

Government Acquisition of Tribal Land for Development Purposes—A Legal Critique

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Abstract

Earth's resources are limited, and when one faction of society obtains resources for itself, it logically follows that another faction is simultaneously deprived of those resources. In the case of indigenous and tribal people, every resource stems from the land that they live on. Without that land, they have no life. And yet, the demands of our ever-growing modern world ignore this fact and continue to deprive them of their livelihood. In such a situation where the actions of society jeopardize the life of others, one would expect the law to intervene and ensure justice. In the following paper, we seek to answer this very basic question: What has the law done to protect indigenous land rights? To answer this question, we take a look at Indian legislations designed to protect land rights, and then move on to scrutinising how the higher judiciary has applied these statutes. To contrast the stance taken by the Indian judiciary, this paper then takes the example of a few judgements delivered outside India. The central argument through the bulk of this paper is that the Indian Judiciary has been inconsistent in protecting tribal land right and needs to change its outlook on the issue in order to make progress.

Keywords: Eminent domain, Tribal land acquisition, right to life, compensation, samatha vs state of A.P

INTRODUCTION

What exactly is happening to indigenous people on their own lands?

Governments across the globe need to acquire land for various developmental reasons. In order to do this, the Government exercises the power of eminent domain. Eminent Domain is the power of the sovereign to acquire the property of an individual for public use without the necessity of his consent [1]. This power is based on the sovereignty of the State, and the State derives this power from Article 300A of the Constitution. Payment of just compensation to the owner of the land which is acquired is part of the exercise of this power. Either the government operates upon this acquired land through its own agencies or further sells it to private corporations. In either case, the Government is responsible for upholding the rights of those already settled on the land. In the case of indigenous people and their land, it is a common trend to see the government violate these rights without reparation. The following incidents from all across the country are prime examples of the Government's *modus operandi*.

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In Sikkim, tribes opposed a 520MW hydropower project near the Khangchendzonga National Park [2]. The damming project by the National Hydro-Power Corporation (NHPC) seeks to build another dam along the already (twice) dammed Teesta River. The stretch of river currently being dammed is the last stretch available for the natives of the region. In the words of a Dzongu resident, “Development has to be sustainable. This large dam will destroy the

heritage and sanctity of Dzongu, the cradle of Lepcha religion, culture, and tradition. We already have Teesta III and Teesta V, we do not need to stop the last free-flowing stretch of our Teesta, we need to be united and strong in seeing this to the end, otherwise, vested interests will gain.” Apart from this cultural and ecological impact, this project encompasses several hundred hectares of land, the possession of which has fallen into the hands of the NHPC for the entire life of this project. As a result, a whopping 256 families have been displaced and stripped of their land rights.

In a separate incident, the Government is looking to set up a solar project in the Nagaon district in Assam, which would involve the eviction of several families [3]. The All-India Tribal Students’ Association Assam (AITSAA) have recently questioned the government’s motives and actions with regard to the Solar project established in the Nagaon District. The Government initially claimed to protect the ‘Jati, Mati, and Bheti (race, land, and hearth)’ of the Tribal people. However, as the project ensued, the govt has driven out the indigenous people who have been nurturing the land for centuries. In this case, the ‘development’ project is affecting nearly 1500 families, who now have nowhere to go. In the words of the AITSAA president, “We hope the PM and the CM show they are not anti-tribal and ensure the lands of the indigenous people are not taken over by private firms. We are not anti-development, but development cannot be at the cost of the tribal people.”

The Government is not the only entity that is exercising these powers. In some cases, large private corporations that are working hand in hand with the government are allowed to indirectly wield the power of eminent domain. For instance, in Chhattisgarh, The Adani Group took over huge plots of rural land with plans to set up a power-plant despite the protesting natives [4]. The government acquired 700 hectares of tribal land in the Korba district of Chhattisgarh under the Coal Bearing Areas (Acquisition and Development) Act of 1957. The government then transferred this land to the Adani group to set up a 1600MW Power Plant. In no way can it be said that the Government took the consent of the original residents as they have been vehemently and outrightly protesting the project from when it was conceived. In the words of Alok Shukla of the Chhattisgarh Bachao Andolan, “Madanpur South coal block falls in an area in Korba district designated as Schedule 5 under the Constitution of India due to its pre-ponderance of tribal population. By invoking the Coal Bearing Act for acquiring land in this area, the Central government is intending to bypass public consultations which are mandatory through Gram Sabhas for areas designated as Schedule 5 [5].” In spite of the fact that their livelihood depends wholly upon this land, nearly 1000 families have now been displaced from the region.

This widespread practice of usurping tribal landowners from their land begs a certain set of questions which will be answered through the course of this paper. The next two sections of this paper go hand-in-hand and broadly discuss the legal framework within the jurisdiction of India. This framework comprises of central and state legislations, which are interpreted by the higher judiciary. For the purpose of this paper, we shall frame our argument based on landmark judgements delivered by the Apex Court of this country. To contrast the Apex Court’s interpretation of the subject, we bring into light certain judgements delivered by prominent courts across the world to learn where there is scope for improvement.

CURRENT LEGAL MATRIX

One of the most important safeguards provided by the law is the prerequisite of consent prior to any governmental development project on tribal lands. According to the preamble of the **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013**, it is “An Act to ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution..... for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation..... fair compensation to the affected families whose land has been acquired or proposed to be acquired..... rehabilitation and resettlement..... social and economic status and for matters connected therewith or incidental thereto” [6]. From a

plain reading of the preamble, we see that Gram Sabhas have an essential role to play in the protection of indigenous land. In consonance with this Preamble, sections through the Act such as 4 and 44 mandate the Gram Sabha's consensus while making a decision which affects them [7]. Similarly, Section 4(d) of the **Panchayats (Extension to Scheduled Areas) Act of 1996** states that "every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution" [8]. This section alone tells us that the legislature intended to safeguard a Gram Sabha's position as the local guardian of people's rights. Section 4(e)(i) of the Act further states that every Gram Sabha shall "approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level" [9]. The **Forest Rights Act of 2006** further enforces the point that any project planned on areas belonging to Scheduled Tribes can be done only in consultation and with consent of the Gram Sabhas and Panchayats of the region. The logic behind this is quite simple – tribal people are heavily dependent on their land for sustaining life as they know it. If the central authorities are allowed to take away tribal land without the consent of the inhabitants, it would almost certainly destroy and uproot their lives. The Supreme Court in the case of *Orissa Mining Corporation Vs. Ministry of Environment and Forest & Ors.* [10] reiterated this principle. This case concerned the eviction of certain forest dwellers in Orissa for the purpose of building an aluminium refinery and primarily dealt with the Forest Rights Act of 2006. The Court here not only applied the above-mentioned Acts, but also interpreted them deeper to discover the legislative intent behind the Acts. The Court held that this intent is clear insofar as they wish to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers. To enforce this interpretation, the judgement in paragraph 42 looks to the statement of objects and reasons provided in the Forest Rights Act. Hence, the Court takes cognizance of the fact that "the forest dwelling tribal people and forests are inseparable and that the simplicity of tribals and their general ignorance of modern regulatory framework precluded them from asserting their genuine claims to resources in areas where they belong and depended upon and that only recently that forest management regimes have initiated action to recognize the occupation and other right of the forest dwellers" [11]. Although the judgement is specific to Forest lands and tribes and was passed prior to the RFCTLARR Act of 2013, the principle enshrined herein remains good in law and spirit with regards to the acquisition of tribal lands for the purpose of development. The fact that the Supreme Court read into the Acts and enshrined the legislative intention behind them is historic, as it is unfortunately rare. As we will see in the forthcoming section, the train of thought adopted by Justice Radhakrishnan in *Orissa Mining Co.* was reminiscent of another judgement delivered nearly two decades ago, and has unfortunately not been as prominent since.

WHAT DO THE COURTS HAVE TO SAY?

It would be impossible to engage in a conversation regarding tribal community rights in India without referring to the judgement passed in **Samatha vs State of Andhra Pradesh, 1997** [12]. In short, this case arose against the backdrop of the liberalisation, wherein the government began to lease out huge mining projects to private corporates. These mining projects naturally entailed the destruction of several important geo-cultural sites and also tribal villages. Several such mining leases worth around 500 acres were granted by the State to non-tribal persons in a scheduled area of the Visakhapatnam district in Andhra Pradesh. Naturally, these mining projects would entail the eviction of hundreds of families from the area. Hence, Samatha Society took up the cause of the people, and filed writ petitions claiming that the State was in violation of the A.P Land Transfer Regulation, which banned the transfer of any scheduled land to a non-tribal. The judgement that ensued is widely considered to be the pinnacle of tribal rights in the Indian Judiciary. A good portion of the judgement focuses on material aspects of the land acquisition of tribal areas and how it must be regulated. One of the questions that the court had to deal with in this regard was whether the state classified as a 'person' under section 3 of the Regulations. This question was firmly answered in the affirmative with the reasoning that on a reading of the rest of the Act and its aims and objectives, it is evident that the

State was not intended to have special access or permission to tribal lands. In other words, the Court decreed that the word ‘person’ in this context refers to natural, juristic, and would also include constitutional bodies. However, the pièce de resistance of this judgement lies in its attitude and intent towards tribal rights. . Specifically, Judge K Ramaswamy included an often overlooked right in the context of tribal land acquisition – the Right to Life under **Article 21 of the Constitution**. It has long been established that Article 21 includes the right to holistic development and the freedom to do so. This judgement makes the point that these rights cannot be enjoyed by tribal people unless their lands are conserved, hence bringing the right to protect their lands under the ambit of Article 21. In the words of Justice Ramaswamy, “*The tribals, therefore, have fundamental right to social and economic empowerment. As a part of the right to development to enjoy full freedom, democracy offered to them through the states regulated power of good government that the lands in Scheduled Areas are preserved for social economic empowerment of the tribals*”.

Further, it was in this case that the Supreme Court for the first time recognized the importance and role of the Gram Sabhas and affirmed their power to make decision on important matters that concern the livelihood of the tribal people. The Court here looked to the Andhra Pradesh (Provision of the Panchayats Extension to Scheduled Areas) Act of 1996, which contains several clauses that indicate the legislative intent to grant Gram Sabhas the power to make autonomic decisions with regard to management of resources of that tribal area. For instance, clause 4(d) of this Act states unequivocally that every Gram Sabha shall be competent to safeguard and preserve community resources. Further, clauses such as 4(j) and (m)(iii) allow Gram Sabhas to manage water bodies, and the allocation of land within the village. This interpretation by the Court solidified the Gram Sabha’s position. It is for all of the reasons mentioned above that the *Samatha* judgement has been widely recognized as a ‘weapon of the weak’ [13] and has become an impediment in the path of agencies and corporations which aim to take possession over such land.

Next, we turn our attention to other regional acts, which also contain similar provisions to impede the government in land acquisition of ST lands. Most Acts contain a stipulation intended to regulate or abolish the transfer of tribal land to non-tribal entities. For instance, the **Santhal Pargana Tenancy Act of Jharkhand** and the **Land Transfer Regulation Act of Andhra Pradesh** [14] specifically abolish this practice altogether. However, **Madhya Pradesh’ Land Revenue Code of 1959** (Amended in 1976) contained a provision which was worded somewhat differently. This Act states that the bhumiswami of a tribal person shall not be transferred “either by way of sale or otherwise”. The issue however is that the amendment in 1976 added an explanation to this clause stating that a ‘lease’ was not covered by this prohibition [15]. If one were to follow the principles and interpretation theme in the *Samatha* judgement, it would be abundantly clear that the intent of this Supreme Court and the Andhra Pradesh Legislature was to prohibit the transfer of land to any non-tribal entities, as this would be detrimental to the interest of the tribal people. In the case of ***Balco Employees Union vs Union of India***, [16] the Supreme Court had to adjudicate a claim based on Section 165(6) of the M.P Land Revenue Code. In this case, the Madhya Pradesh government granted BALCO a lease of 99 acres for aluminium mining and refining. The petitioners in this case framed their entire argument based on the *Samatha* judgement, hoping the Court would see that the explanation to Section 165(6) is clearly untenable in law, thus staying in sync with the tribal-friendly principles laid down in *Samatha*. However, the judgement digressed from and casted doubt upon the *Samatha* judgement a mere 5 years after the latter was passed. The petitioners argued that the land on which the plant was being setup originally belong to the tribal people, and when a majority of BALCO shares were transferred to non-tribal people, the M.P Land Revenue came into play, prohibiting such a transfer. While adjudicating upon the subject of transfer of land to BALCO by the state government by way of lease, the Court held that the content of the MP Land revenue code differed from the Andhra Pradesh Land Transfer Regulation Act in the sense that the AP Act specifically prohibits any form of ‘transfer of land’ while the MP Act specifically permits a *lease*. It was on this basis that the Hon’ble Court concluded that the *Samtha* judgement cannot apply in *BALCO*. The judges even casted doubt as to

whether the majority opinion in *Samatha* was correct but did not go into the specifics of this doubt. Although the Acts do differ in wording, it seems abundantly clear that the Court simply did not have the same mindset as the bench in *Samatha*. Had the Court thought about it from the natives' perspective, they would realise that long term industrial leases can be just as harmful to tribal people as the sale of land. Leases such as this one often last for many years, and maybe even decades. Although the M.P Code does allow a lease, the Supreme Court here interpreted the Act in a fashion which in our opinion, was too literal. 5 years ago in *Samatha*, the Supreme Court offered a great interpretation of tribal land rights in general, by stressing on how essential it is for the tribal people to have possession of their land. In *BALCO*, if the Supreme Court decided to adopt a similar idea while interpreting the M.P Code, it would have almost definitely recognised that this provision was in clear violation of the judgement in *Samatha*. Keeping this in mind, we can conclude that this judgement dealt the first major blow to the 'weapon of the weak' status held by *Samatha*.

The noteworthy though process applied in *Samatha* was further diluted in *State of M.P vs Narmada Bachao Andolan [17]* in 2011 when the Court had to consider the displacement caused by the Omkareshwar dam project. The residents of 30 different villages had been affected due to the dam project, and nearly 5 of them were submerged while the litigation was ongoing in the High Court. In the Supreme Court, the judgement delivered deviated from one of the most crucial aspects of the *Samatha* judgement – the Right to Life under Article 21. While in *Samatha* the Court made a clear connection between tribal land rights and Article 21, the *Narmada Bachao* judgement clearly stated that the acquisition of tribal land does not violate the right to livelihood under Article 21. The Court acknowledged the importance of the right to fair compensation, **Article 300-A**, and even ordered that the authorities look into compensating the displaced families, but vehemently opposed the contention that acquisition of land can be a violation of Article 21 for tribal people. On the subject of the Right to Life, the judgement had the following to say:

"The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress [18]."

This interpretation is certainly harmful to the tribal people, as it is a well-known fact that the fundamental rights carry far more weight than any constitutional right in the country. Effectively, this reduces the effectiveness of any judicial defence that the tribal people would have against future acquisitions.

In the preceding few paragraphs, we have observed that the Supreme Court has shown a regressive trend in their interpretation of tribal rights. The judgements delivered in *Samatha* and *Orissa Mining Corporation* appear to be the only landmark judgements that interpret tribal land rights in a beneficial manner. In the following section, we analyse how Courts from across the world have interpreted this same right, and whether there are lessons to be learned from the same.

TAKING THE EXAMPLE OF FOREIGN JUDGEMENTS

Undoubtedly, the practice of Land Acquisition in tribal areas is common across the world. Not only are the legal rights of the tribal people violated as, in the broader picture, one can easily see that their moral right to live their own life is also taken away. To demonstrate the ideal state of autonomy in tribal areas, we turn to the nation of Panama. More specifically, the Naso people of Panama, whose lands for decades have been under the 'protection' of the state government [19]. The government in this case set up national parks and forest reserves in these areas and maintained full control over them. The Naso people not only sought the right to manage their own lands, but also believed that these lands could not be protected well by government officials sitting hundreds of miles away. When approached with this issue, the Supreme Court came up with a solution which appears quite radical.

The Court decided in favour of the Naso people and granted them the power to manage their entire 400,000 acre territory as a semi-autonomous territory, completely under the purview of themselves [20]. The Naso people have their very own native language, and even practice monarchy among their ranks. Effectively, this entire region has become a Naso mini kingdom. The significance of this judgement is not in the ultimate award, but the fact that the Court recognized tribal people are the best candidates to manage and control their own land—a strain of thought evident in the *Samatha* judgement. Although the Naso case does not deal specifically with the acquisition of land for development, the principle derived from the judgement can certainly be applied in those situations.

The next case concerns forced evictions and comes to us from the Inter-American Court of Human Rights. In *Moiwana Community vs Suriname*, [21] the Court during its judgement had to consider whether a particular piece of land belonged to the Moiwana tribal community or the State. Initially, it was recognized that there was no formal title held by any individuals over that piece of land, which would normally mean that the State was its formal owner. However, the Court recognized that the Moiwana Community had occupied these ancestral lands in accordance with customary practices for decades, and hence decreed that they should be given official possession of the land. The *Kichwa Indigenous people of Sarayaku vs Ecuador* [22] similarly takes a very progressive approach on the recognition of rights. This judgement endorses the idea that the tribal people have always rightly possessed their own land, but the law has been slow to recognize it. Specifically, the need to move away from the classical/colonial definitions of what constitutes a ‘title’ to a piece of land. Instead of considering solely the land records, one can consider cultural evidence such as folklore, oral testimonies, ancient cultural writings, etc. Recognizing these forms of evidence would help tribal people assert control over their lands. In the context of acquisition by the government for development purposes, this judgement by the Inter-American Court of Human Rights reiterated the importance of genuine consultation with the residents of the land. In fact, this concept is enshrined in international law as a *jus cogens* norm, known as ‘Free Informed Prior Consent’. In the African subcontinent the judgement delivered in *African Commission of Human and Peoples’ Rights v. Kenya* [23] or otherwise known as the ‘*Ogiek Case*’ took a progressive step in protecting the land rights of the Ogiek tribe. In this case the Court ordered the government to return the lands that were taken away from these indigenous people, and also recognised that the indigenous people do not need a document to prove that they are “indigenous”, and that their culture and their way of life was enough to show that the lands belonged to them – hence, enough to amount to a violation of their land rights.

CONCLUSION

Before concluding this paper, we shall take a look at a relatively recent development on how the Supreme Court views tribal land rights – *Wildlife First vs Ministry of Forest and Environment*, [24] which is still pending. The Court in this case passed a set of important orders in 2019. Before delving into these orders, let us take a look at the background of this case. In 2008 the petitioner, on behalf of indigenous forest dwellers, approached the Court alleging that the Forest Rights Act of 2006 had allowed several entities to encroach upon their land. The Forest Rights Act provided for a mechanism through which members of Scheduled tribes and castes could file claims for their land by presenting various documentation proving that they have been living in that forest or have been dependent on its resources. Unsurprisingly, Lakhs of forest dwellers’ claims were rejected by the States. Shockingly, the Supreme Court in its judgement decreed that the claimants who had been rejected were ‘encroachers’ on the land and must be evicted by the States with immediate effect [25]. Effectively, the Court authorized states to evict several Lakhs of forest dwellers all across the country. After facing heaps of public backlash, the Supreme Court in a very interesting turn of events placed a stay [26] on its initial order. The Court ordered a stay so as to direct the state governments to investigate whether due process had been followed when the land claims had been rejected. Due to the Covid-19 pandemic, no further orders were passed in this case. The fact that the Supreme Court stayed its own order is a feeble win, given that it should not have passed such a catastrophic order to begin with. This

particular case does not deal with the acquisition of tribal land for development purposes, but we have chosen to use it as a conclusion to this paper to showcase that there is a larger issue of regressive interpretation of tribal rights in the higher judiciary.

The differentiation between a law that *promises* secure land rights vs a law that *practices* it is vital. In India and around the world, legislations towards forest and indigenous people have become more progressive in nature. However, the lack of an implementation mechanism which suits the current cultural practices of the indigenous people is missing. In addition to implementation issues, a progressive law can be rendered useless if the Courts interpret it in a regressive manner. The multivocality of the Supreme Court, as we have seen through this essay, has been affecting *Adivasis* in a negative manner. In fact, *Samatha vs. State of Andhra Pradesh* and *Orissa mining corporation vs State of Ministry of Environment and Forest* were the only landmark judgements where the Court's interpretation came from a humanitarian perspective. The other judgements either interpreted tribal rights differently or failed to spot legislations that are regressive in nature. Throughout this paper, we have focussed on the proposition that the Courts need to start interpreting any given law on tribal land acquisition from a human rights perspective. In sync with this perspective, each of the foreign judgements discussed in the previous section interpreted tribal land rights in a manner that transcended specific legislation, and instead focussed on principles of natural justice and fairness. Going forward and taking the example of not only these specific international judgements delivered by prominent courts but also the views of our very own Supreme Court in the past, it appears that the Indian judiciary needs to change in its interpretation of not only a specific law, but a very basic human right itself.

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