Marginalization, Social Movements and the Law of Land Acquisition

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Social movements and popular struggles have been placing a set of grave normative challenges before the powers of Globalization (from Above) in the form of calls for owning up to a Corporate Social Responsibility and democratization of policymaking procedures and mediation by forcing political players to balance the scales between capital driven globalization and people-oriented globalization. Even as Third World States have emerged in the last couple of decades as hosts to global capital—protecting the interests of global capital against market failure, oftentimes at considerable cost to the most marginalized and vulnerable sections of their society—the alignment of State with the interests of global capital has alienated the displaced and dispossessed people (the State's most marginalized and vulnerable sections) from the State. Though indigenous communities constitute only 8% of the population, they comprise at least 55% of the total persons displaced. In the absence of recognised rights, only 2.1 million of the displaced indigenous people were rehabilitated, and as many as 6.4 million were not. Displacement has now taken on more discomfiting forms, as enormous investments are being undertaken in the mining and power sectors (coal-based as well as hydro-electric) in forest areas. This posed necessity of industrial development, without ample checks, is undermining equitable social and economic development, human rights, peace, food security and environmental conservation, making these areas ripe for the taking of the extreme left (in other words, in the absence of a rule of law is born the seeds of anarchy). It is quite striking that the ‘red-belts’ of India correspond by and large to areas abundant in raw materials useful to large industries, which are strikingly also areas largely

1 This is a working paper. Working Papers are by their very definition drafts, unfinished papers, works in progress, which are posted to stimulate discussion and critical comment. Any reliance on this material is the sole responsibility of the user. Kindly do not cite it in your work.
6 Ibid.
7 Ibid.
inhabited by tribal peoples. Evicted from their lands, the issue of their survival moot for the State, the tribals of India form a large chunk of the most marginalized and vulnerable sections of the Indian population. Increasingly, social movements are providing stiff opposition to actions by the State in promoting the interests of private capital. Some of these movements have actually resulted in the introduction of new or alteration of older laws affecting forests, and the acquisition of land for “public purposes”.

This paper shall examine the relationship between popular struggles/social movements, these manifestations of globalization from below, with the law, from the vantage point of Subaltern Cosmopolitan Legality. The recent legislations, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 [hereinafter referred to as the FRA] and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, [hereinafter referred to as “the RTFCTLARR”] are placed within the larger context of the ongoing movement against the forces of displacement and disentitlement of the tribals. This paper shall then move to the law implementation aspect of the discussion, once the participatory law-making process is over. It shall examine whether the new laws fulfil the demands of the anti-land acquisition movement, how the RTFCTLARR in operation affects community rights granted by the Forest Rights Act, 2006, what are the trends in case law at the Supreme Court since the 2013 Act has come into place, and finally what has been the impact of the developments in the new land law on the ability of the persons to be displaced to participate in the processes of acquisition.

The State, Popular Struggle and the Law, or Law as a Site for Struggle

For its theoretical underpinnings this paper shall rely on the concept of subaltern cosmopolitan legality as described by de Sousa Santos and Rodriguez-Garavito. Subaltern cosmopolitan legality and politics is the global (in a sense, a by-product of globalization) phenomenon of local counter-hegemonic movements that emerge to contest the forces of neoliberalism. Counter-hegemonic globalization is a process of globalization from below, wherein transnational networks of grassroots organizations work against the forces of globalization from above (one such movement was the Seattle WTO Protest in 1999), the economic, social and political outcomes of hegemonic globalization, creating an alternative

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8 See Maps 1.0 Mineral Rich areas overlap with tribal areas, 1.1 India Naxal Affected Districts, 1.2 India Mineral Map, appended.
9 Infra pg 9.
imagination of what counts as world development. Subaltern cosmopolitan legality is the use of legal, illegal and non-legal actions to counter the forces of hegemony (as combating collective legal practices requires a combination of political and legal mobilization) by working against them across multiple scales (platforms/media at local, regional, national and international levels). Subaltern Cosmopolitan Legality differs from a hegemony approach by seeing these transformations not as transactions between transnational elites, but as subaltern actors moving across multiple scales and methods to achieve this transformation.

Santos describes counter-hegemonic globalization as being focussed on the struggles against social exclusion. As mentioned above, subaltern cosmopolitan legality and politics expresses the struggles of the marginalized, in this case the tribals (adivasis) of India, against their own exploitation by the State. Here, the Indian State, in either its ignorance or callousness, was depriving them of their livelihood by denying them property rights.

At one level, social movements look upon the law as being a force for status quo. This leads them to either ignore the law as irrelevant to their movement, or else relevant only indirectly, as a part of the larger political struggle. This is easily explained. Law is used as a tool of domination; it is by its conception an instrument of hegemony and thereby amenable to distrust. But a necessary by product of this phenomenon is that for the ideology behind a social struggle to find widespread acceptance the law must undergo change and reflect the new ethos. This way, the law emerges as a site of struggle between hegemony and counter-hegemony.

We can see this play out in the case of the present legislations. The attitude of the British government towards the forests of India and the people who depended on them was (un)uniquely colonial. They saw forest dwellers and indigenous communities who depended on forests as a threat to the natural resources available therein, and considered them encroachers. The colonial Land Acquisition Act of 1894 was backed by the Criminal Tribes Act which made the factum of being from several notified tribal communities a criminal

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11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
17 This was first notified in 1871, and extended to other parts of British India in 1874, 1911 and 1924.
offence by itself. These Acts were engaged in what Comaroff calls ‘Lawfare’. The colonial land acquisition laws were meant for satisfying the ends of the colonizers, much like their Indian Forest Act of 1927 had been meant to satisfy the British need for timber, with scant regard for the people it affected (or the environment). They did so by circumventing the needs of the principle of Eminent Domain (applicable in the UK, which requires that the State duly compensate the people for land it acquires from them for its purposes) by creating a procedure established by law requirement that would not lay emphasis on the payment of compensation before the acquisition of land for infrastructure development to facilitate governance, and treat forests and their produce as the absolute property of the State, using coercive force to exclude tribals and forest dwelling communities from any dependence on forests or forest produce. Both these legislations cite the continuously nebulous category of “public purpose” as their reason for the acquisition of land, including forest land. There were subsequent amendments to the 1894 Land Act in the years 1962 and 1984, none of which altered its exploitative nature. In fact, the amendments were made in order to allow the Government to purchase land for private companies. Not much had changed in the attitude of the State towards tribals even post independence.

The 1980 Forest Conservation Act divested states from the right of using forest lands for non-forest use, but at the same time it converted millions of forest dwelling tribals into encroachers and illegal occupants. This lead to several brutal evictions by the state and began a process of displacement of forest dwellers without compensation or rehabilitation which only gathered momentum. Guidelines were passed, circulars issued, trying to contain the havoc wrecked by the FCA on the forest dwelling tribes and dependent communities, none to much avail. A change began when the National Forest Policy of 1988 talked of conservation of forests, rather than merely looking at forests as an economic resource. Even

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19 Madhu Sarin, Scheduled Tribes Bill 2005: A Comment, May 21, 2005, Economic and Political Weekly: “In a process that began early in the last century and still continues, millions of adivasis or those belonging to the scheduled tribes have been denied their rights and access to natural resources, especially forests, whose products made up the chief source of their livelihood. Where they have not been labelled as encroachers and arbitrarily evicted, adivasis have also contributed to the ranks of people displaced by development projects. The proposed bill seeking to accord recognition to those scheduled tribes that once enjoyed such customary rights, is an attempt to set right historical injustices”.
20 The Forest Conservation Act 1980 (with 1988 Amendment), available online at http://westbengalforest.gov.in/pdf/fca_1980_f5.pdf. No provision was made to allow forests to be inhabited by forest-dwelling tribes.
though it talked of Joint Forest Management, this policy was biocentric. The FRA 2006 was symbolic of a shift from a paradigm of biocentricity into a people-centric approach towards forest conservation. Yet, the effectiveness of the FRA in improving the plight of the forest dwelling tribals and other traditional forest dwellers has not been consistent. This is partly a result of a lack of awareness about the legal provisions, the incoherence of the legislation itself, as well as reluctance in its proper implementation by the required authorities. Smita Gupta (2012) describes how over 40,000 hectares of land have been diverted annually since the 1980 Act for non-forestry purposes, 9.84 lakh hectares of forest land had been diverted for developmental projects by 2004 and as much as 1,82,189 hectares of land was diverted for non-forest projects across several states during 2008-2011. The latter having occurred after the promulgation of the Forest Rights Act, these displacements have taken place without consultation from Gram Sabhas. Furthermore, Ashish Kothari points out that land acquisition for non-forestry purposes continues largely unchecked by the MoEF which has been ignoring the requirements required to be met, as per MoEF’s own circulars, while looking at proposals for diversions. Simultaneously, when the national and state governments use their authority to issue lands for development projects via the previous Land Acquisition laws, they continue to overlook the competing claims over these lands established by the FRA. This was hoped to be remedied by the RTFCTLARR by bringing in some element of discretion in the kinds of projects that qualified the “public purpose” definition which was absent in the Land Acquisition Act of 1894.

The 1894 Act made no exceptions for the acquisition of forest land for Scheduled Areas. It had no conception of a consultative, inclusive process for acquisition, and provisions for rehabilitation and resettlement were a far cry away. The anti-displacement movement demanded all of that to be changed. The demands of the movement were as follows: (1) defining the concept of public purpose; (2) the right to information, sensitive to the fact that we operate in a society which is generally illiterate and even more illiterate about the law;

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22 Ibid.
23 Ibid.
26 Ibid.
28 Supra 15, Bandi
and (3) a wider understanding of the notions of compensation and rehabilitation, which understands livelihood and community in its widest sense.29

The Forest Rights Act was brought about in the context of atrocities committed by the Forest Department in pursuance of evicting forest dwellers, tasking the Ministry of Tribal Affairs with drafting the Bill with the assistance of an expert group, rather than with the MoEF which had shown till then a greater interest in the conservation of forests than in the welfare of tribals, and seemed unable to see the two not in opposition to each other.30 The Forest Rights Act was passed in 2006. Around the same time, two amendment bills titled the Land Acquisition (Amendment) Bill, 2007 and the Rehabilitation and Resettlement Bill, 2007, respectively, were also introduced in the Parliament, but weren't passed. In 2011, the Land Acquisition, Rehabilitation and Resettlement Bill was introduced into the Lok Sabha. Since then, it was reviewed by civil society bodies and Ministries, was subject to review by the Parliamentary Standing Committee (Department of Rural Development), and was finally, after various amendments were suggested, passed by the Lok Sabha in September 2013.

The FRA, 2006 and PESA, 1996 should be read in close conjunction with the latest Land Acquisition Law since the rights accruing from the first two laws are inevitably and inextricably linked with rights under the latter. While the FRA and PESA undertake the classifications of which lands may and may not be acquired for the listed purposes of the state, it is the rights of forest dwellers et al which are most vulnerable whenever during land-acquisition for developmental projects there is a redistribution of property rights.

**The FRA and RTFCTLARR**

The entire process of land acquisition as laid down by the RTFCTLARR Act is top-down, with the bottom players having a (limited) say only during the final stages, once the institutional blueprint is made. Just as in the FRA, even in the RTFCTLARR Gram Sabhas have been given a consultative role, which is obviously not a binding role. The final call does not lie with the Gram Sabhas, as was seen in the Vedanta case, where the provisions of PESA and FRA were invoked to mandate a consultation with twelve Gram Sabhas whose people would be directly affected by the project, but the final decision to shelve the project was

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30 Supra 19.
taken by the MoEF\textsuperscript{31}. In the Vedanta case, the Forest Advisory Committee noted that Stage II clearance of the Bauxite mining project would be considered only after ascertaining the community rights on forest land and after the process for establishing such rights under Forest Rights Act was completed.\textsuperscript{32} The FAC decided to constitute an Expert Group lead by Usha Ramanathan to carry out a site inspection.\textsuperscript{33} It was this Group which stressed that the consistency with provisions of the FRA should be examined\textsuperscript{34}, leading to the SC ordering consultations with Gram Sabhas, whose negative to the mining project was then deliberated over by the MoEF, which was the ultimate arbiter of the fate of the Dongria Kondhs of the Niyamgiri Hills. Thanks to the benevolence of the Niyam Raja, the Kondhs are protected, as is their home, for the time being\textsuperscript{35}; but there is no reason to indicate that the end result will be in favour of the tribals or landowners in another case. In fact, a recent report suggests that the victory has only been against Vedanta, not against living under the threat of eviction given the increasing presence of CRPF in the Niyamgiri hills.\textsuperscript{36}

The Kondhs’ struggle took place across multiple scales, the resistance movement witnessed local (including women and farmers), national and inter- and trans-national participation.\textsuperscript{37} The resistance was framed in terms of global public policy and the Movement was engaged with the law at each of these levels at all given times. The Indian Supreme Court played a pivotal role at interim and final stages of the struggle, such as was evidenced by the court requiring the matter of the religious rights of the Kondhs be presented before 12 Gram Sabhas. The Niyamgiri hills case demonstrates how difficult it is to judge when and how the role played by the law is hegemonic and counter-counterhegemonic.

The Vedanta Aluminium Ltd invited by the State to set up shop in the Niyamgiri hills of Orissa, finds itself facing vehement protests from the tribals who would be directly displaced by the bauxite mining project. This protest is local, national, across national grassroots networks as well as national and transnational organizations. The protest employs extra legal strategies, as well as being brought up before the highest judicial body of India, which

\textsuperscript{31} Orissa Mining Corporation v. Ministry of Environment and Forest & Ors., WP (Civ) No. 180 of 2011.

\textsuperscript{32} Ibid.

\textsuperscript{33} Ibid.

\textsuperscript{34} Ibid.

\textsuperscript{35} The decision was in favour of not displacing the Kondhs as per their rights to worship, under Art 25 and Art 26 of the Constitution, the deity Niyam Raja who they believe resides in the hilltop. Ibid., para 56-58.


\textsuperscript{37} Supra 14.
ensures that the Gram Sabhas affected have a say in the deliberations. Like the Narmada Bachao Andolan, it presents an instance of subaltern cosmopolitan legality (rather than simply a counter-hegemonic struggle).  

**RTFCTLARR, Anti-Displacement Movement and Community Rights Under FRA**

Despite the exalted words of the RTFCTLARR Preamble, which aims to “ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution, a humane, participative, informed and transparent process for land acquisition”... “make adequate provisions for such affected persons for their rehabilitation and resettlement” and that “affected persons become partners in development leading to an improvement in their post acquisition social and economic status”, its text is not entirely consistent with its proclaimed purpose. Looking at the demands of the anti-displacement movement, circa 2005, shows that it does not meet all the criteria of change demanded by the anti-displacement movement:

1. a redefinition of the concept of public purpose and a public debate on it;

2. a complete listing of persons affected by the project. The ownership and title of land should not be the only criteria. Whoever is dependent on land for livelihood should either directly or indirectly be included, such as landless laborers, traditionally unauthorized cultivators, encroachers, grazers, fisher folk, nomads, and forest produce gatherers.

3. The idea of compensation as an index of justice needs to be rethought. “Cash compensation is the only mode of compensation known to law,” but cash compensation is a reductive portfolio of the law and it cannot be adequate to understand a lived concept such as loss of livelihood. What are missing here are the nontangibles, which are not monetizable, the sense of community and the possibility of survival and competence after the trauma of displacement.  

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38 Supra 8.

The RTFCtlARR does give a new definition to the expression “public purpose”.\textsuperscript{40} It has been redefined to include the provision of land for strategic purposes (vital to national safety and defence); infrastructure projects (an inclusive description); projects for project affected families (missing the irony of displacing people for making space for displaced people), projects for housing, for planned development, for residential purposes of the poor or landless. The Act provides that in cases of acquisition of land for private companies consent of 80 (eighty) percent of the project affected people shall be required to be taken (the 2011 Bill had imposed this requirement even on public purposes where benefits accrue to the general public, for public-private-partnership projects, but these have now been excluded) and for public private partnerships, 70 (seventy) percent.\textsuperscript{41} This requirement has been the subject of political brouhaha throughout the law-making process at the Parliament, and its dilution has been one of the strongest demands of the industrialist lobby.\textsuperscript{42}

The definition of public purpose has been better fleshed out. Even so, though “infrastructure” has been defined exhaustively in the Bill, words such as “planned development” “improvement of village sites” and “Government administered... schemes” leave large loopholes, open to interpretation. It also still provides for land acquisition by the State for private companies and for public-private-partnerships which subverts the 80 and 70 percent consent requirements.

The grassroots movement has succeeded in ensuring that the RTFCtlARR make a very thorough listing of persons affected by such displacement projects. The law has also included the very broad category of Other Traditional Forest Dwellers to which the protections of the FRA had been controversially extended under the definition of “persons affected”.

The RTFCtlARR has failed in its imagination of non-monetary compensations, especially when rights jointly held by a community are affected as a result of displacement due to acquisition. It has only and consistently dealt in cash compensation, and the promise of rehabilitation and resettlement and improved lives has not translated well into the legal provisions.

\textsuperscript{40} Section 3 (za) “public purpose” of the RTFCtlARR.

\textsuperscript{41} Proviso to Section 3, Ibid.

On fulfilling the aims of the anti-displacement movement, the results of RTFCTLARR are mixed. Now, looking at it from the point of view of the rights of forest dwelling tribals, does the RTFCTLARR support the FRA and PESA?

It seems the law explicitly works counter to the spirit of the FRA. The RTFCTLARR provides that a “Development Plan shall also contain a programme for development of alternate fuel, fodder and, non-timber forest produce resources on non-forest lands within a period of five years, sufficient to meet the requirements of tribal communities as well as the Scheduled Castes” but provides no punitive measures for the failure of the implementation of such a Plan. It provides that “affected families of the Scheduled Tribes shall be resettled preferably in the same Scheduled Area in a compact block so that they can retain their ethnic, linguistic and cultural identity”. The tribes having fishing rights in the affected area shall be given fishing rights over a reservoir area. “Affected families” from scheduled castes and scheduled tribes will be paid an additional 25 percent (of what, is unclear) in case rehabilitation and resettlement occurs outside of the current district, along with a one-time entitlement of 50 thousand rupees.

Despite all that it protects under section 42, the RTFCTLARR undoes most of the good by allowing the resettlement of community rights holders, diluting the creation of community rights vested by the FRA. Section 43 of the RTFCTLARR provides for paying off the displaced persons individually in proportion to their shares in the community rights. The Act states that:

43(3) Where the community rights have been settled under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, the same shall be quantified in monetary amount and be paid to the individual concerned who has been displaced due to the acquisition of land in proportion with his share in such community rights. The Rehabilitation and Resettlement Committees under the RTFCTLARR require the appointment representatives from whatever are the stakeholders that have

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43 Section 42 (5) of the RTFCTLARR.
44 Section 42 (7) of the RTFCTLARR.
45 Section 42(3) of the RTFCTLARR.
been thought of being included during the discursive process of framing the legislation.\textsuperscript{46}

This section not only allows community rights over forest produce/territory that had already been settled under the FRA to be resettled under the RTFCTLARR, it also allows for such rights to be broken down into individual shares in the community right, which completely nullifies the purpose of having settled the community rights over forest lands in the first place. It retracts the special status that had been given to the community rights of tribals and joint ownership over forest resources that is typical of their way of life.

In \textit{B.D. Sharma v Union of India} the Supreme Court laid down the provision that during the process of resettlement, the impugned state governments should ensure that rehabilitation would be consistent with Article 21 of the constitution.\textsuperscript{47} In the special case of tribals, community rights assume a very important role while granting their rights under Article 21. As Martinez Cobo, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities defined Indigenous peoples in the paper resulting from the Working Group on Indigenous Populations:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”\textsuperscript{48}

To grant the tribals a right to life also means to grant them the space (social, political and geographic) to retain their ethnic identity and traditional lifestyles, to allow their “continued existence as peoples with their own cultural patterns”. As Praveen Kaushal Manto observed from his time working amongst the Van Gujjars as the founder and director of SOPHIA

\textsuperscript{46} Section 45(2) of the RTFCTLARR.
\textsuperscript{47} In B. D. Sharma v. Union of India, 1992 Supp (3) SCC 93.
(Society for Promotion of Himalayan Indigenous Activities), remembering one Van Gujjar who said: “We don’t need electricity,” he adds, “Why can’t we accept that people are different?”

**Developments in the Land Law Subsequent to Promulgation**

So far we have seen the law making process of the RTFCTLARR. The next half of the discussion is on the law enforcement/compliance since the new law came into force. This picture I shall present next is only partial since the focus is on how the state has responded to the law at the highest levels of the Executive and the Judiciary. The RTFCTLARR came into force on the 1st of January 2014, and six months later, the Congress led government which put it into place, in a spate of other welfarist laws, was replaced by BJP majority Parliament. The BJP has had to, especially in the light of a recent history of Singur, Kudankulam and Vedanta, assure the forces of capital that land acquisition shall not be a hurdle for setting up industries in India. At the same time, it has faced widespread protest from farmers under fear of divestment from their lands. After coming into power, while the Parliament was not in session, the Government promulgated an Ordinance to amend the 2013 Act. This Ordinance, with minor amendments, was repromulgated two more times (April 2015 and May 2015) in the past year. The Ordinance route taken by the Government was seen with suspicion, and met with vituperative castigation. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Second Amendment) Bill, 2015 was introduced in the Lok Sabha on May 11, 2015 to replace the April Ordinance and has been referred to a Joint Parliamentary Committee for detailed examination. In the meantime, the Ordinance has been allowed to lapse.

The first major change made by the Second Amendment Bill is that it removed the exclusion for private hospitals and private educational institutions, while keeping private hotels excluded from the definitional scope of “infrastructure projects”. The Bill excluded subject matters in section 10A from the scope of the first proviso to section 2 (2) on the percentage of consent required from land owners by adding another proviso to section 2(2). The first proviso to 2(2) specifically requires that “in the case of acquisition for- (i) private companies, the prior consent of at least eighty percent of those affected families, as defined in sub-clauses (i) and (v) of clause (c) of section 3; And (ii) public private partnership projects, the

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prior consent of at least seventy per cent of those affected families, as defined in sub-clauses (i) and (v) of clause (c) of section 3, shall be obtained through a process as may be prescribed by the appropriate Government”.

Since consent at the above percentages would no longer be a prerequisite for them, it can be assumed that the activities listed in 10A were also to be excluded from the second proviso to section 2(2) which states that “the process of obtaining the consent shall be carried out along with the Social Impact Assessment study referred to in section 4.”

The Bill would have inserted a definition for “private entity” which means any entity other than a government entity or undertaking and includes a proprietorship, partnership, company, cooperation, non-profit organization or other entity under any law for the time being in force. This is different from the definition of private company which the term private entity replaces in the act. Private company was defined under the Companies Act 1956 as “‘private company’ means a company which, by its articles, (a) restricts the right to transfer its shares, if any; (b) limits the number of its members to fifty (c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company.”

This definition underwent change in the new Companies Act of 2013 where private company has been redefined as “a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed,” while it retains with a minor modification the rest of the older definition of the private company [(i) restricts the right to transfer its shares; (ii) except in case of One Person Company, limits the number of its members to two hundred: (iii) prohibits any invitation to the public to subscribe for any securities of the company;]. This change, as a notification explaining the Bill on the DOLR website informs us, would imply that the provisions of the Land Act 2013 would be restricted to such companies which have a minimum paid up share capital of one lakh rupees or higher only, and would exclude other form of companies like proprietorship, partnership, corporation, nonprofit organization, etc.50

The lion’s share of the amending Bill, though, was in the insertion of a Chapter III A. The inserted chapter was titled: Provisions of Chapter II and Chapter III not to apply to Certain Projects. Chapter II Determination of Social Impact and Public Purpose. This chapter laid

down comprehensive guidelines on the preparation of Social Impact Assessment (SIA) study, and goes on to specify public hearings, mandatory publication of SIA and an appraisal of the SIA report by an Expert Group, as well as examination of these proposals for land acquisition and SIA report by the appropriate government. These procedures are a codification of processes for safeguarding the right of land holders which had already been in place by the action of Supreme Court and High Court decisions.  The Act, under Chapter II, provided that where land that was proposed to be acquired would invoke “the urgency provisions” under section 40, the SIA may be exempted by the appropriate Government.

Section 2(2)(a) of the 2013 Act has lifted the veil of subterfuge from acquisitions made by the Government as public purpose, which would remain under the ownership of the government, but would be used by private companies. This provision was inserted so that companies would not use acquisition by the Government which had lower consent requirements as a means to bypass the safeguarding mechanisms put in place by the Act. The inserted Chapter IIIA via the Bill would nullify the impact of section 2(2) (a) of the 2013 Act by exempting the acquirer from having to conduct SIAs and safeguarding of food-security acquisitions made for infrastructure and social infrastructure projects including projects under public private partnership where the ownership of land continues to vest with the State.

The inserted chapter would seem to add exclusion for projects vital to national security or defence of India, including preparation for defence or defence production. This is not a new addition to the 2013 legislation, and has been described in sections 9 and 40 of the 2013 Act. Rural electrification was also excluded from the purview of Chapters II and III.

The 2013 legislation had added as part of the scope of “infrastructure projects” under the Act, 2(1)(b)(iii) dealing with industrial corridors, 2(1)(d) with affordable housing, and housing for the poor people as under2(1)(e) and2(1)(f).

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51 Which decisions? Have to specify. Example, Orissa Mining and Development Corporation v UoI (Vedanta Case)
52 project for industrial corridors or mining activities, national investment and manufacturing zones, as designated in the National Manufacturing Policy;
53 project for housing for such income groups, as may be specified from time to time by the appropriate Government;
54 project for planned development or the improvement of village sites or any site in the urban areas or provision of land for residential purposes for the weaker sections in rural and urban areas,
55 project 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 the Government, any local authority or a corporation owned or controlled by the State.
All of the above sections have been affected and excluded from the purview of Chapters II and III of the 2013 Act as per section 10A inserted by the Bill. And SIA need not be conducted for the above.

Remarkably, most cases that have come up for hearing since the coming into force of the Act of 2013 have been related to section 24(2) as per the terms of which, where five years have lapsed since the award was passed and possession has not been taken and compensation not been paid, in lieu of acquired land, due to a plain reading of the Act in Pune Municipal Corporation v. Harikchand Misrimal Solanki CA No. 877 of 2014 and ors., along with Sri Balaji Nagar Residential Association v State of Tamil Nadu CA No. 8700 of 2013 and ors., the acquisition proceedings in their entirety were held to have lapsed. In Pune Municipal Corporation v Harikchand Misrimal Solanki, the SC at the outset examined the question of the meaning of the expression ‘compensation has not been paid’ in Section 24(2). The SC noted that by virtue of Section 24(1) containing a non-obstante clause, provisions of the same would have an overriding effect over all other provisions of the new Act. Section 24(1) states that in case of an award having been made under LAA, proceedings would continue under the older Act while in cases where no award had been made the provisions of the new Act would find applicability. Section 24(2) on the other hand also contains a non-obstante clause overruling provisions of Section 24(1) and provides that in case of an award having been made five years prior to the commencement of the new Act and no compensation had been paid or land possessed then the acquisition proceedings would be deemed to have lapsed.

In Sri Balaji Nagar, the Supreme Court did a bare reading of the 2013 Act. The proviso to Section 19(7) in the context of limitation for publication of declaration Under Section 19(1) and the Explanation to Section 69(2) for working out the market value of the land in the context of delay between preliminary notification as per Section 11 and the date of the award, which specifically provides that the period or periods during which the acquisition proceedings were held up on account of any stay or injunction by the order of any court be excluded in computing the relevant period. The Court used this to conclude that the legislature has consciously omitted to extend the period of five years even if proceedings have been delayed on account of court orders and stays and injunctions granted by the courts. Additionally, the Supreme Court observed that the Legislature had added by Amendment in the repealed Land Act a provision to exclude the time for stay in the calculation of time period for limitation under sections 6(1) and 11A. The court reasoned that there must be legislative intent behind not adding such an excluding proviso in the new legislation. In the
case of such casus omissus, the court saw no reason to depart from a literal rule of interpretation.

In *State of Haryana v Vinod Oil Mills* the matter was remitted to High Court for discussion on whether Section 24(2) was applicable. In *Pune Municipal Corporation*, payment of compensation not deemed to have been done for more than 5 years. Appeal was dismissed under Section 24 (2). Court said that if the appellants wished to acquire the concerned land, they would have to start afresh under the provisions of the new Act.

The Bill therefore was clearly attempting to counter to the Supreme Court’s conclusions. The Bill would have inserted a proviso to 24(2) stating that a calculation of the period of five years referred to in 24(2) shall exclude any time period(s) during which the proceedings for acquisition of land were held up on account of a stay or injunction issued by any court, or the period specified in the award of a Tribunal for taking possession or such period where possession has been taken but the compensation lying deposited in a Court or in any account maintained for this purpose.

In what would arguably have been the most dramatic change to the 2013 Act, the scope of section 46 of the Act would have undergone a complete U-turn. Clause 7 of the Bill innocuously would exclude the words “any person other than” from section 46. Section 46 governs the purchase of land through private negotiations for an area equal to or more than an area specified for this purpose by the appropriate government, for which Rehabilitation and Resettlement is required. The section requires that in cases of such purchases, an application be filed with the District Collector notifying the intent of the purchase, the purpose of the purchase and the particulars of the land in question. It also makes it a duty of the Collector to ensure Rehabilitation and Resettlement provisions are being complied with, and accordingly are the individual awards made. Further, it is provided that land use change shall not be permitted unless all Rehabilitation and Resettlement provisions are complied with in full. Most importantly, the entire proceedings with respect to purchase of land shall become void ab initio if purchase of land by a **person other than specified persons** is done without complying with Rehabilitation and Resettlement provisions. As per the 2013 Act, the Government was also included in “any person” who was required to comply with these conditions mandating complete Rehabilitation and Resettlement. If this amendment takes

56appropriate Government, a Government company, as well as an association of persons or trust or society as registered under the Societies Registration Act, 1860, wholly or partially aided by the appropriate Government or controlled by the appropriate Government
place, the Government need not comply with Rehabilitation and Resettlement provisions in case of private purchases of land. The Government may even change the nature of the land use even if they have not complied fully with Rehabilitation and Resettlement. This would be done by simply changing the scope of “specified persons” who were supposed to be private persons who were privately purchasing land for whatever use. This would allow the government to act as a private purchaser if it purchases land through private negotiations. Foreseeing the capacity for abuse of this situation, the 2013 Act had excluded Government from employing private negotiations to bypass having to engage in rehabilitation and resettlement processes.

The provision that really gave teeth to the Act of 2013 was section 87 which attributed personal punitive responsibility on the head of department of any department of the government which committed an offence under this Act (unless it was shown that such offence was committed without his knowledge or he showed due diligence), as well as any officer from such a department if it was shown that the offence committed was attributable to the connivance or neglect on the part of such officer. The Bill, which excuses and prevents any court from taking cognizance of such an offence except with the previous sanction of the appropriate Government (in the manner provided by section 197 of the Code of Criminal Procedure). The amendment is arguably in pursuit of sovereign immunity which the original section 87 under the 2013 Act had explicitly done away with, presumably in the light of the abuse of discretionary powers by government officials with regard to illegal land acquisitions. This brings it to par with the effect the LARR had vis-à-vis the lack of consequences for government officials who do not comply with provisions for the relocation and resettlement of forest dwellers.

The Bill amends section 101 of the Act which stated that any land which had been acquired under this Act and remained unutilized for a period of five years from the date of taking possession would be either returned to the original owners or legal heirs or be deposited into a Land Bank. This also seems to be a direct response to the Case law at the SC.

The Bill has brought into effect the condition imposed by section 105 on the Government to direct within a year from the date of commencement of this Act that determination of compensation as per the First Schedule and rehabilitation and resettlement as per the Second

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57 Explanation.-For the purpose of this section, “Land Bank” means a governmental entity that focuses on the conversion of Government owned vacant, abandoned, unutilized acquired lands and tax-delinquent properties into productive use.
and Third Schedules shall be applicable to cases of land acquisition that are made under the enactments specified in the Fourth Schedule. As per the Bill, these enactments have, from the 1st of January, 2015, been brought under the scope of the First, Second and Third Schedules.

The 2013 Act had limited the power of the Central Government to remove difficulties in giving effect to the provisions of the Act by making provisions or giving directions to only the final Part of the Act, which is presumably Chapter XIII titled Miscellaneous. As per the DOLR notification in explanation of the amending Bill, the word “Part” was used inadvertently instead of “Act”, and the power to remove difficulties was intended to extend over the entire Legislation, not just the final part of it. This power has also been extended from 2 years to 5 years by the Bill.

**Conclusion**

Without the settlement of property rights under the FRA and PESA, proper implementation of the RTFCTLARR when it comes to lands occupied by Scheduled Tribes or Scheduled Areas is going to be exceedingly problematic and overridden by bureaucratic red-tapism. That consultation and deliberation with the Gram Sabhas shall take place in every case or even most cases seems wishful. Further, the definition of Gram Sabha in the rules has been broadened to Panchayats compassing several villages, which makes it harder for small hamlets and marginal community-villages to raise objections. The success of the Niyamgiri Hills protests is certainly heartening, and hopefully the way that decision has turned out shall pave the way for more participatory development even vide the implementation of the RTFCTLARR with consideration given to the rights of worship (and other rights in due

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4. The Indian Tramways Act, 1886 (11 of 1886).
5. The Land Acquisition (Mines) Act, 1885 (18 of 1885).
course) of the Forest Dwelling Scheduled Tribes that are affected by large projects for industrial development. Largely, though, it is a pity that a law that is created through a collaborative, bottom-up process of grassroots mobilization and lobbying through transnational networks, is likely to be doomed by the banal violence of bureaucratic processes. The failure of the RTFCTLARR lies in the weak and easily floutable safeguards during acquisition processes that would allow the people likely to be displaced to have a voice in the process. In the absence of this, the anti-displacement movement must again rely on a subaltern cosmopolitan legality based approach to counter the hegemonic movement towards increasing industrialization, marginalization and displacement. The further marginalized position of the forest dwelling tribes makes it even less likely that they shall be given a choice in their displacement. It has also emerged that the official statistics on even the numbers of forest dwelling tribals is badly accounted for, which is problematic because official figures state that over 81% of claims under the FRA have already been processed. Without changing the processes by which legitimacy of claims is made, and till such time that recognition given to community rights is not doubly secured within a neoliberal climate which is reluctant to recognize any claims towards common property rights, the legal framework is going to continue to be limited in its ability to effect any respite for the subaltern. The subaltern and the marginalized will have to continue to mobilize themselves in extra-legal and illegal ways in order to compensate for the absence of avenues to express their voice and effect a change in the legal sphere for any formal transformations.

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