropriate exercise of the power and is considered essential in any statement of its meaning."); *see also* *Kameshwar Singh* at 923 ("The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way." (quoting Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*)).

³ Smitu Kothari, *Whose Nation? The Displaced as Victims of Development*, 31 *ECO. & POL. WKLY* 1476, 1477-79 (1996); *see generally* VASUDHA DHAGAMWAR ET AL., *INDUSTRIAL DEVELOPMENT AND DISPLACEMENT: THE PEOPLE OF KORBA* 213-232 (2003).

only leads to loss of economic assets, habitat and livelihood but also disrupts communities, social relationships, cultural identities, local markets for goods as well as labour, consequently placing the oustees in a “spiral of impoverishment”.⁴ In view of these traumatic consequences, a legal regime embodying eminent domain must seek to restrict its exercise only to cases of compelling public interest and further minimise the socio-economic costs of acquisition and consequent displacement.⁵ Moreover, it is almost axiomatic that such a regime must also include provision for a fair reconstruction of standards of living, community relations and production systems enjoyed by the affected persons prior to acquisition.⁶

⁴ Michael M. Cernea, *Why Economic Analysis is Essential to Resettlement: A Sociologist's View*, in *ECONOMICS OF INVOLUNTARY RESETTLEMENT: QUESTIONS AND CHALLENGES* 5, 17 (Michael M. Cernea ed., 1999); see also Usha Ramanathan, *Displacement and the Law*, 31 *ECO. & POL. WKLY* 1486, 1488-90 (1996); see also Michael M. Cernea, *Impoverishment or Social Justice? A Model for Planning Resettlement*, in *DEVELOPMENT PROJECTS AND IMPOVERISHMENT RISKS: RESETTLING PROJECT-AFFECTED PEOPLE IN INDIA* 42 (D. Marsden & H.M. Mathur eds., 2003).

⁵ See U.N. Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, (Feb. 11, 1998), available at <http://www.unhcr.org/refworld/docid/3d4f95e11.html>.

⁶ See JOHN RAWLS, *A THEORY OF JUSTICE* 62 (First Indian Reprint, 2000) (“All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.”) (describing the Rawlsian conception in which, given that acquisition results in denial of liberty, property and self-respect, it would be fair only if its consequences are more advantageous than the original position of the affected persons); see also Jay Drydyk, *Development-Induced Displacement and John Rawls' General Conception of Justice*, SHASTRI INDO-CANADIAN INSTITUTE & CANADIAN INTERNATIONAL DEVELOPMENT AGENCY, www3.carleton.ca/cove/papers/Displacement.rtf (last visited June 27, 2012) (explaining that the same argument can also be plausibly made under the capability approach pioneered by Amartya Sen and Martha Nussbaum. The harms resulting from displacement arguably impinge on the capabilities listed by Martha Nussbaum in her list of central human capabilities. To that extent, a state project for acquisition of land must also provide for restoration of the enjoyment of the capabilities diminished by the consequent displacement); see generally PETER PENZ ET AL., *DISPLACEMENT BY DEVELOPMENT: ETHICS, RIGHTS AND RESPONSIBILITIES* (2011).

However, the Land Acquisition Act, 1894 (hereinafter LAA), the primary legal instrument in India for state acquisition of private land,⁷ fails to give effect to any of these principles. LAA's permissive attitude to terms like 'public purpose'⁸ does not limit the exercise of eminent domain to only matters of compelling public necessity. This colonial statute's exclusive emphasis on market-value based monetary compensation is also, completely paradoxical in view of its suppression of freedom of choice of land-owners.⁹ As Swagato Sarkar argues, "the logic of market holds good as long as people are willing to sell their land at a desired price." and is wholly unsuited to the use of eminent domain which is marked by absent markets where there are no willing sellers.¹⁰ At the same time, LAA's myopic focus on monetary compensation also ignores the diverse traumatic undertones of acquisition in as much as cash can never recompense the losses endured due to displacement.¹¹ Critically, this absence of a statutory mandate on resettlement and rehabilitation from the LAA has shaped the larger state neglect of its obligation towards a comprehensive reconstruction of the standard and mode of living, enjoyed by the

⁷ See E.A.S. Sarma, *Sops for the Poor and Bonus for the Industry*, 46 ECO. & POL. WKLY 32, 33 (2011) (noting that apart from this statute, there are at least eighteen other legislation that empower organs of the state to acquire private land for a variety of public purpose).

⁸ SANJAY UPADHYAY & BHAVANI RAMAN, LAND ACQUISITION AND PUBLIC PURPOSE 12-23 (1998); see also Mihir Desai, *Land Acquisition Law and the Proposed Changes*, 46 ECO. & POL. WKLY 95, 96-98 (2011); see also Colin Gonsalves, *Judicial Failure on Land Acquisition for Corporations*, 45 ECO. & POL. WKLY 37, 38-41 (2010); see also Usha Ramanathan, *Public Purpose: Points for Discussion* in THE LAND ACQUISITION (AMENDMENT) BILL 1998: FOR LIBERALISATION OR FOR THE POOR? 19, 24 (Walter Fernandes ed., 1999).

⁹ See Kothari, *supra* note 3, at 1478 (explaining that such dismissal of the role of individual choice of land owners and other affected persons is not just restricted to the question of transfer of land but also pervades through other elements of the land acquisition regime, particularly rehabilitation and resettlement. Thus, affected families have little say over the content of the R & R package, including the location and quality of land allotted to them in return).

¹⁰ See Swagato Sarkar, *The Impossibility of Just Land Acquisition*, 46 ECO. & POL. WKLY 35, 36 (2011).

¹¹ Kothari, *supra* note 3, at 1478-80; see also Ramanathan, *supra* note 4, at 1488-90.

affected persons prior to acquisition.¹² While the Central Government and the State Governments have attempted to fill this legislative void through policies¹³ and separate state legislation¹⁴ on rehabilitation and resettlement (R&R), the disjoint between acquisition and rehabilitation seen in LAA has been emblematic of the step-motherly treatment given to R&R by Indian policy elite.¹⁵

Not surprisingly, state-driven compulsory acquisition of land has been at the heart of a multitude of popular resistance movements that have proliferated across the country in the last two decades.¹⁶ As part of their call for democratisation of the development process, these struggles have also raised searching questions about the core elements of the statutory regime engendered by the LAA. The Government of India, in response, has made several recent attempts to remedy some of the most insidious features and lacunae of the

¹² See Ramanathan, *supra* note 4, at 1489-91; Ravi Hemadri et al., *Dams, Displacement, Policy and Law in India* 8-10 (July, 1999) (unpublished manuscript) (World Commission on Dams) available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN021311.pdf>.

¹³ See National Policy for Rehabilitation and Resettlement of Project Affected Families 2004, National Rehabilitation and Resettlement Policy 2007, Orissa Rehabilitation and Resettlement Policy, 2006, Policy for Resettlement and Rehabilitation of Persons Displaced or Affected by Water Resources Development Projects in Rajasthan, Andhra Pradesh State Resettlement and Rehabilitation Policy, 2005, Jharkhand Rehabilitation and Resettlement Policy, 2008, Bihar Land Acquisition Resettlement and Rehabilitation Policy, 2007 and Madhya Pradesh Resettlement Policy, 2002 among others.

¹⁴ See Madhya Pradesh Resettlement Act, 1985, Karnataka Resettlement of Project-Displaced Persons Act, Karnataka Act No. 24 of 1994, Maharashtra Project Affected Persons Rehabilitation Act, Maharashtra Act No. 21 of 1999.

¹⁵ See Ramanathan, *supra* note 4, at 1489-91; see also Kothari, *supra* note 3, at 1483-84; see also Michael M. Cernea, *Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement*, 35 ECO. & POL. WKLY 3659, 3660 (2000).

¹⁶ Kenneth Nielson, 'Not on Our Land!' *Peasants' Struggle against Forced Land Acquisition in India's West Bengal*, in RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY 217 (Dan Banik ed., 2008); see also Banikanta Mishra & Birendra Kumar Nayak, *Paan or POSCO?* 46 ECO. & POL. WKLY 12 (2011); see also Walter Fernandes, *Singur and the Displacement Scenario*, 42 ECO. & POL. WKLY 203 (2007); see also Avinash Kumar, *Battle for Land: Unaddressed Issues*, 46 ECO. & POL. WKLY 22 (2011).

LAA. Separate bills - 'The Land Acquisition (Amendment) Bill 2007 and the Rehabilitation and Resettlement Bill 2007 – were introduced in Lok Sabha. However, these instruments lapsed due to the dissolution of the House before their adoption. Further, many state governments have attempted to introduce or have introduced new frameworks for land acquisition through separate state legislations or through amendments to the LAA.¹⁷ Moreover, a National Policy on Resettlement and Rehabilitation¹⁸ was notified in February 2004 which was later replaced by the National Rehabilitation Policy, 2007¹⁹.

The Land Acquisition, Rehabilitation and Resettlement Bill 2011 (hereinafter Bill) is the latest in this series of attempts at resolving the tensions inherent in the exercise of power of eminent domain by the State. The Bill, according to its Preamble, seeks to “ensure a humane, participatory, informed consultative and transparent process for land acquisition” and lay down the basic parameters that shall guarantee 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 and for matters connected therewith or incidental thereto.”

But is this preambular statement a mere cosmetic adornment or do the principles enshrined here palpably animate the substance and spirit of the Bill? These are the questions that we examine in this paper. Admittedly, these preambular objectives have attracted severe criticism from a number of eminent commentators for contemplating the state as a facilitator of transfer of land to the private sector.²⁰ Yet, we believe that the Preamble outlines a number of normative

¹⁷ Hemadri, *supra* note 12 at 22-24; *see also* Ramanathan, *supra* note 4, at 1487.

¹⁸ National Policy on Resettlement and Rehabilitation for Project Affected Families 2004, Published in the Gazette of India, Extraordinary Part-I, Section 1, No- 46, dated 17th February, 2004.

¹⁹ National Rehabilitation and Resettlement Policy, 2007, Published in the Gazette of India, dated 31st October 2007, F.No.26011/4/2007-LRD.

²⁰ *See* Sarma, *supra* note 7, at 33; *see also* Desai, *supra* note 8, at 96-99; *see also* R. Uma Maheshwari, *A Bill That Facilitates Displacement?*, THE HINDU (Sept. 12, 2011) <http://www.thehindu.com/opinion/lead/article2447652.ece>.

aspirations that recognise the need for a new paradigm of land acquisition based on rigorous examination of the purported necessity of acquisition, comprehensive scheme for resettlement and rehabilitation, and respect for the right to a dignified life for those adversely affected. Therefore, it does serve as a touchstone to evaluate the adequacy of the provisions of the Bill and consequently, the primary thrust of this paper is around the extent to which the content and the provisions of the Bill give effect to its laudable objectives.

In the first part of the paper, we argue that the Bill contains many welcome features that indeed address many of the root causes of discontent located in the current LAA regime. A number of long-standing demands of activist groups and campaigns against mass-displacement projects have been endorsed and these proposed changes are certainly geared towards a more consultative, transparent and fairer acquisition and rehabilitation process. At the same time, as we explain in the second part of this paper, it fails to include many of the key practices recognised under contemporary international law and by national advisory and judicial bodies, as essential for a fair and transparent process of acquisition. Moreover, we argue that there is a marked lack of clarity on the minutiae related to many of the proposed changes. Indeed, we fear that these flaws pose a real threat of completely subverting the more progressive features of this new Bill.

II. TOWARDS A MORE TRANSPARENT ACQUISITION AND INTEGRATION WITH REHABILITATION AND RESETTLEMENT

As mentioned earlier, the Bill has been celebrated in some quarters for proposing numerous inventive solutions to address the fundamental drivers of discontent in the LAA, 1894.²¹ Most crucially,

²¹ V. Kumara Swamy, *Fight for the Good Earth*, THE TELEGRAPH, (Aug. 17, 2011), http://www.telegraphindia.com/1110817/jsp/opinion/story_14385640.jsp; see also Arun Singh, *Perspective on Land Acquisition, Rehabilitation and Resettlement Bill*, BUS. STANDARD, (Nov. 14, 2011), <http://business-standard.com/india/news/perspectiveland-acquisition-rehabilitationresettlement-bill/455437>; see also Anirban Bhaumik, *Softening Land Acquisition*, DECCAN HERALD, (Aug. 6, 2011), <http://www.deccanherald.com/content/181930/softening-land-acquisition.html>.

the Bill not only contains the procedure for acquisition of land but also stipulates the minimum principles that would govern rehabilitation and resettlement of affected persons. Thus, it acknowledges, as explicitly done in its Statement of Objects and Reasons, that rehabilitation and resettlement are intrinsically connected to acquisition and development process. The significance of this change cannot be overstated as it is the absence of any reference to long-term rehabilitation that has in the last century engendered a bureaucratic approach to eminent domain that glossed over the pervasive socio-economic costs of acquisition.²² The integration of land-acquisition and rehabilitation amounts to a recognition of the fact that a humane model of industrial development can be built only on the edifice of a fair structure of restitution for all affected persons. Further, the creation of a statutory mandate on rehabilitation would be the first step in redressing this historic injustice and shift the discourse on restitution from the arena of charity to that of rights.²³ Hitherto, rehabilitation has been addressed at the national level through executive policies that were very weak on the content of the substantive entitlements for the affected persons.²⁴ In a stark contrast, this Bill spells out a range of concrete positive entitlements. Their adequacy however, as discussed later in the paper, is contested.

Most significantly, the Bill also creates a temporal hierarchy for acquisition, rehabilitation and resettlement. Section 37 requires that the Collector can take possession of land only after payment of compensation and discharge of all the necessary rehabilitation and resettlement obligations.²⁵ Moreover, in the specific instance of

²² Usha Ramanathan, *Land Acquisition, Eminent Domain and the 2011 Bill*, 46 ECO. & POL. WKLY 10, 10-12 (2011).

²³ Ramanathan, *supra* note 4, at 1489-91.

²⁴ For an analysis of the National Policy on Resettlement and Rehabilitation 2003, see Sripad Dharmadhikary, *Resettlement Policy: A Promising Start and a Letdown*, INDIA TOGETHER (Nov.12, 2007), <http://www.indiatogether.org/2007/nov/hrt-randrpil.htm>; see also Asian Ctr. for Human Rights, *India's Failed National Rehabilitation and Resettlement Policy*, ACHR WEEKLY REVIEW, (Dec. 19, 2007), <http://www.achrweb.org/Review/2007/198-07.html> (discussing the weaknesses of the National Rehabilitation Policy 2007).

acquisition for irrigation or a hydel project, rehabilitation and resettlement must be completed six months prior to submergence of the land. Thus, the actual transfer of possession has been rendered contingent on adequate rehabilitation and resettlement. Such a linkage would arguably go a long way in reinforcing the centrality of rehabilitation in development planning and help shed the baggage of traditional bureaucratic neglect.

A. RECOGNITION OF THE PRINCIPLE OF INFORMED CONSENT

The Bill also seeks to address another of the most malignant feature of the current regime on land acquisition in India – the denial of the right of property-holders to exercise their choice. Admittedly, coercion and surrender of individual autonomy is inherent to the theory of eminent domain in general.²⁶

However, we submit that the consent of parties lies not only at the heart of contracts but is also connected to claims of citizenship and popular sovereignty.²⁷ Therefore, its complete exclusion under the LAA

²⁵ Land Acquisition, Rehabilitation and Resettlement Bill, 2011, Introduced in Lok Sabha, Bill No. 77 of 2011, § 37 (“(1) The Collector shall ensure that full payment of compensation as well as rehabilitation and resettlement entitlements are paid or tendered to the entitled persons within a period of three months for the compensation and a period of six months for the monetary part of rehabilitation and resettlement entitlements listed in the Second Schedule commencing from the date of the award made under section 29:

Provided that the components of the Rehabilitation and Resettlement Package in the Second and Third Schedules that relate to infrastructural entitlements shall be provided within a period of eighteen months from the date of the award:

Provided further that in case of acquisition of land for irrigation or hydel project, being a public purpose, the rehabilitation and resettlement shall be completed six months prior to submergence of the lands proposed to be so acquired.

(2) The Collector shall be responsible for ensuring that the rehabilitation and resettlement process is completed in all its aspects;

(3) On the fulfillment of the condition provided in sub-sections (1) and (2), the Collector shall take possession of the land acquired, which shall, thereupon, vest absolutely in the Government, free from all encumbrances.”).

²⁶ Ramanathan, *supra* note 4, at 1488.

²⁷ Sarkar, *supra* note 10, at 37.

is unjust. Such denial of choice also runs contrary to contemporary international human rights standards that emphasise on the need for prior informed consent of the affected persons in cases of development-induced-evictions.²⁸ The role of consent of the affected persons has also been recognised by the National Advisory Council (NAC) which has emphasised on ‘prior informed consent’ as the cornerstone of a just acquisition law.²⁹

The aforementioned recommendation of the NAC has been partially recognised by the First Proviso to Section 3 (za) which requires that wherever land acquisition is proposed for the use of private companies, or for a public-private partnership or for any use by the appropriate Government for any purpose other than those defined in sub-clauses (i), (ii), (iii), (iv) and (v) of that Section, consent of at least 80 per cent of the affected families is mandatory. However, as explained later, the Bill lacks clarity on the manner of operationalising this principle.

B. INTRODUCTION OF SOCIAL IMPACT ASSESSMENT

Activists have argued for long that a corollary of the principle of prior informed consent is that the affected persons and groups must

²⁸ See U.N. Comm’n on Human Rights, Basic Principles and Guidelines on Development-Based Evictions and Displacement Annex I of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Article 56(e), A/HRC/4/18 available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf [hereinafter referred as “Basic Principles”] (stating that full and free prior informed consent of the affected persons, communities and groups must be guaranteed); see also Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex. U.N. GAOR, 61st Sess. Supp. No. 49, U.N. Doc.A/RES/61/295 (Oct. 2, 2007), <http://www.unhcr.org/refworld/docid/471355a82.html>; see also International Labour Organisation (ILO), *Indigenous and Tribal Peoples Convention*, C169, at C169 (June 27, 1989), available at <http://goo.gl/zMhth> (mandating free, prior, and informed consent with respect to decision-making about lands occupied by indigenous peoples).

²⁹ WORKING GROUP FOR CONSIDERATION OF NAC-II, NAT’L ADVISORY COUNCIL, NOTE OF RECOMMENDATIONS ON THE LAND ACQUISITION AND RESETTLEMENT & REHABILITATION BILL, 3(2011), available at http://nac.nic.in/pdf/la_bill.pdf (last visited on Oct. 28, 2011).

have a meaningful opportunity to ascertain the extent of likely social and economic impact of the proposed acquisition. This can be guaranteed through Social Impact Assessment (SIA), the process of assessing the social consequences likely to follow from the development of a particular project.³⁰ SIA also includes preparing a strategy for the mitigation of any adverse impacts and consideration of more efficacious alternatives.³¹ The most important objective of SIA however is to ensure the effective participation of affected communities in planning and decision making processes. The active participation of communities in decision-making not only leads to greater legitimacy for development projects but also maximises their effectiveness³². As a result, SIA is increasingly being affirmed as an integral component of a democratic, participatory and sustainable development agenda and a fundamental principle of international human rights law and the burgeoning law of sustainable development.³³

In this context, the creation of a statutory mandate on a mechanism for SIA to assess, among other things, the nature of public interest, the families that will be affected, the financial, social and environmental costs and benefits etc³⁴ in this Bill certainly represents a monumental leap forward. However, there remain serious concerns about the actual content of the proposed SIA and its conformity with globally recognised best practices in the field.

³⁰ R. Burdge & F. Vanclay, *Social Impact Assessment: A contribution to the State of the Art series*, 14 IMPACT ASSESSMENT 59, 59 (1996).

³¹ WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION MAKING 99-100 (2000).

³² Lyla Mehta & Maria Stankovitch, *Operationalisation of Free and Prior Informed Consent*, <http://oldwww.wii.gov.in/eianew/eia/dams%20and%20development/kbase/contrib/soc209.pdf> (last visited on Oct. 29, 2011).

³³ See Kevin R. Gray, *International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 83, 89-95 (2000); see also Basic Principles, *supra* note 28, at 8.

³⁴ Land Acquisition, Rehabilitation and Resettlement Bill, 2011, *supra* note 25, § 3.

C. NO CHANGE IN THE STATED PUBLIC PURPOSE

The LAA allows diversion of land acquired for one public purpose to another.³⁵ This has resulted in untrammelled and unnecessary land acquisition, far in excess of the minimum required for the stated purpose and subsequent diversion. Thereby, the objective of minimizing acquisition is undermined.³⁶

The current Bill takes care of this lacuna in so far as it prohibits such diversion as a matter of rule. Section 93 affirms that public purpose for acquisition of ultimate transfer to or immediate use of private companies, once stated cannot be changed from the original purpose or a related purpose. Worryingly though, the Bill, unlike the first Draft circulated by the Ministry of Rural Development in August 2011, does not have an express provision rendering changes in “purpose made in violation of the provision of the Bill void and mandating reversion of land and structures attached to it to the land owner.” The inclusion of such an express stipulation in this Bill would eliminate any ambiguity whatsoever about the illegality and the consequences of any post-facto change in land-use.

D. REDEFINING AFFECTED PERSONS

The LAA uses the term “persons interested” and is limited only to those individuals who claim an interest in the compensation offered or have a right of easement over the land. Consequently, the Act focuses only on loss of formal proprietary rights and does not take into account the loss of ‘habitat’ and ‘livelihood’; thereby clearly ignoring the rights of a vast number of dependent persons like landless labourers, share-croppers, *adivasis* and forest-dwellers, occupants without formal title, upper riparian communities (in case of a dam), etc. who are also deprived of their livelihood as a result of any such acquisition process.

³⁵ See *C. Padma v. Deputy Secretary to the Government of Tamil Nadu*, (1997) 2 S.C.C. 627; see also *Chandragauda Ramgonda Patil v. State of Maharashtra*, (1996) 6 S.C.C. 405.

³⁶ Kothari, *supra* note 3, at 1478-79.

This restrictive construction fails to conform to the basic principle of a fair land acquisition that government should not only compensate for assets acquired, but also compensate for loss of habitats, livelihoods and opportunities. This principle was affirmed by the National Advisory Council's draft proposal on the Land Acquisition (Amendment) Bill 2009³⁷ which stressed that all persons who lose their lands, livelihoods and shelter because of acquisition must be brought under the protection of law, and their rights to suitable compensation, resettlement and rehabilitation benefits must be fully protected in all cases.³⁸ The Asian Development Bank's Handbook on Resettlement also asserts that all affected persons, even those without title to land, should be compensated.³⁹

Promisingly, the new Bill includes an additional category of 'affected families'. Its proposed definition provided in Section 3 (c) of the new Bill reflects some of the prescriptions discussed in the previous paragraph. It is far more liberal than any of the previous legislations and for the first time includes within its scope both "land losers" and "livelihood losers". Section 3 (c) (ii) embraces landless labourers like agricultural labourers, tenants, share-croppers or artisans whose primary source of livelihood stand affected by the acquisition of land within this definition. The only caveat is that the Bill adds is that these landless labourers should have been working on the land for three years prior to the acquisition. Moreover, Section 3 (c) (iv) extends this definition to those families who depend on the forests and water bodies as a primary source of their livelihood. These include gatherers of forest produce, hunters, fisher folk and boatmen. The definition is not limited only to those families residing in rural areas, and under Section 3 (c) (iv) a family residing on any land in the urban areas for preceding three years prior to the acquisition of the land or

³⁷ WORKING GROUP FOR CONSIDERATION OF NAC-II, *supra* note 29, at 7.

³⁸ *Id.* at 6.

³⁹ ASIAN DEVELOPMENT BANK, HANDBOOK ON RESETTLEMENT: A GUIDE TO GOOD PRACTICE⁷ (1998) available at http://www.adb.org/sites/default/files/pub/1998/Handbook_on_Resettlement.pdf.

whose primary source of livelihood is affected by the acquisition of such land is also defined as an “affected family”.

E. ENHANCED COMPENSATION

This Bill also significantly enhances the monetary compensation payable to persons interested in the acquired land over what is currently due under the LAA, 1894. According to the formula outlined in the First Schedule, the minimum amount of compensation (inclusive of an additional solatium) would be at least four times the market price of the land in rural areas and twice the market price of the land in urban areas.⁴⁰

F. LAND FOR LAND PRINCIPLE

Social scientists have argued that only monetary compensation is of limited utility for many farmers since they do not have the skill and expertise to utilise it. Therefore, many experts and international policy-bodies have emphasised on ‘land-for-land’ principle where in land-owning cultivators are to be provided replacement land.⁴¹ Encouragingly, the Bill recognises the obligation for land-for-land in the following cases – 1) acquisition for an irrigation project and 2) where Scheduled tribes lose their lands. In the former case, the land-owner is guaranteed a minimum of one acre of land in the command area of the project for which the land is being acquired. In the latter, persons losing land are entitled to land equivalent to land acquired or two and half acres whichever is lower.⁴²

G. RIGHT TO RECEIVE ALTERNATE EMPLOYMENT

Loss of land due to acquisition not only means loss of a valuable productive asset but also loss of a source of livelihood.

⁴⁰ Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, at The First Schedule, read with §§. 27, 28 & 29.

⁴¹ Basic Principles, *supra* note 28, at 6.

⁴² Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, at Entry 2, Second Schedule.

Therefore, international standards⁴³ and national courts have mandated provision for alternate employment in case of acquisition.

The Bill does recognise, through Entry 3 of Schedule II, the obligation to provide employment to one member of every affected family. However, affected owners may be offered the option to choose between alternate employment, a lump sum compensation of five lakhs rupees or annuity of two thousand rupees per month for a term of 20 years. Opting for annuity would provide a sustained source of income for 20 years, while the one-time compensation of five lakhs, could provide a suitable option for those who feel that the jobs/annuity provided is not befitting their skills and expertise.

H. BENEFIT SHARING

The right of the affected communities and persons to have a share in the benefits is now seen as a vital component of a fair development process. Indeed, the Ministry of Rural Development itself has affirmed that benefit sharing results in “good neighbourhood through overall development of affected persons, communities and the wider area.”⁴⁴ Therefore, it is heartening to note that Entry 2 of Schedule II of the Bill partially affirms this principle in the case of acquisition for irrigation projects and urbanization purposes. In such cases, land-owners have been provided with entitlements to minimal share in the fruits of such project. However, this Entry is limited by its application only to irrigation and urbanization projects. It does, in no way, recognise a universal principle of benefit-sharing.

⁴³ The World Bank, *OP 4.12 - Involuntary Resettlement* (Dec., 2001), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

⁴⁴ Department of Land Resources, *International Experience Sharing Workshop on 'Land Acquisition, Resettlement and Rehabilitation, and Benefit-Sharing'*, MINISTRY OF RURAL DEVELOPMENT, GOVERNMENT OF INDIA (July 21 to 23, 2007), http://dolr.nic.in/workshop/workshop_manesar1.pdf.

I. Special Provisions for Vulnerable Groups

Experience with eminent domain in India and even globally, reveals that vulnerable and marginalised social groups bear a disproportionate share of its socio-economic costs.⁴⁵ Therefore, protective norms for insulating such weaker social groups are imperative. As mentioned earlier, the Bill provides for land for land rehabilitation for affected families that belong to Scheduled Castes and Scheduled Tribes. Further, the proviso to section 2(1) states that acquisition of land in Scheduled Areas in contravention of law relating to Scheduled Areas is impermissible.

III. RHETORIC OVER SUBSTANCE – GLOSSING OVER THE DETAILS

Even the worst critics of the Bill would have to concede that it introduces, as discussed in the preceding section of the paper, a gamut of ground-breaking changes that promises to alter the existing edifice of land acquisition laws in India. However, we aver in this section that many of the new principles and concepts introduced by the Bill have not been adequately thrashed out, especially in implementational aspects. Moreover, the content of many of these concepts do not conform to the best global practices, international legal norms or the demands of campaign groups. Most critically, the Bill retains the core bureaucratic and centralising impulse embedded in the LAA, 1894. In this Section, we first discuss the inadequacies in the provisions related to prior informed consent and social impact assessment. Thereafter, certain concerns arising out of the definition of public purpose are analysed. Finally, we throw the spotlight on the gaps and ambiguities in the principles postulated for compensation, rehabilitation and resettlement and dispute settlement procedure.

⁴⁵ Fergus MacKay, *Indigenous People's Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y, 43, 45-46 (2004); see also Lyla Mehta, *The Double Bind: A Gender Analysis of Forced Displacement and Resettlement*, in *DISPLACED BY DEVELOPMENT: CONFRONTING MARGINALISATION AND GENDER INJUSTICE* 3, 3-29 (Lyla Mehta ed., 2009); see also Kothari, *supra* note 3, at 1477-80.

A. SELECTIVE APPLICATION OF THE PRINCIPLE OF INFORMED CONSENT

While prior consent has indeed been recognised by the First Proviso to Section 3, it is worrisome that the Bill does not provide for universal application of this principle in the context of all acquisitions by the Appropriate Government. Consent of affected families is not required for acquisition for purposes mentioned in sub-clauses (i), (ii), (iii), (iv), and (v) of Section 3 (za).⁴⁶ Such exclusion of consent, we submit, is a grave omission and is antithetical to the objective of ensuring a participatory, democratic and transparent acquisition process. Further, it betrays a failure on part of drafters of the Bill to make a clear break from the coercive nature of the doctrine of eminent domain.

Understandably, the required threshold of consent may vary in accordance with the purpose for which land is being acquired. For instance, the threshold may be lower for acquisition by government for a state-led irrigation project than that fixed for acquisition of land for a power project by a private company. Similarly, it would be justified to carve out exceptions for cases of urgency. However, a blanket denial of choice in ordinary instances of land acquisition cannot be sustained as legitimate in a twenty-first century democracy. Therefore, it is vital that consent of at least fifty per cent of the affected families is made mandatory where the Appropriate Government acquires land for the purposes covered under sub-clauses

⁴⁶ Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, at §. 3(za) (“public purpose” includes—

“(i) the provision of land for strategic purposes relating to naval, military, air force, and armed forces of the Union or any work vital to national security or defence of India or State police, safety of the people; or

(ii) the provision of land for railways, highways, ports, power and irrigation purposes for use by Government and public sector companies or corporations; or

(iii) the provision of land for project affected people;

(iv) the provision of land for planned development or the improvement of village sites or any site in the urban area or provision of land for residential purposes for the weaker sections in rural and urban areas or the provision of land for Government administered educational, agricultural, health and research schemes or institution; . . .”)

(i), (ii), (iii), (iv) and (v) of Section 3 (za). Such a requirement would also act as a further check on acquisition of land, far in excess of the quantum required for the stated 'public purpose'.

B. MECHANISM FOR SEEKING CONSENT

Another lacuna that can potentially be fatal for the principle of prior informed consent is the Bill's silence on the procedure for seeking the consent of 'affected families'. Proviso to sub-clauses (vi) and (vii) of Section 3 (za) merely states that the process shall be prescribed by the appropriate government. Accordingly, Section 102 (2) (d) empowers the appropriate government to notify rules in this regard. The Statement of Objects and Reasons also affirms that the consent shall be obtained through a prior informed process. But the contours of such process have not been spelled out in the Bill. The safeguards essential for maintaining the integrity and neutrality of the process; to ensure that the consent is truly free have been left to the discretion of the appropriate government. It is not our case that every single element of the process of prior informed consent must be outlined in the statute. Nonetheless, the elementary principles of this process, its relation with the SIA mechanism and grievance redressal mechanisms ought to be included in the Bill. Given the recent complaints of subversion of progressive statutes through executive chicanery⁴⁷, statutory recognition of the essential elements of the 'prior informed process' may lend greater sanctity to this principle.

The conspicuous silence of the Bill on the components of the 'prior informed process' also runs against the best international practices and international legal instruments wherein the rules

⁴⁷ See Mahim Pratap Singh, *Forest Rights Act Losing Steam as Officials Play with Rules*, THE HINDU, (Aug. 6, 2010), at <http://www.thehindu.com/news/national/article555755.ece>; see also Campaign for Survival and Dignity, *Campaign Welcomes Notification But Condemns Government's Efforts to Undermine and Subvert Democratic Institutions in Rules*, <http://www.forestrightsact.com/statements-and-news/14-campaign-welcomes-notification-but-condemns-governments-efforts-to-undermine-subvert-democratic-> (last visited June 7, 2012); Richard Mahapatra et al., *Major Battle Over Minor Produce: How Government is subverting Forest Rights Act*, DOWN TO EARTH, Nov. 15, 2010, at 27-40.

governing the process are specified. For example, the Indigenous Peoples Rights Act of 1997 in Philippines mandates that the indigenous communities can be displaced only by a process of prior informed consent that is in accordance with the customary laws.⁴⁸ Similarly, Peru recently enacted a law on free and prior informed consent that stresses on good faith negotiations and absence of coercion.⁴⁹ In the international arena, The United Nations Permanent Forum on Indigenous Issues endorsed a Report in 2005 which stated that ‘prior’ implies that the consent should be sought sufficiently in advance of any authorisation for or commencement of the concerned activity.⁵⁰ Moreover, it requires that participation of women and youth in this process is essential.⁵¹ The core components of ‘free and prior informed consent’ have also been explained by international human rights tribunals. For instance, the Inter-American Court of Human Rights has asserted in the case of *Saramaka People v Suriname*⁵² that any such process of seeking prior informed must be “culturally appropriate” and conducted in good faith.⁵³ Regrettably, these indispensable elements of the principle of free and prior informed consent have not been expressly recognised in the Bill.

⁴⁸ See An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/ Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371, §. 58 (Oct. 29, 1997) (Phil.).

⁴⁹ Christina M. Fetterhof, *Peru Enacts Law of Prior Consultation with Indigenous Peoples*, THE HUMAN RIGHTS BRIEF (Oct. 5, 2011), <http://hrbrief.org/2011/10/peru-enacts-law-of-prior-consultation-with-indigenous-peoples/>.

⁵⁰ Report of the International Workshop on Methodologies Regarding Free and Prior Informed Consent and Indigenous Peoples, Permanent Forum on Indigenous Issues, 4th Sess., May 16 – 27, 2005, U.N. Doc. E/C.19/2005/3, available at http://www.humanrights.gov.au/social_justice/international_docs%5Cpdf%5Cunpfii_workshop_fpic_jan2005.pdf.

⁵¹ *Id.*

⁵² *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Cost, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 131 & 136 (Nov. 28, 2007).

⁵³ See Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights Within International Law*, 10 NW. U. J. INT’L HUM. RTS. 54, 63 (2011).

C. AFFECTED PERSONS – ANOMALOUS LANGUAGE

The Bill is also plagued by discrepancy in the words used to refer to the persons affected by land acquisition in the context of the need for prior consent. Section 3 (za) (vii) while defining what is “public purpose” states that, while acquiring land by a private company, consent of at least 80% of the project affected people shall be obtained through a prior informed process to be prescribed by the appropriate Government. However, in a similar context, the proviso to section 8 (4) says that where land is sought to be acquired for a public purpose, the Committee shall ascertain as to whether the consent of at least eighty per cent of the affected families as required has been obtained in the manner as may be prescribed. Curiously, the Bill does not define “affected persons”. The use of different terms in a similar context is likely to lead to avoidable confusion about their respective ambits.

D. INADEQUACIES IN SOCIAL IMPACT ASSESSMENT

Considering the manner in which Social Impact Assessment has been conceived under the Bill, this mechanism is in danger of being reduced to a charade. Internationally recognized practices in this regard have been ignored and there is a preponderance of official representation with little space for independent experts and grassroots representatives.

a. *Participation of Affected Communities*

A Social Impact Assessment (SIA) process must allow for extensive participation of the affected communities. Indeed, the World Commission on Dams had classified gaining public acceptance, through involvement of the people in key decision making processes, recognizing rights and entitlements, addressing concerns adequately and minimizing the risks, as the first objective of any project.⁵⁴

Section 4 (1) of the Bill requires consultation with the Gram Sabha but does not give details of the process of consultation, nor does

⁵⁴ WORLD COMMISSION ON DAMS, *supra* note 31, at 215-25.

it specify the weight that will be given to their views. In the absence of clear stipulations on its form and manner, there is a real possibility of such consultation with the Gram Sabha being turned into a mere cosmetic exercise. Such apprehension is bolstered by the chequered record of implementation of the consultation principle under the Panchayati Raj (Extension to Scheduled Areas) Act, 1996 (hereinafter PESA).⁵⁵

Moreover, there is a need to move beyond mere consultation and involve the people directly in the process of planning. Involving the affected people in SIA, will not only help in minimizing the adverse impacts of the project and local resistance, but will also help avoid major planning disasters and increase the chances of the success of the project.⁵⁶ It is also likely to improve the accuracy of the SIA and make it more comprehensive. Before the project is undertaken, there must be an assessment of the needs of the affected community. There must also be a comprehensive assessment of other possible alternatives, which might entail lower costs. In all of this, direct participation of the people is vital.

b. *Absence of an Independent Body to Conduct SIA*

In addition, in order to better involve the people better, and to prevent bureaucratic failures, it is suggested that the SIA be conducted by an independent committee, rather than by the appropriate government as has been provided by the Bill. This will create a system of checks and balances,⁵⁷ and also directly involve the affected people which must remain one of the key priorities of

⁵⁵ For discussion of tardy implementation of PESA, see Chitta Behara, *Whither PESA? A Status Report with Special Reference to Orissa* (February 2011), <http://www.chittabehera.com/PanchayatiRaj/PESA%20Report/Ch-1%20Background.pdf>; see also Expert Group, Planning Commission of India, *Development Challenges in Extremist Affected Areas*, 35-42 (Apr., 2008), http://planningcommission.nic.in/reports/publications/rep_dce.pdf; see also SECOND ADMINISTRATIVE REFORMS COMMISSION, GOVERNMENT OF INDIA, *Local Governance: An Inspiring Journey into the Future*, 191-197 (Oct., 2007), <http://arc.gov.in/6-1.pdf>.

⁵⁶ WORLD COMMISSION ON DAMS, *supra* note 31, at 215-226.

⁵⁷ WORKING GROUP FOR CONSIDERATION OF NAC-II, *supra* note 29, at 9.

the SIA. In fact, the Working Group of the National Advisory Council (NAC) recommended the same in their paper on suggestions on the Land Acquisition (Amendment) Bill and the Resettlement and the Rehabilitation Bill of 2009.⁵⁸

Therefore, it is vital that a separate and independent committee be constituted by the Appropriate Government, in consultation with the National Monitoring Committee for Rehabilitation and Resettlement. The Committee should also comprise of representatives of the Gram Sabhas and the Panchayats, representatives of civil society organisations who work with the affected communities, representative of the Chief Secretary of the State and representatives of the elected MLAs of the area. It would also meet the need for direct participation of the affected communities.

c. Absence of Clarity on the Impact of Public Hearings

Public hearings as provided under Section 5 are an immensely critical forum for ascertaining the views of the affected people. However, the Bill is silent on the influence these views will command in determining the scale of the project and the strategies to reduce the adverse impacts on the people. It only requires that the views be recorded and included in the Social Impact Assessment Report.⁵⁹ Admittedly, the very inclusion of these views in the SIA Report does affirm their importance. At the same time, it is a cause for concern that neither Section 7 (2), which postulates the relevant factors for the Chief Secretary's Committee to examine nor Section 7(3) which refers to the materials the Committee shall consider, contains any reference to the views expressed in the public hearing. In order to remedy this lacuna, we recommend the insertion of the phrase "including the views of the affected families, expressed and recorded in the public hearing conducted under Section 4" in Section 7 (3).

⁵⁸ *Id.*

⁵⁹ Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, §. 4(1).

d. *Independence of the Assessment Committees*

The Bill provides for two-stage examination of the Social Impact Assessment Report. At the first stage, the SIA Report shall be evaluated by an independent multi-disciplinary expert group.⁶⁰ Subsequently, the entire proposal for land acquisition including the report given by the aforementioned Expert Group shall be examined by a Committee constituted by the Appropriate Government.⁶¹ The composition of the latter Committee however would differ according to the total amount of land proposed to be acquired. Where the land to be acquired is hundred acres or more, the Committee shall be headed by an officer of the rank of Chief Secretary.⁶² In the case of acquisition of land of less than hundred acres, in contrast, the government is required to constitute another committee.⁶³ However, there is no mention whatsoever in the Bill about the composition of this latter committee. In view of this ambiguity on the composition of the latter committee, we recommend that the examination envisaged under Section 8 be done by a single committee and the proposed dichotomy on the basis of the size of acquisition be done away with.

Moreover, the Committee under sub-section (1) of Section 8 is envisaged as predominantly comprising of State Government bureaucrats. Non-official representation is limited to only three “experts from the relevant field”. This official character of the Committee may lead to conflict of interest and render its independence suspect, particularly since in a large number of cases the State Government would be the proponent of the acquisition in question.

e. *Role of SIA in Decision-Making*

A very glaring and potentially fatal flaw in the proposed SIA is the absence of a categorical assertion on the final role the SIA will

⁶⁰ *Id.* §. 7.

⁶¹ *Id.* §. 8(1).

⁶² *Id.* §. 8(1)(c).

⁶³ *Id.* Proviso to §. 8(1).

play in deciding whether the project is carried out or not. Section 19 of the Bill suggests the Appropriate Government will have the final say in undertaking the acquisition. The findings of the independent expert group proposed under Section 5 and the Committee proposed under Section 8 are envisaged as only recommendatory in nature. The Appropriate Government would be free to disregard any such findings; further, it is not obliged to provide reasons for disregarding them either. This creates an opening for the Appropriate Government to treat the SIA as nothing more than a perfunctory exercise. As a result, one of the basic objectives of SIA to enable informed and participatory decision-making would be completely defeated.

f. *Absence of Adjudicatory Review of SIA*

The lack of clarity over the importance of SIA findings in the decision-making matrix is compounded by the absence of any form of review, judicial or quasi-judicial or technical, over the findings of the SIA. As India's experience with Environment Impact Assessment reveals⁶⁴, the Reports prepared can contain a number of methodological deficiencies and can underplay the impacts of a proposed project. Such defects can lead to distorted decisions on part of the executive and thus undermine the Bill's objective of causing minimum required displacement through land acquisition. In this regard, an additional layer of review can allow affected persons a redress against procedural and substantive deficiencies in the conduct of SIA and thus add methodological rigour to it. This view finds

⁶⁴ See e.g., Amnesty Int'l, *Generalisations, Omissions, Assumptions: The Failings of Vedanta's Environment Impact Assessment for its bauxite mine and alumina refinery in India's state of Orissa*, AI Index ASA 20/037/2011 (July 2011), <http://www.amnesty.org/en/library/asset/ASA20/037/2011/en/6006600c-8be3-4495-917f-00584b3efc19/asa200372011en.pdf>; see also Seema Kumar, *India's Environment Impact Assessment Process and Failure to Protect Yamuna River from the Thirst of Development*, THE ACCESS INITIATIVE (Oct. 30, 2008), <http://www.accessinitiative.org/blog/2008/10/india%E2%80%99s-environmental-impact-assessment-process-failure-protect-yamuna-river-thirst-dev>; see also Human Rights Watch, *Out of Control: Mining, Regulatory Failure and Human Rights in India*, (June 2012), available at http://www.hrw.org/sites/default/files/reports/india0612ForUpload_0.pdf.

support in the recent examples of National Green Tribunal which has suspended few environmental clearances after fresh review.⁶⁵ It appears that subjecting the grant of environmental clearances after the EIA has added greater teeth to the mechanism.

These cracks in the framework for SIA outlined in the Bill is illustrative of its perfunctory approach towards ensuring transparent and participatory acquisition of land wherefore, these preambular objectives have been rendered vulnerable to reduction as empty catchwords.

E. DEFINING PUBLIC PURPOSE – A LICENSE TO USURP?

Public purpose⁶⁶ has been worded in very wide and vague terms. Phrases like ‘public interest’, ‘goods for the public’ and ‘benefits largely

⁶⁵ *Green Tribunal suspends environmental clearance to Posco*, THE TIMES OF INDIA, (Mar. 30, 2012), http://articles.timesofindia.indiatimes.com/2012-03-30/india/31260581_1_mega-steel-project-captive-minor-port-posco-india-pvt; see also *Green Tribunal suspends environmental nod to Posco*, THE HINDU, (Mar. 30, 2012), <http://www.thehindu.com/news/states/other-states/article3261507.ece>.

⁶⁶ Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, §. 3(za) (“public purpose” includes—

“(i) the provision of land for strategic purposes relating to naval, military, air force, and armed forces of the Union or any work vital to national security or defence of India or State police, safety of the people; or
(ii) the provision of land for railways, highways, ports, power and irrigation purposes for use by Government and public sector companies or corporations; or
(iii) the provision of land for project affected people;

(iv) the provision of land for planned development or the improvement of village sites or any site in the urban area or provision of land for residential purposes for the weaker sections in rural and urban areas or the provision of land for Government administered educational, agricultural, health and research schemes or institutions;

(v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;

(vi) the provision of land in the public interest for—

(A) use by the appropriate Government for purposes other than those covered

accrue to the general public' provide substantial scope for misuse and acquisition of land for purely private profit.⁶⁷ No criteria are provided to limit the implications of such phrases; therefore it is open to the government to arbitrarily qualify the construction of a tourist resort or manufacture of soft toys as 'public purpose'.⁶⁸

The potential for unlimited expansion and possible misuse is illustrated by the liberal interpretation adopted by the judiciary of similar terms in the context of the LAA, 1894. The Courts have tended to equate public good with rise in GDP. In *Nand Kishor Gupta v. State of U.P.*⁶⁹, the Supreme Court stated that "merely because the benefit goes to a particular section of the society, the acquisition does not cease to be for public purpose". This reasoning was used to justify acquisition of huge tracts of fertile land for the purpose of an 'integrated infrastructure development project' which included construction of a 6-Lane Expressway and an additional 25 million square metres of land for 'creation of five zones for industry, residence, amusement etc.' Further, the courts have ruled that public purpose is

under sub-clauses (i), (ii), (iii), (iv) and (v), where the benefits largely accrue to the general public; or

(B) Public Private Partnership projects for the production of public goods or the provision of public services;

(vii) the provision of land in the public interest for private companies for the production of goods for public or provision of public services:

Provided that under sub-clauses (vi) and (vii) above the consent of at least eighty per cent. of the project affected people shall be obtained through a prior informed process to be prescribed by the appropriate Government:

Provided further that where a private company after having purchased part of the land needed for a project, for public purpose, seeks the intervention of the appropriate Government to acquire the balance of the land it shall be bound by rehabilitation and resettlement provisions of this Act for the land already acquired through private negotiations and it shall comply with all provisions of this Act for the remaining area sought to be acquired.")

⁶⁷ *Id.* §. 3(za)(vi)(A) and (B) & §. 3(za)(vi)

⁶⁸ Michael Levien, *Rationalizing Dispossession: The Land Acquisition and Resettlement Bills*, 56 ECO. & POL. WKLY 66, 67 (2011); see National Alliance of People's Movement (NAPM), *Submission on Land Acquisition Before Parliamentary Standing Committee* (Nov. 2, 2011), <http://napm-india.org/node/524>.

wider than public necessity. Therefore as long as some production activity is carried out on the acquired property it will be deemed to be acquired for public purpose because some employment is being generated⁷⁰. These decisions remain relevant for analysis of the new Bill and exemplify the dangers of gradual overreach in absence of very clearly demarcated definitions.

Moreover, the judiciary has been tentative in examining the purported justifications for the proclaimed 'public purpose behind' development projects. *Bajirao Kote v. State of Maharashtra*⁷¹ and *Narmada Bachao Andolan v. Union of India*⁷² in this context are apt examples. The Supreme Court was reluctant to define public interest in both cases since it was deemed as the government's prerogative. The judicial reluctance to subject the justifications for public purpose to a stricter scrutiny makes it all the more necessary that the terms in the statutory definition are more precisely defined.

Recently however, two Supreme Court judgments, *Sharan v. State of Uttar Pradesh*⁷³ and *Radhey Shyam v. State of Uttar Pradesh*⁷⁴ have examined the justification for public purpose. While these judgments are outliers in the larger body of precedents, they provide us with useful principles to evaluate the Bill.

The Apex Court has held in the aforesaid two cases that:

- Public purpose must be viewed from an angle consistent with the concept of welfare state.
- The focus should be on ensuring maximum benefit to maximum number of people. Public purpose cannot encompass activities which benefit only a particular group of

⁶⁹ Nand Kishor Gupta v. State of U.P. (2010) 10 S.C.C. 282, ¶ 73.

⁷⁰ Desai, *supra* note 8, at 97.

⁷¹ Bajirao T. Kote & Anr. v. State of Maharashtra & Ors., (1995) 2 S.C.C. 442, ¶¶ 11-12.

⁷² Narmada Bachao Andolan v. Union of India, A.I.R. 1999 S.C. 3345.

⁷³ Dev Sharan v. State of U.P., (2011) 4 S.C.C. 769, ¶¶ 15-20,

people at the cost of the interests of a larger group of people, especially when they are the common masses.

- The interpretation of public purpose should at all times be in consonance with Part III of the Constitution, as is mandated under Article 13, and constitutional goals of social and economic justice.

- The Court is duty-bound to protect the interests of the economically disadvantaged and therefore when the acquisitioned property belongs to the poor, the actions of the State will be examined with greater scrutiny and care to ensure that the landowners are not further disadvantaged.

The wide amplitude of the definition of 'public purpose' in the Bill does not squarely cohere with the above discussed dicta. Clauses (vi) and (vii) of Section 3 (za) of the Bill opens the possibility of land being acquired for the activities which benefit only a particular group at the cost of the interests of a larger group of people. In light of the aforementioned concerns, it is imperative that Section 3(za) be defined as precisely as possible with further elaboration on the import of the terms of general amplitude.

The need for a narrower definition is particularly accentuated as the Bill does not provide for any judicial or quasi-judicial mechanism for questioning the existence of a public purpose. The only avenue available is filing of objections under Section 16 with the Collector. The recommendations of the Collector have to be forwarded to the Appropriate Government whose decision shall be final. There is no independent avenue available to the affected persons to challenge the decision within the Act itself. Curiously, Section 58, which provides for reference to a dispute settlement authority (the Land Acquisition, Rehabilitation and Resettlement Authority), does not extend to questions of the existence of public purpose.

F. CALCULATION OF MARKET VALUE OF LAND AND MODE OF PAYMENT OF COMPENSATION – LACK OF CREATIVITY

Under Section 26 of the Bill, the market value can either be

determined on the basis of the minimum land value specified in the Indian Stamp Act, 1899 or the average of the sale price for similar type of land situated in the village or vicinity, ascertained from fifty per cent of the sale deeds registered during the preceding three years, where higher price has been paid, whichever is higher.⁷⁵

There are several problems in this approach. Firstly, officially notified prices invariably understate the real market value as parties habitually underreport the prices in order to evade taxes and fees. Therefore the market price determined on the basis of these legal instruments will never reflect the true market value of the land.⁷⁶

Secondly, it is common to consider the future use of the land being sold in estimating the sale value in any ordinary market transaction. However, the formula proposed by the Bill relies only on past transactions and does not account for future increase in the value of land. In as much as market value of rural land used for agriculture is ordinarily well below the price that it would potentially command in non-agricultural uses, particularly in areas adjoining large cities, land-owners feel aggrieved with mere consideration of past prices.⁷⁷ Indeed, militant farmer protests in Kalinganagar⁷⁸ and in Greater Noida⁷⁹, to cite few examples, were primarily around the absence of their share in manifold increase in land prices post acquisition. Under this Bill too, the land owner would be substantially deprived of advantages accruing from appreciation in land prices.

⁷⁴ Radhey Shyam v. State of Uttar Pradesh, (2011) 5 S.C.C. 553, ¶¶ 21, 66, 77.

⁷⁵ This is similar to the method contained in the Land Acquisition Bills of 2007 and 2009.

⁷⁶ See Sarma, *supra* note 7, at 33.

⁷⁷ Nitin Desai, *The Land Law and Justice*, BUS. STANDARD (Aug. 18, 2011), <http://www.business-standard.com/india/news/nitin-desailand-lawjustice/446104/>.

⁷⁸ See Pramodini Pradhan, *Police Firing at Kalinganagar*, PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) Bulletin (April, 2006), <http://www.pucl.org/Topics/Dalit-tribal/2006/kalinganagar.htm>.

⁷⁹ Ajoy Ashirwad Mahaprashasta, *Fight for Land*, FRONTLINE (May 21 – June 3, 2011), <http://www.frontlineonnet.com/fl2811/stories/20110603281112500.htm>.

Admittedly, Section 96 does provide that where the land acquired is transferred post acquisition, 20% of the difference in price received and the price for which the land was obtained would be given to the original owners of the land. However, this may not be sufficient in view of the astronomical appreciation of land prices that often takes place in the aftermath of acquisition by state.

In addition, the prescribed formula for valuation of land is also ill-suited to regions covered by the 5th and 6th Schedule to the Constitution, where restrictions on transfer of land have depressed market prices.⁸⁰ In order to address this problem, the Standing Committee on Land Acquisition Bill, 2007 had recommended that in Scheduled areas, the criterion for fixing market price should be the highest price of a sale deed of the adjoining non-tribal blocks/village for the last three years plus an additional 50 per cent of that value.⁸¹ Sadly, this proposal has not been incorporated in the current Bill.

a. Mode of Awarding Compensation

Giving monetary compensation presupposes that the receiver has adequate investment opportunities to accrue long term benefits from it. This however is not true especially in the context of the rural population. Income from land is periodic and long term, however a lump-sum compensation combined with unplanned expenditure end up providing short term financial support. Admittedly, the Bill allows for 25% of the payment in form of shares belonging to the requiring authority or one of its sister companies.⁸² However this may not be enough to safeguard the financial interest of the more vulnerable members in the family like women and children against the discretion exercised by the men in the family.

⁸⁰ See Walter Fernandes, *Displacement and Alienation from Common Property Resources*, in *DISPLACED BY DEVELOPMENT: CONFRONTING MARGINALISATION AND GENDER INJUSTICE* 105, 114-16 (Lyla Mehta ed., 2009).

⁸¹ V. Venkatesan, *For a Sensitive law*, FRONTLINE (June 04 – 17, 2011), <http://www.frontlineonnet.com/fl2812/stories/20110617281201900.htm>.

⁸² Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, §. 21

The remedy perhaps lies in strengthening access to banks and banking innovations especially in the rural sector. The Bill recognizes this when it mentions 'bank account number' under Section 30 clearly providing for payment by way of deposits in Bank accounts. In addition, the Bill should stipulate rules providing for creation of special accounts for the transfer of funds relating to the acquisition. Opening either joint/survivor accounts, simpler rules on the frequency and quantum of unilateral transactions made by a single member of the family, organizing special programmes and setting up of special units to advise and educate the families about financial planning are few of the solutions available to safeguard the interest of everyone in the family.

G. LIMITS OF REHABILITATION AND RESETTLEMENT OBLIGATIONS

As discussed earlier, the Bill goes beyond mere monetary compensation and lays down certain minimum principles of resettlement, rehabilitation and benefit sharing. Yet, there remain serious concerns in the framing of these obligations.

a. *Selective Application of Land for Land*

Unfortunately, this Bill recognises the obligation for land-for-land in only two kinds of cases – 1) acquisition for an irrigation project and 2) where Scheduled tribes lose their lands. In other cases, neither does the Bill mandate an obligation to provide land-for-land nor does it require any payment in lieu of the former. This is in contravention of past judicial rulings where land-for-land rule has been recognised as an integral part of any rehabilitation programme.⁸³

It could very well be argued that there is a genuine paucity of land which precludes statutory recognition of land-for-land principle as a universal rule. However even accepting that view, this Bill fares poorly in comparison with the Resettlement and Rehabilitation Bill, 2009 which had stated that those whose agricultural lands are acquired

⁸³ Narmada Bachao Andolan v. Union of India, AIR 2005 S.C. 2994; *see also* Award of the Narmada Water Disputes Tribunal, dated Aug.16, 1978, *cited with approval in* Narmada Bachao Andolan v. Union of India, AIR 2005 S.C. 2994, ¶¶ 32-48.

would be compensated with replacement land, “if government land is available in the resettlement area.” While this was a conditional and a qualified obligation, this applied to every case of acquisition of cultivated land. The very inclusion of this principle, howsoever qualified, would have created a moral imperative and forced the Appropriate Government to advert to this principle in a more earnest way. The present Bill, on the other hand, attempts a specious distinction based on the purpose of acquisition, rather than on the current use of land.

b. Increase in Quantum of Subsistence Grant and Annuity and Compensation Payable in Lieu of Alternate Employment

Schedule II of the Bill assures to every affected family a subsistence grant that has been fixed at three thousand rupees. By providing for the option of long-term annuity and an additional subsistence grant, the Bill commendably attempts to ensure more durable form of protection to the affected families. Similarly as discussed earlier, the Bill allows the Appropriate Government to offer affected owners the option to choose between alternate employment, a lump sum compensation of five lakhs rupees or annuity of two thousand rupees per month for a term of 20 years. This provision of choice for land owners respects their agency and is indeed praiseworthy. Nonetheless, this protection remains weak as the sums guaranteed are insultingly paltry and would not at all serve the objective of providing certain security to the affected families at all.⁸⁴ In fact, they are less than the statutory minimum wages for certain states. For example, an unskilled agricultural labourer in Punjab who finds work for twenty five days in a month would be statutorily entitled to receive approximately Rs 3850.⁸⁵ Similarly in Andhra Pradesh, he

⁸⁴ Ramaswamy Iyer, *A Good Bill That Disappoints*, THE HINDU, (Aug. 18, 2011) <http://www.thehindu.com/opinion/lead/article2366476.ece>.

⁸⁵ This is calculated at a rate of daily minimum wages being Rs. 154.62 (where food is not provided) for agricultural labourer, as applicable from March 1, 2012, Rate based on Ministry of Labour, State-Wise Minimum Wages, available at <http://labour.nic.in/wagecell/Wages/PunjabWages.pdf> (last visited on June 8, 2012).

would be entitled to earn around Rs. 3600.⁸⁶ In contrast, the subsistence grant has been fixed at a mere three thousand rupees and the annuity assured is to the tune of two thousand rupees per month per family. Moreover, a sum of five lakhs rupees cannot substantively compensate at all for a job that can be source of livelihood for years, if not decades.

c. *Allotment of Shares*

A large number of countries have experimented with allotment of shares of the land requiring authority as a model of benefit-sharing.⁸⁷ This practice also finds a reference in Section 26 of the Bill, wherein a person interested may be offered 25% of the compensation value in shares.

However, shares are risky instruments since their value is contingent on the vagaries of the market. Not surprisingly, the NAC has opined that allotment of shares should be in “*in addition* and not in lieu of other compensation” so that “it can only possibly benefit, but not cause any loss to affected persons.”⁸⁸

Another critical lacuna in this regard is Bill’s silence as to the stage at which shares would be allotted to persons interested. In view of the likely lack of familiarity of land owners, especially in rural areas, with the process of allotment and transfer of such instruments, this loophole needs to be plugged.

H. AMBIGUITY ON RIGHTS OF ADIVASIS AND PERSONS WITHOUT FORMAL TITLE

Very notably, tribals and forest dwellers are considered as “affected family”⁸⁹ and “person interested”⁹⁰ if they stand to lose any

⁸⁶ Minimum Wages in Andhra Pradesh, <http://www.paycheck.in/main/salary/officialminimumwages/andhra-pradesh> (last visited June 8, 2012) (explaining that this is calculated at a rate of daily minimum wages being Rs. 147.00).

⁸⁷ DEPARTMENT OF LAND RESOURCES, *supra* note 44.

⁸⁸ WORKING GROUP FOR CONSIDERATION OF NAC-II, *supra* note 29, at 14-15.

⁸⁹ Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, at §. 3(c) (Affected Family: ...”(iii) tribals and other traditional forest dwellers, who

of their traditional rights recognised under the Scheduled Tribes and Traditional Forest-Dwellers (Recognition of Forest Rights) Act, 2006. But worryingly, the Bill nowhere stipulates that the process of settlement and recognition of rights should be completed before the land is acquired, thus providing a scope for deliberate delay in settlement of rights under that Act in order to avoid rehabilitation and resettlement obligations. The Parliament would do well to incorporate NAC's suggestion that the rights that accrue to the Scheduled Tribes and other forest dwellers under FRA must be recognised and settled before any acquisition takes place⁹¹.

In addition, there is considerable uncertainty over the status of rights of persons without formal rights. Admittedly, members of Scheduled Tribes and Scheduled Castes, forest dwellers, farmers, artisans, landless persons whose primary source of livelihood has been affected by acquisition, like forest gatherers, hunters, fisher folk, boatmen, those residing on any land in an urban area for preceding three years or whose primary source of livelihood for three years prior to the acquisition of the land is affected are classified as "affected family" in the Bill. But it is not clear whether this term extends to groups and communities who have resided or cultivated land without having title records and other legal documents, and those who have settled on government land. In an acknowledgment of this concern, the NAC in its report recommended that all encroachers of government land for a period of five years or more before the date of acquisition, who are otherwise landless or marginal farmers, shall be treated as owners of the land for the purpose of R&R⁹². The current Bill, however, is vague on this issue.

have lost any of their traditional rights recognised under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 due to acquisition of land").

⁹⁰ *Id.* §. 3(x) (Person interested: "(ii) [T]ribals and other traditional forest dwellers, who have lost any traditional rights recognised under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006; . . .").

⁹¹ WORKING GROUP FOR CONSIDERATION OF NAC-II, *supra* note 29, at 11.

⁹² WORKING GROUP FOR CONSIDERATION OF NAC-II, *supra* note 29, at 8

I. RIGHTS OF PERSONS AFFECTED BY TEMPORARY OCCUPATION AND USE OF LAND

The Bill empowers the government to temporarily occupy and use, wherever necessary for public purpose, waste and arable land, albeit only for a maximum period of three years.⁹³ Yet, it is silent on the formula for calculating the compensation in such cases.⁹⁴ Section 75 (2) only refers to “such compensation, either in a gross sum of money or by monthly or other periodical payments, as shall be agreed upon in writing” between the Collector and persons interested in such land. This ambiguity is compounded by the fact that the principles outlined in Chapter IV and First Schedule to the Bill apply only in case of acquisition. Given the qualitative distinction between acquisition and temporary occupation, it is doubtful whether the principles of compensation applicable to the former could be extended to the latter through purposive judicial interpretation. It is also not clear whether SIA and the rule of prior consent, as applicable under Chapters I and II of the Bill, would apply to such transient occupation. Similar confusion also prevails over the application of R & R provisions. Lastly, the provision for appeal to High Court against the decision of the Land Acquisition and Rehabilitation and Resettlement Authority under Section 68 applies only to decisions related to compensation award for acquisition and not to decisions on temporary acquisitions.⁹⁵ Even though temporary occupation and use of land may not result in final transfer of title, it nevertheless constitutes a serious interference with the owner’s enjoyment of her property and affects the livelihood of persons dependent on it. Hence, the cavalier approach of the Bill towards the rights of the persons affected by temporary acquisition is indefensible and needs reconsideration.

⁹³ See Land Acquisition, Rehabilitation and Resettlement Bill 2011, *supra* note 25, §. 75.

⁹⁴ Pallavi Bedi & Sana Gangwani, *The Land Acquisition, Rehabilitation and Resettlement Bill*, P.R.S. LEGISLATIVE RESEARCH (Apr. 23, 2012), <http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/LARR%20-%20Final%20Brief.pdf>.

⁹⁵ *Id.*

J. CONSTITUTION AND MANDATE OF THE NATIONAL MONITORING COMMITTEE

Chapters VI, VII and VIII of the Bill set forth the institutional arrangements envisaged to monitor the acquisition process and settle disputes. Sections 39, 40 and 41 prescribe the function and the appointment of Administrator of Rehabilitation and Resettlement, Commissioner for Rehabilitation and Resettlement and Rehabilitation and Resettlement Committee at project level. In addition, Sections 43 and 44 mandate the creation of a National Monitoring Committee for monitoring the implementation of rehabilitation and resettlement schemes or plans under this Bill and invest obligations on the state to provide information to the committee when the latter so requires. Further, Chapter VIII empowers the appropriate Government to establish the Land Acquisition, Rehabilitation and Resettlement Authority for speedy disposal of disputes arising out of acquisition, rehabilitation and resettlement under this Act.

Curiously, the Bill leaves the constitution of the National Monitoring Committee to the sole discretion of the Central Government. It does not spell out in unequivocal terms the minimum eligibility criteria of the members. Nor does it mandate civil society participation. As a result, the Central Government is free to pack the body with pliant bureaucrats and thereby the institutional autonomy of the Committee may be compromised.

Moreover, the extent of review exercisable by the National Monitoring Committee is not clear. The Bill does not explain whether the Committee has the powers to direct cessation of the acquisition process or return of acquired land in case of non-compliance with the norms provided under this Act. Nor does it state whether its recommendations would be binding or not.

The limitations discussed in this chapter indicate an element of continuity with LAA 1894 in the new Bill's preference for bureaucratism. As discussed, key decision-making authorities contemplated under this instrument are packed with government officials, with little representation from local communities, farmers groups, etc. Moreover,

vital forward looking recommendations of the National Advisory Council and Parliamentary Standing Committee Report on the Land Acquisition (Amendment) Bill 2009 have been ignored.

IV. CONCLUSION

The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 is undoubtedly a long overdue attempt to address the inadequacies of the Land Acquisition Act 1894. As outlined in its preamble, it seeks out to limit the coercive power of the state in compulsorily appropriating land. With its emphasis on acquisition and rehabilitation, incorporation of SIA, enhanced compensation, partial recognition of the importance of consent of the affected, among many other changes, the Bill does concretely draw upon the subaltern experience of affected communities with the working of the existing LAA regime. Most importantly, its attempted linkage between acquisition and rehabilitation and resettlement promises to usher a new paradigm of land acquisition in India.

At the same time, it cannot be iterated enough that this proposed law betrays a penchant for cosmetic rhetoric at the cost of adequate details. Even support is professed for widely acclaimed principles of prior informed consent, social impact assessment, long-term rehabilitation, addressing social costs of acquisition, etc., which are only partially incorporated. Further, the lack of attention to their substantive content thoroughly emasculates them of their meaning. The limitations highlighted in this paper are not completely exhaustive. They however do tell us that the new Bill, for all its purported improvements, does not make a complete break from the doctrine of eminent domain and leaves tremendous space for its widespread governmental abuse. As a result, the preambular promises of 'humane, participatory, informed, consultative and transparent process of land acquisition' are reduced to mere tropes.

Finally, an effective makeover of the legal regime on land acquisition cannot be realistically achieved without an equitable resolution of the increasingly intractable political debate on the existing resource-extraction based models of development, their social

and ecological implications and the state's role in this project as a facilitator of transfer of land and other resources; since the use and abuse of eminent domain is shaped as much by politics of power and resistance as by the letter of law.