NOTES AND COMMENTS

'PARTNERS IN DEVELOPMENT' UNDER THE NEW LAND ACQUISITION LAW: A MISNOMER

Abstract

Participation in development is an integral part of the right to development. Therefore the proclaimed embodiment of values of participation and partnership in the new land acquisition legislation is an important milestone. Such a proclamation, if matched by equally robust provisions operationalising the same would mark a fundamental shift in India's approach to development. This necessitates a journey through the entitlements of those displaced on account of acquisition of land for development as recognised in the legislation. Conceptualising different categories of partnerships as transformatory, staus-quoist and iniquitous and considering the alternatives with regard to the treatment of the displaced, the author, in this paper traverses the entitlements of compensation, rehabilitation and resettlement under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 to assess the partnership forged under the Act.

I Introduction

THE RIGHT to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter RFCTLARR Act) envisages making 'affected people', 'partners in development'.[1] "Improvement in the post-acquisition social and economic status"[2] manifests the outcome of such partnership. Transforming the status of people hitherto burdened by the process of development into partners is laudable. It implies dawn of a new era marked by the recognition of development as a human right.[3] However, before attributing this accomplishment to the law, it is necessary to delve into whether the objective embodied in the preamble is furthered by the provisions of the Act, if so, how and to what extent? This further necessitates three tasks *viz.*, assessment of the kind of partnership envisaged by the Act, examination of the options through which it may be achieved and evaluation of the entitlements under the Act to ascertain afore mentioned transformation. Keeping in mind the sociological and historical modes of development of law, the essential ingredients of partnership, as developed historically under the common law as well as Roman tradition, are identified in the first part of the paper. The scheme of the Act is also reflected upon, to ascertain the embodiment of these ingredients in the Act. Part

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1 RFCTLARR Act, 2013, preamble.

2 *Ibid.*

3 See Declaration on the Right to Development, 1986, art. 1.

II of the paper undertakes a comparative analysis of various options available for operationalising the particular paradigm of partnership adopted in the Act, which is then used to consider the implication of the peculiar choice made by the legislature. Examination of the specific entitlements embodied in the Act to make 'affected people', 'partners in development' is undertaken in part III of the paper with the purpose of deconstructing the nature of purported partnership.

II Nature and levels of partnerships and RFCTLARR Act

Partnership implies collaboration in a pursuit and agreed distribution of burdens and benefits emerging from the pursuit. "The choice of contracting parties" was held to be of essence to any partnership under English law.[4] Similarly, consent was held to be essence of partnership by the Roman lawyers.[5] Thus, persons could not become partners by accident, force of circumstances without knowledge or deliberate assent.[6] Based on the notion of consent, partnership is averse to compulsion. Thus, partners are held to be liable to each other. Share in profits is also considered to be crucial to the notion of partnership under English law Lord. C. J. Tindal remarked that partnership implies "mutual participation in profit and loss".[7] The trilogy of consent, participation and share in benefits and burdens, therefore, emerge as the recognised constituents of the notion of partnership. It is, therefore, desirable to consider the embodiment of this trilogy in RFCTLARR Act.

Consent

The acquisition of land by the state under RFCTLARR Act is a compulsory process and not voluntary or consensual. The absence of consent at this level of development decision making, strikes at the very basis of partnership in development. "Industrialisation, development of essential infrastructural facilities and urbanisation"[8] stand recognised as goals of development irrespective of competing or divergent perspectives on the same nurtured by those displaced on account of development. The absence of consent with regard to development decision making, denies the displaced person, the agency of partner and makes the purported partnership devoid of its essential ingredient.

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4 *Crawshay* v. *Collins*, 15 Vesey 225; 2 Vesey 34, cited in John George Philimore, *Principles and Maxims of Jurisprudence* 194 (John W. Parker and Son West Strand, London, 1856).

5 Ulpian, Code Civil, art. 1832, cited in John George Philimore, *id.* at 188.

6 John George Philimore, *id.* at 189.

7 *Green* v. *Beesley,* 2B. and C., 112, cited in John George Philimore, *id.* at 191.

8 *Supra* note 1.

Participation

The participation of 'affected persons' under RFCTLARR Act is sought to be secured through social impact assessment as well as seeking their inputs with respect to the rehabilitation and resettlement (hereinafter R&R) plans. With respect to the social impact assessment, the level of participation is limited to giving inputs with regard to the correspondence between public purpose and acquisition of land, exploring alternative acquisition in other areas, minimal acquisition, the nature and extent of impact damage. It does not pertain to rejecting the public purpose itself and introducing a completely different paradigm of development.[9] Further, the inputs of people with respect to social impact and R&R are subjected to hierarchical assessment by multidisciplinary expert groups and thereafter by the government.[10] Thus, partnership in terms of collaboration is not comprehensive but partial and emerges not at the level of decision making but at the level of assessment of impact of the decision. Moreover, the preamble reflects the level at which the Act seeks to make affected people partners, which is only at the level of sharing of benefits emerging out of the process of development involving acquisition of land. It clearly states, "that the cumulative outcome of compulsory acquisition should be that affected people become partners in development leading to an improvement in their post-acquisition social and economic status."[11] The level of partnership envisaged under the Act is therefore only limited to the sharing aspect of the trilogy constituting partnership.

Moreover, viewed from broader perspective of political theory, consent and participation of affected people may be read as the measures undertaken by the state in a representative democracy. Thus, the need for consent and participation in every specific measure taken by the state may appear to be superfluous. From this perspective, the position taken by RFCTLARR Act can very well be defended and reaffirmed though not irrefutable. However, given that stance, the existence of partnership primarily depends on the avowed sharing of benefits and burdens.

Sharing benefits and burdens

From the perspective of sharing of benefits and burdens of the pursuits, it is possible to classify partnership into three broad categories, though not straight-jacketed. The classification is made from the standpoint of the outcome of the purported partnership for the marginalised. The peculiar outcome may not be the result of intentional, deliberate and planned act of those envisaging, initiating and

9 *Id.*, s. 4.

10 *Id.*, s. 7.

11 *Id.,* preamble.

operationalising the partnership. However, it can be argued that if a particular outcome in terms of the impact on the marginalised is either foreseeable or ought to have been foreseen then the relationship between the operationalisation of partnership with that of the outcome no longer remains so benign. The three categories of partnerships are as follows:

i. Transformatory partnership – Partnership that allocates the shares of benefits and burdens in a way so as to ameliorate existing inequalities. In this kind of partnership the distribution of benefits is not governed by contribution but the objective of ushering equality or rather attenuation of inequalities, guided by the zeal to achieve the objectives of justice and fairness. The benefits allocated in affirmative action to the marginalised would fall under this category. The Constitution of India which provides for affirmative action reflects this form of partnership among 'we the people'.[12]

ii. Status-quoist partnership – Partnership that allocates share of benefits and burdens depending on the contribution of each partner towards the achievement of the objective of partnership. In other words, sharing in this category of partnership may improve the conditions to the extent that each partner has contributed (as determined under any social-economic order) towards the objective. Thus, such a kind of partnership emerges in a system where share-holders (as recognised under the legal system) are entitled to their respective share in profit or loss.

iii. Iniquitous partnership – Partnership that allocates the shares of benefits and burdens in a way that results in further perpetuation of existing inequalities in complete disregard to the contribution made by the partners but allowing exploitative amassing of benefits by those who are already privileged at the cost of the marginalised. Such collaboration would exist where certain contributions do not find recognition under the existing social-economic arrangements. This kind of partnership is far from being a 'partnership for development' as envisaged in the preamble of RFCTLARR Act.

The question about the nature of partnership that the Act embodies out of those delineated above, with respect to benefit sharing depends on two factors. *Firstly*, the overall response chosen by the legislature, towards those affected (in whatever way) on account of acquisition of land, out of the existing alternatives. *Secondly*, the

12 The Constitution of India, arts. 38, 39, 43A, 115(3), 16 (4) *etc.*

need to determine the potential of the specific entitlements recognised under the Act to convert the bearers of burdens of development into partners and improve their post-acquisition condition.

III Alternatives with respect to the displaced and the legislative choice

Alternatives with respect to the displaced

The appropriate response to the people displaced on account of development initiatives adopted by states has been a subject of theoretical discourse world-wide. The three broad approaches that have emerged over the years are as follows with the first one being the earliest and the most dominant.

Compensation

The compensation approach put forth by Nicolas Kaldor and John Hicks offers an economic justification for undertaking development projects.[13] This approach focuses on compensation to the losers in any development project so that the losers are not worse off. It was expected that the compensation would flow from the gainers in the project to the losers, though hypothetically, so that the project satisfies the test of efficiency in terms of pareto improvement which in turn implies that in moving from state A (with no development project) to state B (when a development project is undertaken) at least one agent is better off and no one else is worse off.[14] The approach required a cost-benefit analysis in which total losses were hoped to be set off by total gains through notional transfer of gains by the gainers to the losers through compensation with money emerging as the measure to aggregate the benefits.[15]

Since the compensation approach aggregates costs and benefits in monetary terms it has been criticized of 'income determinism'.[16] This aspect is very pronounced in case of payment of monetary compensation to tribals for whom it is of little value and is inadequate to rehabilitate them.[17] Further, the approach does not require actual transfer of benefits from the gainers to the losers, the test is satisfied even in the

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13 Anjan Chakrabarti and Anup Dhar, *Dislocation and Resettlement in Development: From Third World to the World of the Third* 53 (Routledge, New York, 2010).

14 *Id.* at 52, 53.

15 *Id.* at 54.

16 *Id.* at 55.

17 Mathew Areeparampil, "Industries, Mines and Dispossession of Indigenous Peoples: The Case of Chotanagpur" in Walter Fernandes and Enakshi Ganguly Thukral (eds.), *Development, Displacement and Rehabilitation: Issues for a National Debate* 29 (Indian Social Institute, New Delhi, 1989).

absence of actual transfer.[18] The test of efficiency on which the approach is based is neutral to distributional concerns as it equates the significance of extra one rupee income to rich with that of the poor,[19] as well as the disequilibrium between gainers and losers.[20] Michael Cernea has argued that compensation can only at best provide for 'past asset replacement'[21] but not for the loss of potential growth that the community would have experienced without the project.[22]

Social cost-benefit approach

As against the compensation approach the social cost-benefit approach seeks to address the distributional neutrality of the compensation approach by attributing different normative weights to gains and losses of the poor as compared to that of the rich. The approach was developed by Little and Mirrlees in late 1960s and early 1970s.[23] However, this approach lost out to the compensation approach not only because of the time required to account for distributional considerations, but also the susceptibility of the latter to the law of average that speaks of trickle down system through which the benefits of growth on account of development projects would percolate down to the immediate losers.[24]

Impoverishment, risk and reconstruction approach

Michal Cernea the chief proponent of impoverishment risk and reconstruction approach criticizes the trickle-down theory on the ground that it misses out the fact that the displaced suffer dispossession, marginalisation and impoverishment and have to go through years of struggle to reconstruct their economic and social situation.[25] He argues that the response cannot be better compensation but one marked by recognition of losers from development process and impoverishment on account of development.[26] As the name indicates, the first step in Cernea's approach is identification

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18 *Id.* at 54.

19 *Id.* at 53.

20 Michael M. Cernea, "Reforming the Foundations of Involuntary Settlement: Introduction" in Michael M. Cernea and Hari Mohan Mathur (eds.), *Can Compensations Prevent Impoverishment: Reforming Resettlement through Investments and Benefit-Sharing* 56 (Oxford University Press, New Delhi, 2008).

21 *Id.* at 59.

22 *Ibid.*

23 *Id.* at 56.

24 *Id.* at 57.

25 Michael M. Cernea, "Financing for Development: Benefit Sharing Mechanisms in Population Resettlement" 42(12) *Economic and Political Weekly* 1042 (2007).

26 *Supra* note 20 at 57.

of risks faced in encountering the possibility of dislocation and the second step is to find out the method of "reconstructing the forms of life that have been dislocated."[27] The risks identified by Cernea are as follows:

i. landlessness

ii. joblessness

iii. homeless

iv. marginalisation

v. increased morbidity and mortality

vi. educational losses

vii. food security

viii. loss of common property

ix. social disarticulation or community breakdown

The recognition of these risks goes beyond merely economic losses and includes social risks as well. The losses he recognizes are multidimensional – economic, social, cultural, in cash and in kind, in opportunities, in power.[28] He views the situation of displacement as akin to an earthquake that "shatters production systems and social networks, undermines identity and plunges those affected on a downward poverty spiral" and asserts that compensation does not have the potential to redeem such impoverishment of displaced.[29] Therefore, as against compensation, he puts forth a model of reconstruction of the lives of the displaced so that the risks mentioned above or any other which may exist are minimized or averted for which he recommends participation of resettlers in decision making about how to proceed with resettlement.[30] Therefore, as against compensation he proposes investment in financing resettlers' development and thus, secure resettlement with development.[31] These investments, he says, can be financed not only from upfront budget allocation but also through sharing of future benefits arising out of the project. The rationale for this emerges when one views those who give their lands to the new project as 'investors of equity' in the new

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27 Michael M. Cernea, "For a New Economics of Resettlement: A Sociological Critique of the Compensation Principle" 55 (175) *International Social Science Journal* 36 (2003), as cited in *Dislocation and Resettlement in Development, supra* note 13 at 61.

28 *Ibid.*

29 *Id.* at 62.

30 *Id.* at 63.

31 *Id.* at 65.

project.[32] In his words, "the indispensability of their lands for creating the enterprise makes them an indispensable party, a 'stakeholder' and a 'share-contributor' in the project building the new enterprise."[33] It is the transfer of ownership of land from the displaced to the state or private developers that enables them to use the natural resources and earn windfall profits. Therefore, justice demands that the displaced should have right to a portion of these surplus funds generated on account of this transfer of ownership.[34] He also argues that project's long-term and expected stream of benefits should also contribute to financing reconstruction.[35] Additionally, he argues that the state not only has a role to "facilitate private industry expansion" but also to create a "regulatory environment in which the private sector recognizes its responsibility...for preventing impoverishment."[36] Some of the benefits sharing mechanisms identified by Cernea are as follows:[37]

i. direct transfer of share of revenue streams for the financing of post-relocation development schemes;

ii. establishment of a development fund through fixed allocation whose interest is used for post-resettlement development;

iii. equity sharing through co-ownership;

iv. special taxes to region and local governments to supplement local development programmes;

v. allocation of electrical power;

vi. granting of various subsidies such as preferential electricity rate, lower water fees *etc.*

Dwivedi has critiqued Cernea's approach as being top-down "designed for the planners to manage the displaced populace so that the project can go through without too many hitches or too much resistance."[38] Participation of resettlers envisaged in the approach remains limited to planning the resettlement process rather than conceptualization of the project and the freedom to reject the project altogether. Even

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32 *Supra* note 20 at 62.

33 *Id.* at 73.

34 *Supra* note 13 at 66.

35 *Ibid.*

36 *Supra* note 20 at 71.

37 *Supra* note 13 at 66.

38 R. Dwivedi, "Models and Methods in Development Induced Displacement" 33 (4) *Development and Change* 717 (2002), as cited in *Dislocation and Resettlement in Development, supra* note 13 at 64.

in planning and resettlement, Cernea is silent on the process of integration of social differences in any resettlement plan.[39] Dwivedi's critique finds resonance in the issue of participation discussed earlier in this paper. This part of the paper is not concerned with participation, but with the potential of various responses to transform the bearers of burden of development into partners in development through proper benefit sharing. Comparison of the three broad approaches establishes the greater potential of Cernea's approach as against the other two.

The legislative choice for the displaced

From the point of view of the three kinds of partnerships discussed earlier, even Cernea's approach at best has the potential to forge status-quoist partnership as it is geared towards preventing impoverishment and also sharing of benefits on the basis of contribution of the displaced (though it refrains from going to the extent of transformatory sharing where at least the marginalised contributors seek to benefit much more than the mainstream contributors). Notwithstanding the fact that Cernea's approach itself is limited from the standpoint of transformatory partnership, his approach holds enormous potential to at least ensure status-quoist partnership where the post-acquisition condition of both the partners improves from their earlier condition. Also from the point of view of the fact that until the enactment of RFCTLARR Act, the only response to those subjected to acquisition of land was compensation, the incorporation of R&R as conceptualised by Cernea has the potential to improve the post-acquisition condition, which is the conception of partnership envisaged under the preamble of RFCTLARR Act. Thus, an assessment of responses towards the displaced in terms of their entitlements under RFCTLARR Act can reveal the degree to which the post-acquisition condition may improve under the RFCTLARR Act.

As mentioned earlier, social impact assessment under RFCTLARR Act envisages elaborate collection of data with respect to many facets of lives of the affected families which span across all the aspects specifically recognised by Cernea. However, the mechanism to address the social impact under the legislation remain starkly in contrast to those suggested by Cernea and rather appallingly fall much more within the domain of the other approaches towards the displaced. The choice of these approaches over Cernea's approach and their embodiment in the legislation itself constitutes a barrier in the achievement of avowed objective of the legislation *i.e.,* "affected persons become partners in development leading to an improvement in their post-acquisition social and economic status."[40] The three primary responses towards the displaced embodied in the legislation are:

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39 *Id.* at 67.

40 *Supra* note 1.

i. compensation

ii. resettlement

iii. rehabilitation

Now what remains to be assessed is the potential of the afore-mentioned entitlements to bring about improvement in the post acquisition social and economic status of affected persons and the specific nature of partnership that is evident from the specific entitlements.

IV The subject and nature of partnership: Entitlements under RFCTLARR Act

Scheme of the Act

The subject of partnership, its nature and appreciation of the entitlements under the RFCTLARR Act requires a certain degree of familiarity with the scheme of the Act. Unlike the Land Acquisition Act, 1894, (hereinafter LA Act) under the RFCTLARR Act, the issue of preliminary notification is preceded by conduct of social impact assessment[41] through public hearing[42] which involves, *inter alia,* consideration of the viability of the project in the light of the costs for addressing the social impact.[43] The social impact assessment is subject to appraisal by the expert group which is further subject to the final decision of the appropriate government.[44] Once the decision of acquisition is taken by the government, preliminary notification for the same has to be issued[45] within 12 months from the date of appraisal of the social impact assessment report.[46] Preliminary survey of land to be acquired is thereafter undertaken.[47] "Any person interested in any land which has been notified" may file objections[48] within 60 days.[49] After publication of preliminary notification a survey of affected families is undertaken by the administrator for rehabilitation and resettlement who also prepares a draft R&R scheme which is put to public discussion and the draft scheme along with the report is then submitted to the collector.[50] After being reviewed by the collector

41 *Id.*, s. 4.

42 *Id.*, s. 5.

43 *Id.*, s. 4(4)(f).

44 *Id.*, s. 7.

45 *Id.*, s. 11.

46 *Id.*, s. 14.

47 *Id.*, s. 11(5).

48 Objections here relate to the area and suitability of land proposed to be acquired; justification offered for public purpose; the findings of social impact assessment report.

49 *Supra* note 1, s. 15.

50 *Id.*, s. 16.

the draft along with the suggestions of the collector is submitted to the commissioner rehabilitation and resettlement.[51] Only after the publication of the summary R&R scheme together with the declaration of area identified as resettlement area, the final declaration for acquisition can be issued under the Act.[52] Final declaration is followed by measurement and marking out of land[53] and notice, public as well as individual (in certain cases), is issued so that claims to compensation and R&R are made to the collector.[54] Claims for compensation and R&R are invited for 'all interests in such land'.[55] Within one year of final declaration the collector is required to make an award of compensation and R&R.[56] Full compensation is to be paid within a period of three months and monetary part of entitlement within a period of six months from the date of the collector arriving at the final award after taking into account all the considerations mentioned in the Act.[57] Only after ensuring above stated payment and R&R can the collector take possession of the land.[58] Infrastructural R&R entitlements are to be provided within 18 months from the date of the award.[59] However, in case of urgency, possession may be taken just after issuing notice to persons interested under section 31 of the Act.[60] Persons interested who do not accept the award may apply to the collector for reference of the matter to the land acquisition rehabilitation and resettlement authority within stipulated period.[61] The redetermination of the award with respect to the person challenging the award of the collector before the authority may thereafter be extended by the collector to all those covered by the same preliminary notification.[62] The appeal from the authority lies with the high court.[63]

Some of the major contributions of the RFCTLARR as against its colonial precursor *i.e.,* the L A Act are:

i. identification of varied categories of people affected by acquisition;

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51 *Id.*, s. 17.
52 *Id.*, s. 19.
53 *Id.*, s. 20.
54 *Id.*, s. 21.
55 *Ibid.*
56 *Id.*, s. 23 read with s. 25.
57 *Id.*, s. 38 read with s. 30.
58 *Id.*, s. 38.
59 *Ibid.*
60 *Id.*, s. 40.
61 *Id.*, s. 64.
62 *Id.*, s. 73.
63 *Id.*, s. 74.

ii. conduct of social impact assessment;

iii. timeline for completion of various processes under the Act;

iv. laying down clear rules regarding determination of compensation ;

v. clearly laid down R&R entitlements.

In the background of the scheme of the Act it needs to be examined as to who are made partners under the Act and how? Whether the entitlements secured for affected persons have the potential to improve their post-acquisition social and economic conditions? If so, what is the nature of benefit sharing and thus, whether the partnership forged is transformatory, status-quoist or iniquitous?

The partners and their role

'Affected persons'[64] recognised as partners, is not a specifically defined category under the RFCTLARR Act. Therefore, it is worthwhile to consider the range of categories that are entitled to compensation and R&R under the Act. Entitlements under the legislation pertain to four categories of people *viz.*,

i. affected families; [65]

ii. displaced family; [66]

iii. land owner; [67]

iv. person interested. [68]

Firstly, whereas the definition of terms 'displaced family' and 'person interested' are exhaustive, the definition of 'land owner' and 'affected family' are inclusive. The definition of the term 'land owner' though inclusive, appears to be the clearest of all and therefore leaves for contemplation as to 'who' other than those mentioned could be included in this category. It refers to:

i. owners of land, building, part of building recorded in the records of the concerned authority;[69]

ii. any person declared to be land owner by an order of the court or authority;[70]

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64 *Id.*, preamble.
65 *Id.*, s. 3(c).
66 *Id.*, s. 3(k).
67 *Id.*, s. 3(r).
68 *Id.*, s. 3(x).
69 *Id.*, s. 3(r)(i).
70 *Id.*, s. 3(r)(iv).

iii. grantees of forest rights under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006;[71]

iv. person entitled to be granted patta rights under any law, including assigned land.[72]

Despite many overlaps in the definition of 'affected family' and 'person interested' the former is narrower than the latter. Land owners or owners of immovable property,[73] scheduled tribes and other traditional forest dwellers,[74] tenants, share-croppers and persons holding easement[75] are specifically recognised under both the definitions. Apart from people dependent on common property resources (whose primary source of livelihood is affected due to acquisition of land)[76] and artisans, the definition of affected family explicitly mentions those "who may be working in the affected area for three years prior to the acquisition of the land, whose primary source of livelihood stand affected by the acquisition of land."[77] Therefore, only those whose livelihood is affected by the acquisition of land are included under the definition of affected family in RFCTLARR Act. As against this, the definition of 'person interested' refers to "any person whose primary source of livelihood is likely to be adversely affected"[78] without requiring that the adverse affect on livelihood be a direct consequence of acquisition of land. Moreover, mere *likelihood* of adverse impact on livelihood suffices to include such persons in the definition of person interested. The expansive nature of this particular clause has also been hailed by the Supreme Court in the *Government of NCT of Delhi* v. *Manav Dharam Trust*.[79] Self employed persons, dependent on community for their livelihood, who get adversely affected because of the disintegration of the community, also stand implicitly included in the definition of 'person interested'. There is no such category like self-employed clearly recognised in the definition of 'affected family'. Such a position taken with respect to self-employed persons despite the fact that the National Rehabilitation and Resettlement Policy 2007 (hereinafter NRRP) clearly embodied 'self employed'[80] within the definition of affected family is intriguing.

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71 *Id.*, s. 3(r)(ii)

72 *Id.*, s. 3(r)(iii)

73 *Id.*, s. 3(c)(i) and s. 3(x)(i).

74 *Id.*, s. 3(c)(iii) and 3(x)(ii).

75 *Id.*, s. 3(c)(ii) and 3(x)(III), (iv).

76 *Id.*, s. 3(c)(iv).

77 *Id.*, s. 3(ii).

78 *Id.*, s. 3(x)(v).

79 (2017) 6 SCC 751, para 17.

80 The National Rehabilitation and Resettlement Policy, 2007, cl. 3(b)(iii).

In this regard ambiguity further arises on account of entry number eight of second schedule pertaining to R&R entitlements of affected families, which refers to "self employed or an affected family which owned non-agricultural land or commercial, industrial or institutional structure in the affected area" and entitles them to minimum of Rs. 25000 as one time financial assistance.

Further, the broad ambit of the clause implying inclusion of self employed in the definition of 'person interested' has the potential to subsume within itself the categories of artisans, other workers and people dependent on common property resources embodied in the definition of affected family. Given the initially mentioned commonalities between the definitions and the capacity of the definition of 'person interested' to absorb the residue left in the definition of affected family beyond the commonalities makes the definition of 'affected family' merely a subset of the definition of 'person interested'.

The definition of 'displaced family' locates displacement within the universe of acquisition[81] and therefore, remains restricted. By defining 'displaced family' as the one "who on account of acquisition of land has to be relocated and resettled" doesn't serve the purpose of clearly identifying 'displaced family' as distinct from 'affected family' or even land owner as both these categories get displaced and are therefore, to be rehabilitated and resettled. As against the definition, the main provision which lays down that 'collector shall pass' R&R award refers to affected families.[82] The category 'displaced family' though broadly remaining redundant throughout the Act, however, finds mention in sub-clauses (c), (d) and (e) of section 31(2). This is with respect to the allotment of house site/house, land, subsistence allowance and transportation allowance. All these entitlements are also embodied in the second schedule which pertains to the 'affected families'. In entries pertaining to subsistence grant and transportation cost the column mentioning elements of R&R (broad theme of entitlement) in the second schedule refers to 'displaced persons' whereas the column pertaining to entitlement/ provision (*i.e.* specific entitlement) refers to "each affected family which is displaced."[83] Thus, notwithstanding the definition of 'displaced family' in the definitional clause, the category remains redundant with respect to entitlements as all the limited entitlements which are specifically embodied in the legislation with respect to the same get subsumed within the category of affected families.

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81 For details see Usha Ramanathan, "Eminent Domain, Protest, Discourse on Rehabilitation" in *Can Compensations Prevent Impoverishment: Reforming Resettlement through Investments and Benefit-Sharing*, *supra* note 20 at 214.

82 *Supra* note 1, s.31.

83 *Id.,* second schedule, entries 5 and 6.

The category of 'affected family' subsumes the category of 'displaced family'. The former in turn is subsumed by the definition of 'person interested', thus, making the entire effort at defining different categories quite intriguing. Not only that the definitions overlap, their further incorporation in other parts of the legislation is also marred by reference to two or more categories simultaneously or reference to one category as a substitute to the other. Further, despite the expansive definitional recognition of varied categories under the RFCTLARR Act, the effect of the new law does not go beyond ensuring that 'affected people'/ 'person interested' are entitled to R&R which was non-existent under the LA Act.

Objections with respect to preliminary notification are invited from 'persons interested';[84] notice for making claims to compensation and R&R relates to persons interested;[85] considerations in determining the amount of compensation primarily refers to persons interested;[86] calculation of amount of compensation refers to land owner;[87] components of minimum compensation package refer to land owner and tenant[88] and awards under the Act are held to be final and conclusive evidence as between the collector and the person interested.[89] As against this preparation of R&R scheme,[90] declaration of area identified as R&R area,[91] publication of summary R&R scheme,[92] obligation to pass R&R awards[93] and elements of R&R awards[94] refer to affected families. Perusal of these provisions purportedly indicates that 'affected families' are entitled only to R&R and 'land owners' and 'person interested' are entitled to R&R as well as compensation but ambiguities prevail. For instance, minimum compensation package relates to "those whose land is acquired and to tenants referred to in clause (c) of section 3."[95] The reference to section 3 (c) is significant here since as against all the other provisions referring to person interested with respect to compensation, the first schedule fails to identify the category of tenant as one drawn from 'person interested' but is rather drawn from the category of 'affected family'. Since, both the definitions

84 *Id.,* s.21.
85 *Id.,* s.15.
86 *Id.,* s. 28.
87 *Id.,* s. 27.
88 *Id.,* first schedule.
89 *Id.,* s.37.
90 *Id.,* s. 16.
91 *Id.,* s. 19(1).
92 *Id.,* s. 19(2).
93 *Id.,* s. 31(1).
94 *Id.,* second schedule.
95 *Supra* note 88.

include the category of tenants, particular choice of the legislature in picking this category from section 3(c) defining 'affected family' rather than from 3(x) which defines 'person interested' is perplexing. The mystery builds up when one notices that the particular clause referring to tenants in the definition of 'affected family' entails many more categories than just tenants. Two facts further deserve a mention here. *Firstly,* apart from the value of land (which is of significance to the land owner) the factors to be taken into account by the collector primarily refer to 'person interested'[96] while only the last consideration which refers to ground based on equity and justice refers to 'affected families'. *Secondly*, the minimum amount of compensation to the land owners and tenants stand legislatively ascertained and digression from the same will constitute violation of a statutory right, whereas compensation to different categories of 'person interested' is completely left to be determined by the collector. This may be because of the uncertainty of factors like the value of stand crops, value of effect on other movable or immovable property *etc*.

Uncertainty shrouds the category entitled specifically to R&R and those entitled to both compensation and R&R. This uncertainty emerges on account of the broad definition of 'person interested', and the lack of resonance of the breadth of the definition in the considerations required to be taken into account by the collector while determining the amount of compensation,[97] its complete absence in the schedule specifying minimum compensation and certain overlaps between compensation and R&R. With respect to persons whose primary source of livelihood is likely to be adversely affected, under the definition of 'person interested' the only weakly related provision in section 28 pertaining to the considerations to be taken into account by the collector while determining the amount of compensation refers to 'affected families'.[98] Moreover, it only figures as an enabling provision rather than being mandatory. The inclusion of affected families in section 28 is only by way of an enabling provision, based on considerations of equity and justice, where it otherwise remained an excluded category, indicates that the legislature did not probably intend to entitle this category to compensation, which like the colonial precursor of the Act, prioritised and recognised a higher claim of land owners rather than mere displacees. The Act, therefore, only recognises more varied constitution of 'person interested' without clearly directing the collector to take them into account while determining the amount of

96 *Supra* note 1, s. 28, secondly to fourthly.

97 In fact considerations to be taken into account by the collector while determining the amount of compensation remain starkly the same as those under the LAAct, except the inclusion of the last consideration which is based on equity and justice.

98 *Supra* note 1, s. 28, seventhly.

compensation and further without mentioning any minimal entitlement to compensation to self employed people under the schedule. This does not take the law with respect to the displaced any further as compared to the LA Act also because of the fundamental distinction in the way 'person interested' is defined under this Act rather than its precursor where the definition was inclusive rather than exhaustive. The ambiguities in the legislation introduce uncertainties in the post acquisition/ displacement conditions of the affected families and thus, result in partnership being placed in doldrums in the absence of clear identification as to who the partner is.

The ambiguities, overlaps and exclusions discussed above cast a major dent on the potential of the legislation to make affected persons partners in development, since their lives move from existing certainty of returns dependent on land or community to uncertainty emerging from legislative ambiguities affecting their recognition as a particular category under the legislation and their entitlements. Apart from these general ambiguities and exclusions affecting the potential of the legislation to make affected persons partners in development, the potential of compensation and R&R to actually ensure partnership in development also needs to be assessed.

Partnership through entitlements

Compensation

RFCTLARR Act clearly provides for determination of compensation on the basis of market value[99] and also lays down the following criteria for determination of market value:[100]

i. the minimum land value, if any, specified in the Indian Stamp Act, 1899 for the registration of sale deeds or agreements to sell, as the case may be, in the area where the land is situated, or,

ii. The average sale price for similar type of land situated in the nearest village or nearest vicinity area,

These were also the two *ad-hoc* practices for determination of market value that had gained ground in the process of operationalisation of LA Act.[101]

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99 *Id.*, s. 28.

100 *Id.,* s.26(1)(a)(b).

101 Vivek Kumar Porwal and Shashi Ratnaker Singh, "Land Acquisition and Determination of Land Price: A Critical Appraisal of the Existing and Proposed Normative Framework as Applied in Singrauli District, Madhya Pradesh" in Sakarama Somayaji and Smrithi Talwar (eds.), *Development Induced Displacement, Rehabilitation and Resettlement in India: Current Issues and Challenges* 66 (Routledge, New York, 2011).

The determination of compensation on the basis of market value of land acquired has been questioned on account of the fact that such an amount does not enable the land losers to buy alternative land of same potential close to the resettlement site.[102] The concept of replacement value had only been recognized in the NRRP that too only in case of irrigation and hydel projects where the affected family cannot be given or opts not to take land in the command area.[103] Further, NRRP had laid down two criteria for determination of market value for computing compensation *i.e.,* location wise minimum price per unit area fixed and intended land use category.[104] The latter criterion seeks to benefit the land losers on account of the appreciation in the value of their lands because of changed use to which the acquired land is put. Such appreciated value of land to be taken into account for determination of compensation is also supported by Cernea on the ground that it amounts to "payment for the land's developmental potential,"[105] the benefit of which gets transferred to the new enterprises that are established. On the other hand, it has been argued that "appreciated value of the intended land use cannot be realistically assessed in 'advance' of the use,"[106] as such an assessment "would either be based on the norms for fixation of conversion charges paid for such use or from the land transactions in the adjoining areas or vicinity at the time of making the award."[107] However, even if such appreciation cannot be assessed in advance there is no provision in the legislation for transferring certain portion of appreciated value of land or share in profits made by the new ventures to those contributing towards establishment and growth of that venture through their land even at a later stage. In the absence of such a provision recognising a share in profit on account of their contribution, it is difficult to understand as to how land owners become partners, leaving the partnership of other affected families a still distant dream.

In case the land is situated in such area where the transactions in land are restricted or registered sale deeds or agreements to sell for similar land are not available for the immediately preceding three years or minimum land value has not been specified under the Indian Stamp Act, 1899, the concerned state government is empowered to specify the floor price or minimum price per unit area of the said land based on the price

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102 K.B. Saxena "Rehabilitation and Resettlement of Displaced Persons: A Critical Examination of the National Policy and Proposed Bills" in *Development Induced Displacement, Rehabilitation and Resettlement in India*, *id.* at 37.

103 *Supra* note 80, para 7.4.2.

104 *Id.* para 6.22 (b) (c).

105 *Supra* note 20 at 73.

106 *Supra* note 102 at 37.

107 *Ibid.*

calculated in the abovementioned manner in respect of similar types of land situated in the immediate adjoining areas. This guideline is aimed at determination of market value of land in areas where the market in land is not robust, and therefore, the value cannot be determined through reference to average sale price. However, three other factors that distort the price of land that have remained unaddressed under the RFCTLARR Act are distortion of price on account of social power structure whereby, lower caste farmer is generally coerced to sell land at a lower price than would be available to a member of an upper caste; asymmetry in information among different stakeholders and restrictions with regard to transfer of land especially in case of scheduled areas which adds to transactional costs and therefore reduces the quoted price of these lands.[108]

Comparison of compensation under the LA Act and the RFCTLARR Act indicates that the compensation to which an owner of land is entitled under the latter is enormously high as compared to that under the former. This reflects the intention of the legislature to better compensate the land owners and thus, smoothens the process of land acquisition for development projects which have till now been vociferously resisted by those whose land was sought to be acquired. With the laying down of clear principles for determination of market value as well as calculation of compensation the legislature has tried to put an end to determination of compensation through 'guesstimate',[109] and reliance on subjective judgment of the collector which has been reported to disproportionately benefit the land owning class and the other upper castes as against lower castes and other vulnerable groups.[110] While determining the award of compensation the collector is required to take into account varied interests of 'persons interested' but apart from 'land owner' and tenant there is no provision in the Act providing guidelines for clear determination of the amount of compensation for the other persons interested. However, the challenge to award of compensation in the RFCTLARR Act as in case of LA Act or for that matter any other law prevailing in the country is based on 'reactive mobilization'.[111] The consequence of such a requirement

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108 *Id.* at 66, 67.

109 Guesstimate is estimation based on mixture of guesswork and calculations with higher certainty than mere guess. See *Trishala Jain* v. *State of Uttaranchal* (2011) 6 SCC 47.

110 Sujit Kumar Mishra "Compulsory Land Acquisition in Orissa: Policy and Praxis" in *Development Induced Displacement, Rehabilitation and Resettlement in India, supra* note 101 at 82.

111 The term is used to indicate that the initiation of legal process is dependent on the aggrieved person by filing a complaint rather than the state doing so which is referred to as pro-active mobilization. D. J. Black, "The Mobilization of Law" 2 *The Journal of Legal Studies* 125 (1973), as cited in Upendra Baxi, *The Crisis of the Indian Legal System* 47 (Vikas Publishing House, New Delhi, 1982).

is that the affected persons who have better information network and the capacity to challenge the awards have a greater opportunity of getting the award enhanced through the intervention of the court or the authority under the RFCTLARR Act. As pointed out by Sujit Kumar Mishra, based on his empirical study conducted in Orissa, "the more powerful members of the displaced community were able to challenge compensation awards and make complex arguments with respect to land valuation."[112] Since, the state of land records in rural areas also poses an insurmountable barrier in assessment of the market value of land, the RFCTLARR Act unlike the LA Act specifically entrusts the task of updating land records to the collector after the publication of preliminary notification.[113] Further, compensation based on market value may not necessarily enable the land owners to buy similar land at the site of resettlement. Moreover, as against liquid cash an asset like land offers livelihood security to generations[114] therefore, money equivalent of the value of land even though many times higher as provided under the RFCTLARR Act may not secure same status or standard of living to the land owners. Improvement in the condition of land owners envisaged through manifold increase in the amount of compensation under the legislation also presumes land owners avid investors who have the capacity to make proper use of such cash to secure sustainable income over the years. With respect to scheduled castes and scheduled tribes, R&R mandates provision for equivalent land or two and a half acres, whichever is lower. With respect to others, a provision may be made to allot land to those who have been reduced to the status of a marginal farmer or landless only in case of irrigation projects.[115] The minimum land to be allotted in command area in such cases is one acre.[116] The land for land provision therefore, remains highly truncated.

Finally, compensation does not take into account emotional attachment to land, its role in determination of social status of the owner. Many cases of protests against acquisitions are based on claims to different lifestyle, perceptions, values and attitudes as against the dominant perceptions as embodied in law which treats land merely as property or economic resource completely ignoring other perceptions about the relationship between land and people. This brings to question the role played by law in developing and promoting hierarchy and domination by legally recognizing and giving effect to ideologies based on certain perceptions and worldviews while illegitimising other perceptions and worldviews.

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112 *Supra* note 110 at 80, 88.

113 *Supra* note 1, s.11(5).

114 Shankar Venkateswaran, "Industrial Displacement: looking Beyond Cash Compensation," 42(22) *Economic and Political Weekly* 2050 (2007).

115 *Supra* note 1, second schedule, entry 2.

116 *Ibid.*

Rehabilitation and resettlement entitlements

The potential of R&R to bring about improvement in the post acquisition social and economic conditions of the affected families depends on the degree to which the entitlements go beyond providing just compensation for the losses suffered by the affected families. From this point of view, the provision for a house for affected families, including those without homestead[117] and provision for financial assistance to those having cattle to enable them to construct cattle shed irrespective of whether they had the same in the area where acquisition took place have the potential to improve the social and economic status of the affected families. Against this, most of the other R&R entitlements like subsistence grant for a period of one year, transportation cost, one time grant to artisans and small traders, one time resettlement allowance, waiver of stamp duty and registration fee only constitute a response aimed at minimising suffering of the affected families without any potential to improve their conditions. As mentioned earlier, land for land and grant of fishing rights are only in the form of enabling provisions rather than being mandatory and thus, offer a kind of protection that is uncertain.

The legislation offers a choice of annuity or employment. Out of the three options offered in this regard, the first is only to make a provision but does not create a right to be employed in the project or any other project whereas the other two create an entitlement of cash payment whether one time or staggered payment extending to 20 years. The provision for jobs remains dependent on creation of jobs through the project, development of skills and training for those jobs, the minimum rate of employment being pitched at minimum wage.[118] Moreover, this is only an option provided to affected families and given the existing social hierarchy the affected families are likely to consider it a move down the social spiral from being a land owner, a tenant, a person dependent on common property resource, a businessman to a wage labourer. This is an option which is likely to be exercised only as a last resort by people fearing descent into abject poverty but that too is contingent and subject to provision for training, which enables them to take the job being offered. Job in the project does not therefore, stand protected as a right of the affected families, hence, sustainable source of livelihood after the acquisition remains precarious and entitlement to one time or staggered cash payment creates public patriarchy making families dependent on state support rather than remaining in the condition of self dependence being enjoyed by them earlier.

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117 *Supra* note 1, second schedule, entry 1(2).

118 *Id.,* entry 4.

Further, whether mere reservation and offer to buy land out of 20 percent developed land,[119] is to be viewed as a measure towards rehabilitation or resettlement is questionable. This is especially because the cost of the land so bought is deductible from the amount of compensation package. It, therefore, does not create an entitlement to developed land in lieu of acquired land but merely an entitlement to an offer to buy developed land but that too at the cost of parting with compensation equal to the price of the developed land. Furthermore, the use of term 'may' with respect to fishing rights practically deprives them of the status of a right in terms of a claim as it does not embody a corresponding obligation on the state to secure its enjoyment. In fact, its recognition itself is contingent upon the will of the appropriate government.

The losses recognised under the second schedule only relate to economic losses. It is only in case of displacement from scheduled areas, that there is a weak obligation to relocate affected families in a similar ecological zone. Further, it is concerning to note that mere preference to relocate in similar ecological zone is assumed to secure preservation of language, culture and community life of the tribal communities. Given the differential impact of displacement on account of the diversity among those who are displaced it is necessary to bear in mind, as Upendra Baxi suggests that, "diverse population areas – in terms of gender, ethnicity, age, economic levels, other vulnerabilities – cannot be lumped together under general administrative scheme of rehabilitation."[120] Even the economic losses are intended to be mitigated through financial assistance which lacks the potential to prevent impoverishment and thus, cannot be viewed as a contrivance offering a formidable protection to livelihood interests.

Though, the provision for social impact assessment requires assessment of impact of displacement on the people in terms of breakdown of communities but the provision for R&R does not necessitate resettlement of communities in the same area so as to alleviate the impact of such breakdown. The third schedule provides for infrastructural facilities to be provided in the resettlement area which includes facilities for water, sanitation, health, education, grazing, child-care, fair price shops, burial/cremation grounds, playgrounds, community centre, places of worship, traditional tribal institutions, common property resources for forest dwellers, electric connection, post office, seed cum fertilizer storage facility, irrigation and transport facilities. Thus, R&R entitlements whether individual or in terms of basic amenities for the entire community

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119 *Id.,* entry 3.

120 Upendra Baxi, "Notes on Constitutional Aspects of Rehabilitation and Displacement" in *Development, Displacement and Rehabilitation, supra* note 17 at 169.

offer infrastructural support, however, rehabilitation requires re-establishing patterns of social and economic organisation[121] within communities which definitely requires efforts beyond providing infrastructures that support community life. Such support mechanisms may include interaction with the community, organising meetings, discussions, programmes, celebrations at the level of the community for a long duration after resettlement but no such support mechanism is envisaged under the RFCTLARR Act. The mechanisms for ensuring rehabilitation of the displaced communities remain starkly absent from the legislation.

V Conclusion

RFCTLARR Act seeks to convert the 'affected persons' into 'partners in development'. The compulsory nature of acquisition deprives this partnership of being consensual, and the limited role of the affected persons prunes the participation aspect of partnership. Operationalisation of benefit sharing, the third ingredient of partnership, is peculiar on account of the varied categories and the nature and extent of entitlements recognised under the Act.

The Act recognises varied categories of people getting affected by the acquisition of land *viz.*, land owner, affected family, person interested and displaced family. The Act circuitously and interchangeably refers to varied categories in different processes and entitlements under the Act. Thus, whereas the purported recognition of categories of people is broad these categories do not clearly resonate in the entitlements. The preamble of the Act generically refers to affected persons as partners however, the constitution of this category of 'affected persons' remains shrouded in mystery. Because of certain distinctions maintained in the Act with respect to entitlements to compensation and R&R, it is difficult to discern with certainty the partners envisaged in the preamble. Different categories of affected people are enormously differentially placed with respect to their entitlements under the Act. Thus, it is difficult to say that the post-acquisition social and economic condition of all of them would be better than before.

Compensation under the Act though is many times higher than that under the erstwhile LA Act, it still remains limited. *Firstly*, normative standard and minimum level of compensation is laid down only for the category of land owners and tenants. With respect to all the other interests it remains variable based on the subjective assessment of the collector in the absence of normative basis. *Secondly*, compensation as a response to displacement is itself a mirage since the risks that the displaced suffer

121 Michael Cernea, "Public Policy Responses to Development-Induced Population Displacements" 31(24) *Economic and Political Weekly* 1516 (1996).

are far intense and varied than capable of being addressed merely through compensation. Further, even though the compensation under the Act may be many times the market value of the land, still it may not ensure that the land owner is able to replace the land lost with the similar land at the resettlement site. *Thirdly*, norms determining compensation are exclusionary, being based on economic conception of property mentioned above, poor land records, the lack of concern for the developmental potential of land and absence of treatment of displaced as 'stakeholder' or 'share contributor' in development. *Fourthly*, it is naive to think of liquid cash as a substitute for an asset like land which has the capacity to secure livelihood for generations. *Fifthly*, the belief that the increased amount of compensation would offer security of livelihood to generations is based on an unsubstantiated assumption that the displaced are avid investors who know how to reap benefits by intelligently investing cash.

The expansive recognition of varied categories of persons affected by land acquisition reverberates only in certain specific entitlements with respect to provision for resettlement. However, the extent of resettlement entitlements only seek to undo the losses suffered by the people rather than to substantially improve their social and economic condition. This is because of the fundamental failure of the law to recognise acquired land and sacrifice of settled livelihood of people as a contribution made by them towards success of the development initiative. Such recognition would transform the morality of compensation and R&R into a 'just desert' for the contribution made by the displaced. Even the entitlements which go beyond merely undoing the loss are severely truncated and have certain other repercussions. For instance, apart from one time grants which are aimed at providing immediate relief to the people the provision for annuity policies for payment of not less than Rs. 2000 per family for 20 years creates a sort of public patriarchy resulting in loss of self respect of people who may otherwise have been self dependent. Against this mandatory provision for capacity building and training followed by an offer for secured job in the resettlement area or support for self employment appear as better options. Offer for jobs under the Act is extremely contingent depending not only on creation of jobs but also provision for training, skill development and is limited to securing minimum wage. Even when such a job is offered, it may for a person mark a transition from being self-employed into being a wage labourer. There is absence of any provision offering a stake to the affected persons in the new venture that may be embarked upon through acquisition of land. Truncated security to livelihood being offered under the Act falls short of 'benefit sharing' which is an integral aspect of partnership.

The Act unfortunately deals with rehabilitation as a one-time affair limited to providing infrastructure to facilitate the same as marked by the provision for community centre. It fails to offer continued support to the resettled people with ways and

mechanisms for re-forging their social and economic organisation at the site of resettlement especially where the resettled communities are subjected to backlash from the communities already residing in those areas. Organising social activities at the community level, facilitating establishment of self help groups, cooperatives *etc.*, have the potential to re-establish social and economic ties. As suggested by Cernea, those who give their land for new ventures should be considered 'investors of equity' in the new project through sharing of benefits arising out of the project.[122] Subsidies should be offered to them even after they resettle and they should be entitled to special incentives and initiatives of the government aimed at human resource development.[123] Rehabilitation is a long drawn process necessitating state support beyond one time or even continued monetary allowance.

Finally, devoid of consent and participation, adhering to cost-benefit approach with respect to the displaced rather than adopting impoverishment, risk and reconstruction approach, ambiguously identifying and responding to the needs of affected people in a very truncated manner, the RFCTLARR Act not only fails to embody transformatory partnership or even status-quoist partnership but also slips to the fringes of iniquitous partnership and thus fails to make affected people 'partners in development'.

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122 *Supra* note 20 at 62.

123 *Id.* at 66.

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