

Can the Bill Bring Desired Outcomes?

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The Land Acquisition, Rehabilitation and Resettlement Bill (LARR) is considered to be a flawed piece of legislation. An alternative method based on auction based pricing mechanism is suggested here.

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Introduction

The Land Acquisition, Rehabilitation and Resettlement Bill (LARR) was tabled in Parliament on the second last day of the monsoon session of 2011. The initial draft was prepared by the National Advisory Council (NAC), and after a review by the Cabinet, a revised version was placed on the Ministry of Rural Development's website, for public discussion and feedback. Currently, the bill is before the Standing Committee, and is expected to come up for debate and voting very soon.

Eminent domain – the state's right to confiscate private property for a public purpose – is a term coined by the Dutch jurist Hugo Grotius in the seventeenth century. Most nations in the modern world have acknowledged it in one form or another, but have also attempted to place restrictions on such confiscatory powers to prevent abuse. Chapter 28 of the Magna Carta requires that cash payments be made against any expropriation. The Fifth Amendment of the American Constitution includes the famous 'takings clause': "private property [shall not] be taken for public use, without just compensation." Article 17 of the *Universal Declaration of the Rights of Man and the Citizen*, the French Revolution's defining document, prohibits the confiscation of private property except for "public necessity" and only after the owner has been "previously and equitably indemnified."

Eminent domain has been a controversial instrument of state power anywhere in the world, and has often triggered a clash between two widely held values – protection of private property and promotion of public interest. In India, the use of eminent domain has become a tricky political issue, often leading to protests, unrest and violence. The troubles in Singur and Nandigram in West Bengal, which arguably led to the electoral defeat of the CPI (M) led Left Front after more than three decades in power, illustrates that no political party today can afford to take the land question lightly. What has heightened tensions is the rapid growth unleashed by the economic reforms of the early 1990s, which has built up enormous pressure to convert agricultural land into factories, industrial parks, infrastructure, urban housing projects, SEZs, etc. The fact that the

fruits of this new growth has been concentrated at the top means that land acquisition efforts are often seen as the abuse of state machinery by a politically empowered elite trying to grab resources from an impoverished majority.

The Land Acquisition Act, 1894

In India, the legal foundation for eminent domain is established by a colonial era law, the Land Acquisition Act of 1894. The Act has undergone some amendments since Independence, but its basic character remains unchanged. The Act outlines the process through which the government can acquire private land. This includes a preliminary notification, adequate opportunity to affected parties to file objections, a final declaration and the issuance of financial award to the dispossessed. Section 11 stipulates that the Collector will determine the value of the seized land on the basis of local market price, and pay compensation within two years of the initial notification. There is no detailed instruction on how market price is to be determined.

Section 17, the controversial “urgency clause”, is a provision that allows for land to be acquired quickly in special cases, within fifteen days of initial notification. Although the Act empowers the state to confiscate land mainly for public projects like roads and railways, part VII adds that land can be acquired on behalf of a private company if the nature of the work involves a public purpose. There is a widespread perception that the urgency clause and the company rule have been rampantly misused in recent years by mining and industrial interests, who have bribed politicians to exploit these loopholes. The judiciary has traditionally given the administration wide latitude in interpreting what constitutes public purpose. The Supreme Court, has stated: “The concept of public purpose has to be held to be wider than ‘public necessity’”, and has upheld the use of the Act to acquire land for a paper mill as well as a factory for electric compressors [Desai, 2011]. It is also worth noting that a Constitutional amendment of 1978 abolished the right to property as a fundamental right and reduced it to statutory status.

One complication that arises in the process of land acquisition in India is that property rights are often ill defined. This is especially true in tribal areas, where tribal groups have traditionally depended on the forest commons for produce and cultivation, but do not hold formal title deeds to the land. Tribals’ access to forest land has recently come under threat both from conservation efforts and increased mining activity triggered by high mineral prices in the international market. Absence of formal property rights has deprived *adivasis* from receiving compensation when their traditional grounds are encroached upon or declared off limits. The Forest Rights Act, 2006, is an attempt to remedy this, but by all reports, its implementation has been mired in bureaucratic

subversion, red tape and corruption, with only 39 per cent of applications having been granted titles so far [Government of India, 2011].

LARR, 2011

The bill currently under consideration will introduce some significant changes to India's land acquisition law. The foremost among these is the vastly increased compensation burden placed on the government. The cash award is now required to be at least four times the estimated local market value of land in rural areas, and at least twice in urban areas.

The bill also requires that all affected parties be paid a rehabilitation and resettlement (R&R) package in addition to cash compensation for lost assets. Affected parties are defined as those persons and families whose primary source of livelihood was the land that is being taken. Although this leaves some room for interpretation, the intended beneficiaries seem to be tenants, sharecroppers and agricultural workers who were employed on the seized plot. The stipulated R&R package includes a variety of entitlements, including transportation and resettlement allowances, a monthly stipend for one year, and a job for one family member which can be exchanged for a lump sum payment. The compulsory R&R benefits add up the cash value of nearly Rs. 6.5 lakhs for every affected family. There are, in addition, conditional benefits, such as the provision of constructed housing when there is loss of homestead, some land-for-land in the case of irrigation and urbanisation projects, and a share of capital gains if the land is resold undeveloped. Even industries buying land on the open market will have to meet R&R obligations if the procured area is 100 acres or more (50 acres in urban areas).

In addition to increased monetary liabilities, the bill also raises the procedural bar for land acquisition. A committee of independent experts must carry out a social impact assessment of the project, an administrative committee must review if it serves the public interest and also if the benefits outweigh the costs, and disputes are to be referred to a specially constituted body instead of civil courts. Multi-cropped land is not to be acquired except under special circumstances, and such acquisition must not exceed 5 per cent of the cultivated area in the district.

Analysis

The proposed bill can be subjected to two kinds of criticism. The first arises from a sense that the letter of the law leaves too many loopholes, which will allow the spirit of the law to be compromised. The second kind of criticism targets the spirit of the law, and casts doubt on whether the law can produce desirable outcomes even if faithfully implemented.

Regarding loopholes, critics have pointed out that the scope of the enhanced safeguards and compensation obligations have been severely curtailed by granting priority to a slew of existing laws, as listed in the Fourth Schedule. This means that land acquisition for atomic power plants, mining, highways, railways and SEZs are exempt from the new rules. The ill reputed urgency clause remains (but is restricted to defence and disaster related needs), and the definition of public purpose is still left vague enough to be manipulated.

In our view, LARR is a fundamentally flawed piece of legislation even (and perhaps especially) if it does not end up being subverted. The central question on land acquisition is how to price an asset that its owner must surrender involuntarily. The bill tackles this question essentially through guesswork rather than applying basic economic principles. Its arbitrary mark-up formula carries no guarantee of achieving either justice or efficient resource allocation. The bill betrays a lack of understanding of the functioning (and non-functioning) of particular markets. Instead of designing clear and simple algorithms for bureaucrats to follow, it stacks complex layers of additional bureaucracy in the hope that the sheer weight of manpower will somehow crush the problem. We will discuss three important points in detail.

(a) *Market price as benchmark*: There are numerous problems with equating fair compensation and market price. In rural India, land transactions are extremely infrequent and records are thin. This gives a corrupt official insufficient data and sufficient discretion to under-estimate market price. Price is often under-reported to escape stamp duty, and genuine distress sales further deflate it. Industrialisation or commercial development of a region typically leads to a real estate boom, making historical market prices a poor measure of the value of the land being seized. These practical problems apart, there is a fatal conceptual error in using the price from *voluntary* transactions as a measure of owners' value in *forced* acquisitions. Owners are owners for a reason – they find the market price inadequate compensation for their land. Otherwise, they would have sold it!

Fair compensation should therefore be at a rate above the market price. The question is, by how much? The bill simply applies an arbitrary mark-up, offering no reason why this particular number was chosen. It may not be enough in some situations and may lead to gross over-pricing in others. The problem with over-pricing is not only that it may lead to serious resource misallocations (socially beneficial projects may not be undertaken in some locations), it may also compromise farmers' interests by depriving them of windfall gains from profitable land conversion and keeping them stuck with the poor returns from agriculture. Colloquially speaking, it amounts to killing the goose that lays the golden egg.

The mark-up formula also opens up possibilities of strategic behaviour. Companies will now clearly have an incentive to bribe officials to report even lower market prices to neutralize the mark-up. [Banerjee, 2011], on the other hand, points out that once a project plan becomes known, people will have the incentive to carry out quick trades at vastly inflated prices in order to receive much bigger amounts as compensation from the government. Finally, since the R&R entitlements are independent of the recipient's land holdings, they have the potential to vastly increase project cost in places where land is highly fragmented.¹

(b) *Compensation for livelihood losers*: LARR entitles non-owners like sharecroppers and agricultural workers to the R&R package. This attempt to extend protection to all victims of economic change is overdue, but the solution offered suffers from a lack of understanding of how effects are mediated through markets. The diversion of some farmland to other use will generate an inflationary pressure on land rents and a depressing effect on agricultural wages in the local economy. The adverse effects will, therefore, be diffused among *all* tenants and agricultural workers in the region, not merely those who were employed on the particular plots that are being acquired. LARR, however, narrowly targets only the latter group. A better strategy would be to invest comprehensively in the local economy, including NREGA style job creation programmes, skills retraining, infrastructure building, etc., improving economic opportunities for the entire community.

(c) *Public purpose and multi-cropped land*: LARR purports to restrict the scope of eminent domain to projects which have a clear public purpose and precludes the acquisition of multi-cropped land except in rare cases. Let us set aside the question whether these objectives can be met, given the escape clauses in the text, but focus on whether they are desirable objectives. The authors of the bill appear to be caught between utilitarian and rights based perspectives. On the one hand, the preamble lays down the following aim: "improvement in [affected persons'] post acquisition social and economic status." On the other, the insistence on public purpose seems to suggest that the interest of a few may be sacrificed for the interest of many. If the law can successfully protect and even improve the economic conditions of farmers who stand to lose assets and livelihood, there is no reason why it shouldn't act as a mediator in acquiring land for private industry. Indeed, such participation would be desirable

¹ For example, in Singur, where the land earmarked for the Tata factory had 12,000 owners, the total bill for the compulsory R&R payments would have amounted to at least Rs. 780 crores, not counting compensation money and other benefits. For perspective, note that the total investment for the project was Rs. 1500 crores.

given the high transaction costs involved in large private projects and the potential for forced eviction by the land mafia. If compensation amounts are chosen right so as to fully capture the economic value of lost agricultural production, industrialists seeking sites for factories will be forced to internalize this loss. If they still want multi-cropped land, it must be because the locational and logistical advantages (such as proximity to raw material sources, electricity, water supply and skilled labour) outweigh not only private but social costs [Ghatak and Ghosh, 2011] for further discussion on these points). Land acquisition legislation should focus on safeguarding the interests of displaced farmers. It should avoid creating unnecessary constraints and dealing with a confused multitude of objectives.

An Alternative Method

We have argued elsewhere [Ghatak and Ghosh, 2011] that an auction based pricing mechanism should work much better than the arbitrary and rigid mark-up prescribed by LARR. Here we will present the gist of the idea. The interested reader may look at our longer article for details.

We propose that as a first step towards acquiring land for any project, the government should buy land in the general neighbourhood through an auction. Next, owners of unsold plots that lie within the intended project site can be compensated with land-for-land awards, that is, by giving them cultivable land of equal area outside the project site. This will consolidate the acquired land into contiguous territory where the project can be located.

This mechanism has two major advantages. First, it incorporates a transparent way of determining price that takes discretion out of the hands of corruptible officials and bases it on the farmers' own valuation of land, elicited through competitive bidding. This will substantially reduce the coercive element of eminent domain and defuse the political resistance against development. Second, it will reallocate the remaining farmland to those farmers who place the highest value on land. Normally, the land market would carry out such a function, but as is well known, rural land markets are highly imperfect in India. It is imperative, therefore, that the acquisition process, in effect, substitutes for these missing markets.

India is a country that is both poor and entrenched in social divisions and unequal power relations. If we are to achieve a high level of general prosperity and well being, it is necessary not only to focus on distributive justice but also on increased productivity. The latter demands large scale shift of resources from traditional agriculture to modern industry and services. Land acquisition laws are pivotal in achieving this delicate balance between fast growth and just income distribution. Unfortunately, the new legislation comes up short.

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