

A Lot of Scepticism and Some Hope

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After recognising the main reasons to be hopeful about the new Land Acquisition Bill, this commentary critiques two significant structural problems in the proposed legislation: first, the definition of “public purpose”, especially the “informed consent” provision that has been included; second, the price setting mechanism, especially the possibility of an exponential escalation at the metropolitan edges and the creation of certain bizarre rural-urban boundaries. The article concludes by raising a basic question: If the State has been the problem in land acquisition, why is more of it the solution?

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The United Progressive Alliance (UPA) government’s new Land Acquisition, Rehabilitation and Resettlement Bill (LARR) is a very significant legislation, not least because it is on a subject that has created much injustice and misery over the years and keeps igniting into political turmoil and violence in recent times. This is the first proposed replacement (not amendment) of the notorious Land Acquisition Act of 1894, and the first ever national legislation on rehabilitation and resettlement (R&R). Therefore, there are reasons to be hopeful. But, this is also a Bill that could create fundamental changes in the operations of land markets in India, and because other fundamental changes have not been made, nevertheless be unsuccessful in quelling the turmoil of recent years. Since it is not possible to discuss all that is good and bad in the LARR in this space, let me list the principal benefits and discuss in detail the two most important causes for concern.

Reasons To Be Hopeful

There are four main positives in the LARR and they all point in the same direction – more benefits and rights for people whose land will be acquired.

- First, landowners of record will be paid much more than they used to. There will be a process to determine the “market price” of land. Compensation will be no less than four times this price in rural areas and twice this price in urban areas. Later I argue that this benefit, as designed, has the potential to upend peri-urban land markets in India.

- Second, since the Bill has a referendum mechanism for some situations – the approval of 80% of landowners is required when the private sector is involved in projects larger than 100 acres – it should now be possible to identify some lands that are simply not for sale. I argue later

that this benefit too has a very serious problem.

- Third, the affected population that is landless will be compensated with income for 20 years, plus other immediate benefits, and will have to be included in the R&R package. This will be the first ever legislated relief for the landless who are displaced by acquisition.

- Fourth, any acquisition of 100 acres or more will automatically require an R&R package (50 acres if the acquisition is by private firms in urban areas); if implemented as detailed in the bill, this should provide better conditions than the virtual internment camps of the past.

We should be clear that these benefits to land-losers and other project-affected persons are long overdue. In fact, it would be useful to not think of these as benefits, in case there is even a whiff of a suggestion that these are undeserved favours rather than justice served after decades of rapacious land takings.

Reasons To Be Sceptical

Let us begin with a clear understanding of the two questions at the core of all land acquisition law: First, what is the justification for taking a given piece of land? Second, how will compensation be determined? The answer to the first question has always been: public purpose. The real question then becomes: what constitutes public purpose? The answer to the second question has been: by the local state authority (typically the district collector) based on market price. There are other issues, but they are secondary. The most contentious of these secondary issues is the question of what acts of private industry may be considered to serve a public purpose. These practical matters rest on the bedrock of the fundamental constitutional issue of the meaning of private property rights and the conditions under which the State may deprive a citizen of these rights. This fundamental issue is not at stake here, so let us examine the core practical matters: public purpose and the pricing process.

Public Purpose

The origins of eminent domain (or land acquisition) law in India can be traced to

the colonial state's need to create infrastructure to facilitate the movement of goods and people and enable commerce; these first "public works" were typically canals and roads; later came railways, mines, and irrigation schemes, and even later came factories and other business establishments. One of the main reasons to use eminent domain, then and now, is to get the needed land cheaply. Another, possibly equally important reason, is to get it quickly by avoiding protracted negotiations with numerous small landholders and sidestepping the legal problems of sorting out the considerable ambiguities about who "owns" what. In other words, land acquisition law is essential to collate multiple properties and to own them "free and clear" of legal encumbrances.

This LARR gives the impression that the recent problems with land acquisition have happened because of the reckless acts of private industry and that it will rein in such behaviour. The facts are quite the opposite. The conflicts over land acquisition today are the result primarily of the actions of the independent Indian state, undertaken over six decades of land takings and displacements, paying minimal prices and providing very little rehabilitation. Dams and irrigation schemes have contributed by far the largest quantities of acquisitions and displacements. This is entirely a state enterprise. Transportation, environment, power, and defence are other major categories that have caused significant displacement and are entirely or almost entirely in the domain of the State. In my rough estimate, the private sector has been responsible for possibly less than 10% of India's total acreage taken and population displaced; the State is responsible for the remaining 90%. One Hirakud or Bhakra Nangal or Sardar Sarovar takes more land than a 100 or even 200 Nano factories.

The situation is not a lot different even in this post-liberalisation period of market ascendance. It can be shown that a majority of the land-related conflicts today are over state projects on water, power, transportation, and other infrastructure. The Special Economic Zone Act of 2005 may have lit the fuse that blew this powder keg, but the narrative of "rich capitalists vs poor farmers" is a

convenient myth. As far as land acquisition is concerned, it has always been and still remains "the State vs peasants" (especially the most vulnerable ones: tribals and marginal farmers).

Till now, almost any project could be and was defined as a public purpose project; all state projects certainly, and most private projects too, if they were large enough to need state assistance on land acquisition; job creation has normally been considered sufficient reason to meet the public purpose criterion. The LARR provided an opportunity to address the omnipotence of "public purpose", a chance to constrain and limit it. But it does not.

The definition of "public purpose" in the Bill begins with state projects: two clauses on defence, transportation, irrigation, power, etc, and three clauses on project-affected people, weaker sections, displaced persons, and persons affected by natural calamities. Clause (vi) brings in "Public Private Partnership projects". And finally in clause (vii) comes this: "the provision of land in the public interest for private companies for the production of goods for public or provision of public services". This could mean almost anything. Certainly the entire manufacturing sector can be included in this, possibly much of the service sector too. This is business as usual.

The 'Informed Consent' Rule

But the really troubling part comes in the next paragraph. It is a single sentence that suggests that the framers of this Bill have chosen not to understand why, after the colonial Land Acquisition Act had done the job for over 115 years, it has become necessary to abandon it. The sentence in question imposes an "informed consent" rule on acquisitions of 100 acres or more, whereby 80% of the affected population will have to agree to the acquisition deal being offered. This rule is imposed on the clause (vi) and clause (vii) projects described above – that is, public-private and private sector projects – but the entire state sector is absolved of this responsibility. Which means all new dams and irrigation schemes, all hydro and nuclear and most thermal power projects, all roads and railways and airports and

ports, and most mines and all oilfields will be outside the "informed consent" rule. Recall that over 90% of all land acquisition and displacement have taken place precisely for these projects. The "informed consent" rule, as written, turns out to be a sham.

Why is this so important? Let me try to explain briefly. One of the findings in my ongoing research is that some land is "priceless". This is not because people are emotional and irrational about land, but because under certain conditions – when the land has no substitute for its owner, when there is little market or price information for that land, when the owner gets more utility from the current use of the land than can be compensated by the new land use – land can become priceless. We cannot imagine that a new thermal power plant could be set up where the Khajuraho temples stand today, nor can we imagine that if oil were discovered underneath Connaught Place in Delhi, excavators would move in to dig it out. These are very valuable lands and there is almost no use, certainly no industrial use, that could pay for them. Yet our imagination often balks at the idea that agricultural land could be very valuable, so much so that it would not be possible to buy it at market price and convert it to almost any other economically viable use.

As recent events have shown, these lands do exist, and they effectively are priceless. This includes well-to-do cashew farms in Goa and the impoverished Niyamgiri Hills in Orissa. When this priceless land sits on an immovable resource – be it an existing airport that has to be expanded or a bed of iron ore that needs to be extracted – the conditions exist for serious conflict.

The 80% "informed consent" rule, one assumes, is a way around this conflict. It is a method to determine which land is truly priceless. But since the LARR does not require the State to meet the 80% rule, state projects will find out which land is priceless the hard way – when conflict erupts. One of the main reasons for the creation of this Bill is to avoid conflict over land acquisition; the Bill assumes that a high price is sufficient for that purpose. I suggest that a high price is necessary to avoid conflict but not

sufficient because some land is priceless. Because this Bill does not think it necessary for the State to find out which land is priceless before it blunders into conflicts, there will be conflict.

The Pricing Process

The price setting process detailed in the LARR follows the same basic principles of the past: a “market price” discovery process by the collector, followed by an augmentation of that discovered price – multiplication by four in rural areas and two in urban areas in the new Bill. The hope surely is that this will raise prices high enough for most landowners to become compliant sellers. But there are serious problems in this approach. We begin with a reiteration of what the courts have been saying for years: it is not easy to discover the “market price” of rural land.

First, there are few land transactions at a village scale; in Bengal, where there is supposedly an active land market, a recent study by Bardhan et al (2011) found that one acre of land is bought and sold per village, per year; similar information comes from an earlier study (Sarap 1996) in rural Haryana. Second, a significant but unknown proportion of the transactions are distress sales that tell us more about rural inequality, poverty, and indebtedness than about the land market. Third, the transactions that do take place are often improperly recorded, in order to underpay stamp duties; and, where they are properly recorded, it is because the State has preemptively set the stamp duty, regardless of declared sale price; in effect, the State has already set the price of land. Fourth, there is so much variation in land quality (by yield, number of crops) and size of landholding that it may be impossible to find comparable transactions.

Therefore, in deep rural areas, the discovered “market price” will, in reality, frequently be a judgment of the district collector, a fact that is tacitly admitted in the Bill itself. Why then go through this expensive and time-consuming charade? On the other hand, on the edges of metropolitan areas, there are active land markets and known land prices, approaching and crossing a crore per acre around Mumbai and Delhi. Why double this price?

These questions have added urgency because the multiplication of “market price” to turn it into “acquisition price” has the distinct possibility of increasing land prices exponentially (by geometric progression) in some regions. This is because the “acquisition price” in round one is likely to become something close to the base “market price” in round two; whereby the “acquisition price” in round two could very well be double or quadruple the “acquisition price” in round one; which means, in theory, it could be four or 16 times the “market price” of round one. If this prediction turns out to be even partially correct, the LARR process will effectively remove the most desirable land (at the metropolitan edges) from the market.

Moreover, there appears to be no recognition of the fact that this pricing formula will create bizarre boundaries – where the price of land on one side is twice as high as on the other. In defiance of some basic and universal market principles, the more expensive side of this boundary will be rural, the less expensive will be urban. This is so outlandish that it may be impossible to predict how market agents – the buyers and sellers – will respond. This must be corrected.

There is every reason to support the intent to deliver more money to the land-losers, but there are better ways of doing it than what has been proposed in the LARR. The best approach, I suggest, is to set floor or minimum prices by bands/regions at the state level. These prices should be very liberal, but not legislated to be X times “market price”. Prices near urban centres should be higher than prices at locations further away. Beyond that, it is probably best to let states work out the rates iteratively. In Haryana, where this model is in use now, set prices (declining in bands away from Delhi) have been promulgated thrice in five years. Therefore, these prices will change frequently, perhaps as often as every year. It would be wise to borrow from and improve upon the Haryana model. But if there is a strong preference for using a “market price” approach (the courts appear to favour this approach), there are better ways too. Because of space limitations, we will have to leave it at that.

A Coda

There is a central, philosophical puzzle in all this. If the State has created the problem (and it has) why is more of it the solution? The LARR has a large new institutional architecture embedded in it, including an administrator; a commissioner for rehabilitation and resettlement; a rehabilitation and resettlement committee; a national monitoring committee for rehabilitation and resettlement; and a land acquisition, rehabilitation and resettlement authority. A significant majority of the Bill itself, in terms of the number of words and pages, is devoted to this new architecture and its workings.

On the one hand it is not hard to understand why this is so. The State presumably recognises the error of its ways and now wishes to deliver fairness and justice over land acquisition; who better to deliver it than the State? Moreover, what the State knows better than anything is to reproduce itself, primarily by creating more watchdogs to discipline its own predatory behaviour. Never mind that almost every state watchdog has become a predator itself, so much so that there is now a national movement to create a super-watchdog to discipline other watchdogs. Never mind that the new architecture will increase transaction and opportunity costs for the project developers at the same time that it extracts rents for itself.

I do not mean to suggest that a new institutional architecture is not needed, but that it has to be built from different fundamental principles. The most important principle is to include all stakeholders – project-affected people, civil society, and most important, political parties – in the price setting process itself. Otherwise we will see more of what got us here – land disputes that get fanned into conflicts by political parties and state institutions that behave as we have come to expect.

REFERENCES

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