Land Acquisition, Governance and the State: Issues and Complications

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Examining the volatile issue of land acquisition vis-a-vis the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, the article explores the concept of 'eminent domain' and the state's power to acquire private land, the source of this power, and the justification for its use

INTRODUCTION

Land acquisition by the state is an issue that is fraught with numerous complications, strong opinions and conflicting viewpoints everywhere in the world. In India, it has contemporary relevance, given the focus of the present government on economic growth as a means of development and poverty eradication, and the consequent pressure on acquiring land for industrialization, infrastructure development, urban expansion, raw material and energy.

There has been increasing public awareness about the land acquisition issue because of the widespread protests and agitations, which have been highlighted by the media. There is social unrest, Maoist violence and a cloud of suspicion over the state using its powers for the well-being of a well-connected few to the detriment of the majority of the people.

There are weaknesses in the laws relating to land acquisition, especially regarding public purpose and the just compensation to land owners. The exploitation of these by the state has led to discussions on the need for a more contemporary law that walks the line between economic growth, equitable distribution and human rights. As an outcome of this dialogue, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (LARR) Act 2013 came into force on January 1, 2014.

This paper examines land acquisition by the state from the perspective of governance. It begins with studying the concept of 'eminent domain' that provides the basis for the state to appropriate private property; then delves into the philosophical underpinnings of LARR and how it is different from its predecessor, the Land Acquisition Act of 1894. It further discusses the state's power to acquire private land, the source of this power, and the justification for its use.

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It then examines the matter of public purpose regarding land acquisition and the issue of fair compensation. The third section describes the shifts in thinking from government to governance and enquires whether the change from the Land Acquisition Act (1894) to LARR epitomises this thinking.

It also addresses broad questions such as whether LARR will help better governance and whether it requires the state to relinquish or devolve some of its powers. In the process, this essay seeks to discuss the complications around land acquisition and the complex inter-dependencies within them.

EMINENT DOMAIN

The basis for LARR, the Land Acquisition Act of 1894, and land acquisition by the state in most parts of the world, lies in a concept called 'eminent domain'—the power of the state to acquire private property for public purposes with reasonable compensation. This is a politically sensitive instrument of state power because it can not only help economic and technical progress, and inclusive growth, but can also trample on property rights, economic interests of the vulnerable group, and fundamental principles of justice.

The right to private property is fundamental to liberal democracy and free market principles. For those who believe that a state taking away the property of its citizens is an act of robbery and, therefore, sign of a weak, klepto-cratic or a less-evolved state because it exists to protect property rights, let me clarify that the state can acquire, confiscate and appropriate private property with or without compensation and frequently does so, even in countries with sophisticated legal systems.

Eminent domain is as old as political society itself and is deemed necessary because 'public projects cannot be blocked by the recalcitrance of persons who happen to own property in the path of improvement'. When it is exercised, a corresponding right to compensation arises.

PROPERTY, SOVEREIGNTY AND POWER

As a legal term, property denotes certain rights (and not material things), most importantly 'my right to exclude others from interference with my enjoyment of that which the law recognizes as mine'.This right is not a relationship between an owner and a thing; it is one between an owner and other individuals, with reference to things.

The distinction between property and sovereignty goes back to Roman law and its discrimination between dominium, or rule over things by the individual, and imperium, or rule over individuals by the king or state. Dominium over things was also imperium over

fellow human beings; land was power and the landlord was, to the tenant, an agent of the state.

The modern economic and political system changed this by making land a mere factor of production and seeking to simplify and modernize the laws in order to commoditize it, and take it out of the hands of the landed aristocracy signalling, thereby, the end of their political power and control. Contemporary laws around property and related rights have a basis in this modernization process.

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Cohen (1927) observes that no individual rights can be exercised in a community without public regulation and, in the case of property rights, the state enforces an owner's right to exclude others and places restrictions and duties upon owners on matters such as usage of the land and what will be done with it upon the owner's death.

The state can also deprive a person of his/her property, justly so, when done in public interest, and there is no absolute principle of justice that requires the payment of compensation for this (although Cohen says that it is generally advisable to do so).

What is the source of the state's power in the eminent domain?

The 17th century philosopher Hugo Grotius ('On the Law of War and Peace') rationalized the foundation for state power in the recognition of transferability of rights. Rights are powers and faculties that humans possess and are, therefore, commodities that may be traded like all other possessions.

Rights come to the state from private individuals through collective agreement—innumerable, separate and sequential decisions that occur over a protracted period of time during which individuals agree to form institutions that govern society by imbuing them with some of the power that they naturally possess. These institutions gel into a single coherent entity, the state. The state's power is, thus, the product of wilful transference of individuals' powers or rights to it.

Eminent domain is particularly controversial because it overrides individuals' right to property which, in liberal democracies, translates to wealth, income and a means to livelihood, and is, thus, a base for other rights and democracy, market principles and economic growth. Yet, despite its criticality to the system, the Right to Property is not always recognized as a fundamental right.

In India, the Constitution had designated the Right to Property as a fundamental right. The 44th Constitutional Amendment of 1978 changed this to a Constitutional one under Article 300-A, for which legal remedies and protection moved from the powerful Article 32 to Article 226.

In the move from the Land Acquisition Act 1894 to LARR, the state continues to have the power to acquire land from private owners if it wishes. The differences between the two laws lie in the clearer definitions of public purpose and compensation, restrictions around the acquisition of multi-cropped land (which, according to several commentators reflect a concern for aggregate food production and prices, and not the property rights of land owners), procedural safeguards (in the form of adequate notification, social impact assessments, the use of *gram sabhas* in

obtaining consent, etc.) and narrowing the urgency clause to national defence, security and natural calamities.

Some of the inadequacies of the previous law around eminent domain continue in LARR, especially the obfuscation of the scope of LARR when land is acquired under the 16 other laws of land acquisition; as the state acquires a bulk of its land using the Land Acquisition (Mines) Act (1885), the National Highways Act (1956), the Coal Bearing Areas Acquisition and Development Act (1957), the Railways Act (1989) and, more recently, the Special Economic Zones Act (2005).

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THE ISSUE OF PUBLIC INTEREST

The power of the state to forcibly acquire land from private individuals is widely (albeit grudgingly) accepted when carried out in public interest, for a public purpose. The public purpose or public interest (and I use these terms synonymously) objective is critical to the justification of the use of eminent domain, at least for a democratic government, in the public eye. This begs the question—what is public interest?

An examination of the literature on public interest suggests that this is one of those admirably flexible terms that affords most users a measure of identification; that there is no clear agreement as to what it constitutes and that this flexibility around the term facilitates considerable room for manoeuvre for decision-takers and policy makers.

Even so, public interest is the standard that guides the execution of law and introduces objectivity, order and unity into an administration. The task of the government in a democracy is to adjust competing socio-economic forces. Public interest is the standard that should determine the degree to which the government lends its forces to either side.

In India, much of the recent conflict around land acquisition has been centred on the issue of whether the government can forcibly acquire land on behalf of private companies, corporate interests and other private profit-making entities while claiming that this has a public purpose.

The Land Acquisition Act of 1894 stipulated public purpose behind land acquisition and left its interpretation to the state, allowing for the use of eminent domain on behalf of private entities. This developed into a means for powerful industrialists, bureaucrats and politicians to use leverage to grab land arbitrarily without paying just compensation.

LARR defines a set of activities as coming within the realm of public purpose. Whereas it continues to permit the use of eminent domain for private entities, it requires the consent of 80 per cent of the affected families in these cases (75 per cent for public-private partnerships) through a prior-informed process, before eminent domain can be exercised for the remaining land.

The prior-informed process includes a social impact assessment that determines the public purpose in a particular land acquisition exercise to be undertaken by an independent entity (other than the state, the sellers and the buyers). The social impact assessment uses participatory mechanisms and elicits opinions from a wider cross-section of people than those directly affected (for example, the social impact process recognizes the role of the *gram sabhas* in Schedule V and VI areas and involves

the indirectly affected, such as agricultural labourers, as well). LARR is thereby also compliant with the *panchayats* (Extension to Scheduled Areas) and the Forest Rights Acts of 1996 and 2006, respectively.

LARR ultimately takes the view that whereas the market works well in bilateral transactions, its effectiveness drops exponentially as the number of parties to a transaction increases, especially when property rights are poorly defined, land records are fuzzy, courts work at a glacial pace and the likely outcome of large-scale land acquisition through the market would be a legal quagmire. LARR sees state participation as necessary in such cases because of the reduced transaction costs and expedited processes that occur due to the value attached to equity and justice, and because the state has an interest in enabling socially useful projects to succeed.

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The Issue of Compensation

To many, the entire brouhaha around land acquisition boils down to a single and rather more mundane issue—whether the owner is adequately compensated for the loss of his or her land.

Kratovil and Harrison (1954), identify two irreconcilable theories of compensation. The first is 'owner's loss'—that compensation should aim for the owner to be in as good a financial position as she or he would have been in if his or her property had not been acquired. The second is 'taker's gain'—that the state should pay for only what it gets, not the larger losses suffered by the owner because that would impose an inordinate drain on the public exchequer.

The Land Acquisition Act of 1894 was aligned with the second theory—it laid down the principle that compensation should be equal to the local market price for land and that the market price should be calculated based upon the average price of all land transactions completed in the area in the previous three years.

This was grossly unfair because, in many regions, land transactions are few and not very well-documented and leave room for officials to manipulate figures; the full value of land deals is often concealed in order to evade stamp duties, and distress sales often constitute a bulk of previous transactions. Moreover, given that land acquisition often leads to appreciation in local land prices, the dispossessed landowner is usually unable to buy back land with the compensation money, leading to land alienation.

LARR aligns itself with the first theory. It combines acquisition, compensation, rehabilitation and resettlement into a single Act, specifies the compensation amounts and the basis for their calculation clearly (LARR Schedule I), recognizes the claim for compensation of those who have not lost land but whose livelihoods have nevertheless been affected, outlines rehabilitation and resettlement entitlements of land and livelihood losers (LARR Schedules II to VI), and prescribes mandatory procedures for these to mitigate the negative impact of displacement. It also includes all private purchases of land above a threshold level within its ambit while requiring prior consent and evidence of public purpose in these transactions. In the process, it aligns itself with the seller of the land.

Involuntary land transactions are now increasingly difficult; compensation is much higher and procedures for rehabilitation and resettlement are clearer and more inclusive. These make land acquisition much more expensive, burdening the taxpayer and possibly placing a brake on the industrialization process.

Ghatak and Ghosh in the article "The Land Acquisition Bill: a Critique and a Proposal" (2011) suggest that the use of a market price for a voluntary transaction as a proxy for an owner's value in forced acquisitions of land is fundamentally flawed. The value of a plot of land to its owner, they say, is not tangible or subject to objective measurement—it is subjective and whatever the owner deems it to be.

In a perfect asset market (which the market for agricultural land is not; it is thin, fragmented, and riddled with friction) all current owners value their asset more than the prevailing market price, otherwise they would sell and not hold. Market price is, thereby, a lower bound on valuation and not a good estimate of compensation in the case of assets that are forcibly seized. On the other extreme, any system of compensation involving a negotiated price provides incentives for landowners to make exaggerated claims. Any acquisition process, therefore, must feature a formula for determining compensation amounts that reflect the dispossessed owner's own valuation. The stipulated compensation formula in LARR is weak because it uses no inputs from landowners, with respect to their own valuations.

There are merits to this argument from the perspective of market failure in the form of inefficiencies from transaction costs, agency problems and informational asymmetries in incomplete markets. Yet, alternatives to market price, in some form or the other, as a basis for just compensation are not clear. LARR does reasonably well in providing a set of transparent and fixed rules regarding compensation (though this is based upon market price) and in leaving less scope for the discretion of officials and experts in this matter.

GOVERNMENT, GOVERNANCE AND LARR

LARR recognizes the claims of those who have not lost land but are nevertheless affected by the acquisition. It specifies compensation amounts and their basis clearly and outlines rehabilitation and resettlement entitlements of affected populations. It defines a set of activities as constituting public purpose and has a narrow urgency clause in place. Thus, it makes involuntary land transactions much more difficult and the compensation for loss considerably higher. It also uses local people's institutions in the acquisition process and brings more people within its ambit.

'Government' to 'Governance'

The term 'government' is associated with formal institutions of the state and their monopoly over legitimate coercive power. It is characterized by an ability to take decisions, a capacity to enforce these and the formal institutional processes that operate at the level of the nation-state to maintain public order and facilitate collective action. It seeks to enable the state to cope with external challenges, prevent conflict among its members, procure resources and frame goals and policies.

'Governance' has two (closely related but nested) meanings. In the first, governance can refer to any mode of co-ordination of inter-dependent activities. The second meaning is heter-archy itself, which involves the self-organized steering of multiple agencies,

institutions and systems, each of which are operationally autonomous from one another and yet are structurally coupled due to their mutual inter-dependence.

Governance, therefore, includes other actors (in addition to the government, such as civil society organizations and the private sector). It is associated with the modern state that has welfare and developmental functions as well as administrative responsibilities. It seeks outcomes that are similar to those of the government but with processes that blur the boundaries between public, private and voluntary sectors, and with mechanisms that are without the authority and sanctions of traditional institutions of government.

LARR and Governance

The actors and institutions involved in the land acquisition process under LARR include the state Social Impact Assessment (SIA) units, independent practitioners, social activists, academics, technical experts, public functionaries, requiring bodies, CBOs, CSOs, NGOs, the media, political representatives at different tiers of the government, environmental agencies, institutions of local self-government, *gram sabhas*, governments at the district and sub-district levels, and various other public forums—each operating with its own internal code and logic, in its own strategic and structural context, having its own values, visions, and missions.

Table 1 contains a summary of the actors, institutions and processes, as outlined under LARR.

THREE QUESTIONS

Would LARR enable better governance?

LARR involves a large section of society in decision-making—NGOs, CBOs, CSOs and institutions of local self-government. Would this result in better governance or in more chaos?

It is the author's considered opinion that, by virtue of the devolution of decision-making processes, involvement of more stakeholders in the processes, the creation of decentralized forums for debate and discussion accessible to a larger number of affected people and the transparency provisions envisaged in the Act, the conflicts around land acquisition stand a higher chance of being played out in the open and resolved through democratic means. There will be less recourse to violence, underground anti-state movements and other unconstitutional disruptive mechanisms. LARR can be seen, therefore, as a move towards better governance.

Does LARR require the state to relinquish power or to devolve power to decentralized entities?

This is dependent upon the way power is defined—whether it is 'ego' or 'other' oriented, and whether it permanently exists or exists only in relation to specific acts. The use of the political scientist Robert Dahl's (1957) intuitive idea of 'A having power over B to the extent that A can get B to do something B would not otherwise do', that is, power as 'other' oriented, and related to a specific act, would lead to the possibility of LARR devolving power on land acquisition from the state to various decentralized forums and institutions.

It is, however, the author's considered opinion that the state's power under eminent domain is of an 'ego' oriented and permanent nature and this has not been relinquished or decentralized in any way under LARR, despite its provisions of transparency and participation.

This is seen in the manner in which LARR envisages the participation of stakeholders and the affected communities; in the use of

Table 1: Actors, Institutions and Processes under LARR

Actors/Institutions	Processes
◆ State SIA Unit ◆ Qualified SIA resource partners ▪ Independent practitioners ▪ Social activists ▪ Academics ▪ Technical experts ▪ Public functionaries ◆ Requiring body ◆ CBOs, CSOs and NGOs ◆ Media ◆ Political representatives at different tiers of the government ◆ Environmental agencies ◆ Expert groups ◆ *Panchayats* and equivalents ◆ *Gram sabhas* ◆ Government ▪ State ▪ District ▪ Sub-district ▪ Line departments	◆ Notification ▪ In local languages ▪ Within outlined time frames ▪ Use of public places, Internet and government offices ◆ SIA ▪ Collecting and analysing qualitative and quantitative information ▪ Undertaking field visits ▪ Using participatory methods ▪ To ensure adherence to public purpose as outlined in LARR ▪ To do a detailed land assessment • Area of impact • Land prices and recent changes in ownership • Total land requirement • Is it minimum? • Is it demonstrable last resort? • No. of affected families ▪ To ascertain consent ▪ To assess nature, extent and intensity of positive and negative social impacts ▪ To prepare a Social Impact Monitoring Plan (SIMP) with ameliorative measures to address identified social impacts ◆ Public Hearings ▪ To present SIA findings, seek feedback, incorporate omissions and additional information ▪ Facilitated by a member of the SIA team, held in the local language ▪ In at least all villages/towns where 25 per cent of the residents are directly affected ▪ Appraisal by Expert Group

'invited' participatory spaces wherein the preliminary agenda is controlled by planners and policymakers, which can preclude alternative perspectives, re-enforce existing privileges and lead to the de-politicization of participation and the possibility of co-optation of the agenda. Whereas LARR legislates the use of participatory spaces (and this is a positive step), it does not guarantee the empowerment of the affected communities at the cost of the power of the state.

Does the administration retain its ability to manipulate land acquisition outcomes under LARR?

The rules regarding LARR processes (listed in Table 1) are remarkably detailed and make involuntary land acquisitions considerably more difficult compared to the earlier Land Acquisition Act. Despite this, in the author's opinion, there is scope for manipulation of LARR outcomes, even in cases where the urgency clause is not invoked.

Land acquired under hydro-electric and irrigation projects, for example, by-passes the SIA process under the rules—an environmental impact assessment conducted by a state agency is deemed sufficient to meet the objective of assessing the social impact. The SIA process also contains possibilities of manipulation, owing to the fact that the requiring body pays for it and acquires the power, thereby, to influence who is on the SIA team, what its terms of reference are and which of the SIA processes have adequate financial provisions. This ability is not necessarily negative—an administration requires flexibility to function effectively and this includes the ability to influence land acquisition outcomes, wherever a clear sense of public purpose is discernible.

CONCLUSIONS

Whereas opinions around eminent domain may be varied, eminent domain itself is a fact. The state will always have the power to acquire private land for any purpose it sees fit and societal, governmental and constitutional checks and balances on this power will never be sufficient to entirely prevent it.

The needs of society as a whole will always require a delicate balance with the rights and requirements of individuals and eminent domain, though fraught with the complications described above, ultimately enables this.

LARR reflects these complications and attempts to maintain this delicate balance. The 'government to governance' line of thought is seen as applicable to the differences between LARR and its predecessor, especially in its wider objectives and clearer definitions of public purpose requirements and compensation amounts, and in the involvement of a larger section of society in decisions and processes around land acquisition.

Is LARR a 'good' Act? The very fact that no commentator is entirely happy with the Act—it is either too generous to the dispossessed landowners or tramples on their rights, defines public purpose too vaguely or does not give the state the necessary flexibility in this matter, brings too many people within its ambit or leaves out some categories of the affected populations, inter-alia—can be seen as a point in its favour. After all, to quote Pranab Bardhan, "The greatest challenge facing Indian democracy is that of finding a way to balance the needs of economic growth, equitable distribution and human rights, and this requires rescuing these complex and sometimes conflicting objectives from the demagoguery of single issue advocates."

The references for this article are available on request from newsreach@pradan.net