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LAND ACQUISITION, REHABILITATION AND RESETTLEMENT: LAW, POLITICS AND THE ELUSIVE SEARCH FOR BALANCE

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ABSTRACT: -

This article explores key issues in the Right to Fair Compensation and Transparency in the Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act) read with recent changes proposed by the central government. The LARR Act has to be read in the context of political contestation and changing political winds, the spate of decisions by the Supreme Court in the run up to the enactment and the need for 'balancing' multiple viewpoints. In such context, the twin categories—federal and judicial—become prominent. The nature of the LARR Act's response to both will determine its continued existence and significance. This article examines legal dimensions of issues such as 'Eminent Domain' and 'public purpose', R&R, compensation, safeguards for project-affected families and other relevant processes. The article asks larger legal and political questions regarding land acquisition within constitutional debates pertaining to the LARR Act's implications for federalism and a detailed analysis of recent pronouncements of the Supreme Court. The article also looks at potential scenarios, and in particular, possible consequences of the enactment for future urbanisation patterns in India.

KEYWORDS: *LARR Act, federalism, Supreme Court, urbanisation, federal and judicial balance.*

BACKGROUND AND CONTEXT:

The 'Right to Fair Compensation and Transparency' in the Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act) stands at the political fault line of a changing India, undergoing significant transitions: political, economic, social, environmental and spatial. A deepened democracy attempts to find room for dissenting voices, including civil society, marginalised castes, scheduled tribes, as well as for powerful regional political parties. 'Public purpose' is a much more contested term, particularly in the last decade, where the private sector is increasingly significant, even as the state remains predominant. The state is no longer the uniform behemoth. Apart from the Executive, Legislature and the Judiciary, there are centre–state (and local) debates around decentralised federalism. Within federalism, where various matters pertaining to 'land use' are part of the 'state list' in the Constitution, debates around land acquisition too have gradually shifted to the states.

A search for 'balance' has been the leitmotif in the political process of enacting the LARR Act that finally replaced the colonial enactment of 1894. The LARR Act may be seen as a legal attempt to achieve a coherent

framework for land acquisition, rehabilitation and resettlement, while recognising the multiplicity of actors involved, the requirements of land for economic growth, as well as the changing political economy with greater democratisation and increasing judicial involvement. However, this legislative project to ensure 'balance', no matter how legitimate, may ultimately be rendered implausible, with the sheer polarity of political views and the multiplicity of stakeholders, with varying degrees of power and leverage, exercised at politically convenient moments. At the same time, the very attempt at balance renders the LARR Act inevitable. Current debate as to whether the changes introduced through the recent Ordinance and Amendment Bill detract from the LARR Act also need to be read in the light of such political balancing. Little surprise, that the language and tenor of the LARR Act was influenced by immediate circumstances, namely, recent judicial holdings and elections, first at Assembly level and then the national Lok Sabha elections, within the backdrop of a history of redistributive failures and displacement from large-scale acquisition in the name of development (Fernandes, 2008, as cited in Chakravorty, 2008). If events around land acquisition in Singur (West Bengal) provided a political moment in 2008, Assembly elections in Uttar Pradesh in 2012 presented the opportunity for the then central government to draft the central enactment. The LARR Act came into force in 2013 after multiple rounds of negotiation on various drafts of the bill for over two years. The recent Ordinance and the Amendment Bill initiated by the current central government are only the latest links in this saga. The Amendment Bill, passed by Lok Sabha but yet to pass muster in the Rajya Sabha, is currently with a Joint Committee of Parliament (consisting of MPs from various political parties from the Lok Sabha and Rajya Sabha). The fate of the Amendment Bill may well hinge on preparations for the impending assembly elections in Bihar, a state where land relations continue to be socially entrenched and, therefore, politically significant. There continues to be keen debate (in Parliament and outside), and to add complexity, the validity of continued re-promulgation of the ordinance is also the subject matter of a PIL, sub judice before the Supreme Court.

This invites a question as to whether the LARR Act, if amended, continues to provide an internally consistent legal framework; and how the legal project of ensuring 'balance' can still be carried out within such unpredictable, complex and difficult political territory. The Supreme Court remains a key factor as an arbiter of such claims. All this means that the LARR Act has to be read in the context of political contestation and changing political winds, the spate of decisions by the Supreme Court in the run up to the enactment and the need for 'balancing' multiple viewpoints. In such context, the twin categories-federal and judicial-become prominent. The nature of the LARR Act's response to both will determine its continued existence and significance.

FEDERAL 'BALANCE'

In its aim to not tilt the delicate federal balance, the LARR Act's language attempts interesting legal compromise.

First, the act is a parliamentary enactment, deriving legislative competence from the concurrent List (Entry 42, List III: 'Acquisition and requisitioning of property'). Since it is a concurrent list entry, the right of states is not taken away. States continue to have the power to enact respective legislation and rules that accompany them. The legal issue is the manner in which a conflict between the centre and the states gets resolved. In such cases, attempts will first be made to read such laws-central and state-through principles of 'harmonious construction' (read together, to find unity and common purpose) and then on the basis of 'pith and substance' of the matter (in layman terms, discovering essential meanings in the text). In matters of clear opposition, central legislation prevails on a matter involving the concurrent list's legislation on the same issue.4 This means that if any state makes a law on land acquisition that is legally 'repugnant' to the LARR Act, such a law, to the extent of repugnancy, will give way to the LARR Act. However, a provision in a state law, even if 'repugnant' to central law, may prevail if it has been reserved for the consideration of the President and received presidential assent. Parliament continues to have the right to make such law that amends, varies or repeals such state law.

That says nothing about political resolution though. The LARR Act does not tread upon troubled federal waters. All it says is that states are free to provide higher compensation or implement their own rehabilitation and resettlement (R&R) schemes, so long as they are above the floor prescribed by the LARR. This is where the law meets politics.

S. 107 of the LARR Act states: 'Nothing shall prevent any state from enacting any law to enhance or add to the entitlements enumerated under this Act which confers higher compensation than payable under this Act or make provisions for rehabilitation and resettlement which is more beneficial than provided under this Act.' The ball then is metaphorically in the state's half, to do better (and not worse).

S. 108 of the LARR Act further remarks that where a state law or a policy framed by the Government of a State provides for a higher compensation than calculated under the LARR Act for the acquisition of land, the affected persons or his family may at their option opt to avail such higher compensation and rehabilitation and resettlement under such state law or such policy of the State instead of the LARR Act.

There is implicit recognition that, barring some exceptions, most land acquisition and land use decisions lie at the hands of the state governments. 'Appropriate Government' in the LARR Act includes not just the central government (in relation to its lands) but significantly state government which owns much of the land in its jurisdiction.6 Section 109 allows the 'Appropriate Government' to make rules to 'carry out the provisions of the Act'.7 There are Central Rules on Consent and Social Impact Assessment (SIA), framed in 2014. These rules prescribe detailed guidelines and formats on Institutional Support (SIA Unit), various processes, the SIA Report, the consent form and other particulars. Following this cue, various state governments such as Karnataka, Assam, Bihar, Odisha, Maharashtra, Andhra Pradesh, Manipur, Madhya Pradesh, Haryana and Telangana have also framed respective rules under the LARR Act. Other states are also in the process of drafting rules. The precise content of the rules also depend on which party is in power in a particular state, and whether they want to toe the current central line. The LARR Act is legally acknowledged by various state governments.

Another compromise is how the LARR Act allows states to prescribe their own numerical 'floors' for R&R to be triggered, especially impacting the private sector. This allows state governments leeway depending on state government policy (especially on investment, industrialisation and so on) and on the particular political winds blowing at a particular time.

Such provisions create multiple forms of federal action within the broad rubric of the LARR Act. The LARR Act seems to be based on the premise that it is no longer politically possible for the states to balk at the LARR enactment or its spirit and purpose, on grounds of federalism. The LARR Act attempts to do what states perhaps would not do themselves, that is, frame a uniform law that mandates R&R, attempts SIA and, in some cases, prior consent. The federal question will not go away politically: What states do with acquisition also depends on which political party is in power, at centre and states, and when (i.e., before or after elections). If some state governments ask for dilution of key provisions in the LARR Act or enact their own legislation, it is likely that the judiciary will once again be called to become the arbiter of key claims and resolve constitutional issues that arise.

Judicial 'Balance'

The LARR Act is also a response to criticism from the judiciary regarding the erstwhile colonial enactment on three parameters: first, a critique of 'arbitrariness' via a widened definition of Article 300A of the Constitution that in turn could invite a potential interrogation using Basic Structure doctrine; second, some reflections on 'public purpose'; and finally, scathing critique of abuse of the 'urgency' clause and thereby, a broader critique of the colonial enactment itself. The judiciary's articulation of executive inaction and abuse prodded the then central government to create a new law, not just for land acquisition but also for R&R. Since the colonial law was widely criticised, the legislative vacuum (for judicial intervention) had to be appropriately filled through a new LARR Act. The LARR Act thereby attempted to include elements which could pass judicial muster.

GOING BACK TO 'BASIC STRUCTURE

The judiciary's recent pronouncements were a marked contrast from its relative historical deference to the executive's determination of 'public purpose'.8 As long as the twin requirements of Eminent Domain theory- 'public purpose' and 'compensation'-were satisfied, the legality of the acquisition generally had held good. 'Eminent Domain' through the state's control of territory could also be regarded an attribute of sovereignty in International Law (Ramanathan, 2009; Shaw, 1997). The right to property was initially a fundamental right, which provoked epic constitutional battles between the parliament and judiciary on land reforms. After the 44th Constitutional Amendment, the right to property was changed from a fundamental right to a legal right (under

Article 300 A of the Constitution), and no one could anymore challenge an acquisition by the state of private property on grounds of violation of fundamental rights (Austin, 1999; Singh, 2008). The judiciary can interrogate any intrusion by parliament into the Basic Structure of the Constitution. The Basic Structure is a broad compendium of elements considered essential to a functional democracy-an inclusive doctrine, of which fundamental rights are a part.

Article 300 A of the Constitution states that 'no person shall be deprived of his property save by authority of law'. There has been debate as to whether 'authority of law' means law broadly defined to be 'fair, just and reasonable' or whether it simply means law as enactment, which survives tests of basic due process. If it is the former, issues of fundamental rights, through the notion of 'arbitrariness', emerge raising questions of violations of the right to equality in Article 14. The courts, well aware of judicial history, have since Article 300 A's enactment, not entered the thicket from the viewpoint of fundamental rights. Eminent Domain theory has generally held. From this standpoint, acquisition decisions of the State will continue to be enforced, so long as the basic procedure according to law is followed.

Yet, the tenor of recent judicial decisions conveys a growing sense of judicial disquiet about executive action.

In the case of KT Plantation, the Supreme Court enshrined 'public purpose' and 'compensation' within the purview of Article 300 A when the state acquires land. In other words, both 'public purpose' and 'compensation' have been 'read into' the language of Article 300 A. This means reading Eminent Domain into Article 300 A. What is so novel about this In this case, the five judge Constitutional Bench stated that the meaning of Article 300 A was that:

• person cannot be deprived of his property merely by executive fiat, without any specific legal authority or without the support of law made by competent legislature- Article 300 A therefore protects private property against executive action … but the question looms large as to what extent their rights will be protected when they are sought to be illegally deprived of their properties on the strength of a legislation - that law has to be reasonable. It must comply with the other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or beyond what is required in public interest…not disproportionate to the situation or excessive…violation must be of such a serious nature which undermines the very basic structure of the Constitution and our democratic principles… (emphasis added by author).

There is much to be gleaned here. The law, in turn, has to be 'reasonable'. If arbitrary to the extent that the Basic Structure is undermined, the courts will intervene. This is a telling message. The extent of protection, the nature of 'reasonableness' and the degree of judicial scrutiny-whether 'minimum rationality' or 'strict scrutiny' or intermediate-are yet unresolved. But a judicial opening has been initiated. In the days before the LARR Act's enactment, there was even speculation as to where the Supreme Court would draw its own thresholds within the ever evolving debate on separation of powers, while deciding on land acquisition matters.

'Arbitrariness' is a valid ground for violation of a fundamental right (which the right to property no longer is). A move from the Supreme Court towards questioning the degree of such reasonableness by exploring 'arbitrariness' could potentially renew the precarious debate on separation of powers. It will require a politically interesting case for the judiciary to decide where to draw the line and where to stretch it. The Supreme Court has in the meantime, pronounced judgment on land acquisition matters recently, based on the LARR Act's provisions, which means it has explicitly recognised and affirmed the LARR Act as the current law.

RECENT HOLDINGS ON 'PUBLIC PURPOSE

The judiciary has traditionally taken a deferential view of the executive's prerogative to determine 'public purpose'. The judiciary has admitted that the term 'public purpose' has to be 'compendious', 'not static' and it would not be wise to define it exhaustively, once and for all.15 It is by its very nature an 'inclusive' definition that accommodates many illustrative elements but keeps room for future contingencies. Significantly, it appears that 'planned development' enjoys a high degree of legitimacy.

However, recent Supreme Court decisions point to renewed judicial activism, marking a departure from the tradition of deference. In Radhey Shyam v The State of Uttar Pradesh, it remarked: It must be accepted that in

construing public purpose, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people especially of the common people defeats the very concept of public purpose. Even though the concept of public purpose was introduced by pre-Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles. In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part-III must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of public purpose in acquisition of land must be judged on the touchstone of this expanded view of Part-III rights. The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country.

When this interpretation is read alongside the KT Plantation judgment, it appears that the Supreme Court could ask deeper questions regarding the legitimacy of 'public purpose', should a suitable case present itself.

IN RADHEY SHYAM'S CASE, IT WAS ALSO REMARKED:

- Recent years, the country has witnessed new phenomena. Large tracts of land have been acquired in rural parts of the country in the name of development and transferred to private entrepreneurs, who have utilized the same for construction of multi-storied complexes, commercial centers and for setting up industrial units. In light of such 'phenomena', the judiciary seemed to be entering a new thicket of judicial–executive relations:

Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17... The Courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the Courts especially the Higher Courts, cannot afford to act as mere umpires.

This interpretation certainly goes beyond investigating procedural matters. In another recent case, that of M/S Orchid Hotels, the Supreme Court categorically affirmed that no change in 'public purpose' would be permitted, that the state having acquired land for 'public purpose' (in this case, a 'golf cum hotel resort') could not subsequently transfer the land to private entities for private use, that this amounted to 'diversification' of public purpose and that public purpose 'cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken'.

From these decisions, it seems the judiciary would continue to seek a wider role for itself in determining what constitutes 'public purpose' in actual use of the land, without necessarily claiming to second-guess the Legislature's intentions. It would investigate abuse of the urgency clause through very careful lenses of strict scrutiny. It would check whether compensation has been paid. It would look deeper in examining the presence of mala fides or 'colorable legislation'. It would also ask if public purpose has been diverted for private use, once acquisition is complete. There is also a suggestion that a 'public purpose' benefits a large section of the community rather than particular interests. This particular debate could also intensify around urban areas, as has been seen in some of the recent discussions in USA where the use of private entities in city revitalization has provoked interesting questions on 'public purpose'.

RECENT HOLDINGS ON MISUSE OF THE 'URGENCY' CLAUSE

In Devendra Kumar Tyagi v State of Uttar Pradesh, the Supreme Court was categorical about its abuse:

The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 [of the LAA 1894] but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4) [of LAA 1894]. The court can

take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1) [of LAA 1894].

The Supreme Court's admonitions are cautionary especially in cases where more than a year would pass between the notification (on urgency grounds) and the declaration of acquisition. Abuse of the urgency clause has even provided an avenue for the courts to ask more direct questions on what goes beneath, 'in the guise of development'.

Does the LARR Act Address Such Concerns

'Public Purpose' and 'Consent'

Where the political landscape is variegated enough to contain competing voices, 'public purpose' too has multiple renderings.

What is 'public purpose' under the LARR Act?

• First, the LARR Act retains legally uncontested and undisputed 'public purposes' (such as strategic interests, national security, a large gamut of infrastructure projects, etc.).

• Second, projects for 'industrial corridors or mining activities, national investment and manufacturing zones as designated in the National Manufacturing Policy' also now come under 'public purpose'.

• Third, 'public purpose' has been expanded to include other newer uses of land, including land required for 'project-affected families', housing for low income groups, R&R and so on.

If 'public purpose' is satisfied, the provisions in the LARR Act pertaining to acquisition, compensation and R&R would apply.

At the same time, facilitation by the government for private companies for 'public purpose' under the LARR Act would also invite provisions of acquisition, compensation and R&R. In other words, the mere existence of a private entity does not per se render the purpose less public. This may be read as legitimising the role of the private sector for 'public purpose'. This interpretation is also in line with the US judgment of Kelo v City of New London, where the existence of private entities in city planning for revitalisation did not render a purpose (here an Integrated City Development Plan) less 'public'. The implication is that if the 'public purpose' definition is otherwise fulfilled, even private entities could be involved. The LARR Act clarifies that subject to exceptions (such as land being rendered unusable or unforeseen circumstances), no change in public or related purpose would be allowed. No change in ownership without permission would be allowed.

The LARR Act's 'public purpose' definition does not fundamentally re-align the landscape but enshrines it within the provisions of the Act. Did not the courts themselves say that 'public purpose' cannot be static; it is necessarily compendious; to define would be to limit?

But what exactly is 'private use'? If 'planned development' is legitimate, how do 'multi-storied complexes, commercial centres and industrial units' lose legitimacy, since development authorities also claim that all 'planned development' must also have residential accommodation, commercial centres and industrial units Is the Supreme Court looking for a tell-tale case of diversification-one that blatantly ignores compensation and also seemingly dispenses with any creation of public utilities? If the land is acquired for planned development and all that is (initially) done is the construction of high rise apartments-is it a violation of 'public purpose' Does judicial resolution differ, between land acquisition decisions in urban when contrasted with those in rural areas Does it accept the Master Plan with less scrutiny in the urban and yet question what is touted as planned development in the rural? These are all unresolved questions.

CONSENT

Where the government acquires land for private companies for 'public purpose', 80 per cent of consent of affected families would be a prerequisite. Similarly, subject to the exceptions proposed, in public private partnership (PPP) projects (for public purpose), consent would be required of 70 per cent of affected families.

The process of obtaining such 'consent' is left to rules, to be made by 'Appropriate Government', which includes respective state governments. The consent rider is an addition to the 'public purpose' requirement and not a substitute for it. Critically, however, in the bulk of Eminent Domain acquisition which is directly state-acquired (i.e., not for private or PPP), there is no consent requirement. The recent amendments proposed by the centre create exceptions where consent would not be required-this is generated predictable political debate-as to whether such a move detracts from the very spirit of the LARR Act, and if it brings back the old ambiguity on 'public purpose'.

Rehabilitation and Resettlement (R&R)

The LARR Act made R&R a right (and not just policy), within the acquisition processes of the Act (and not separately, as in previous legislative attempts). This marked a departure from past practices including the Rehabilitation and Resettlement Bill, 2007, and various R&R policies (in 2003 and 2007) which did not enjoy the status, legitimacy and, more significantly, the enforcement capability of law (National Rehabilitation Policy, 1998, 2003, 2006; Rehabilitation and Resettlement Bill, 2007).

Further, the R&R requirement is not just for the government, but also for private companies (including for privately negotiated acquisitions) and PPP projects, if a certain trigger of land size is reached.

However, this comes with a predictable rider. The trigger of land size is to be prescribed by respective governments and no specific numbers are made explicit in the LARR Act-another of the compromises made to ensure the LARR Act's enactment in parliament. One could argue that by widening 'public purpose' and allowing land acquisition for public purpose but on behalf of private companies, the LARR ACT makes the de facto, de jure, as long as R&R and the fixed percentage for consent is maintained. In such instances, the definition of public purpose will cease to hold much consequence, where such acquisition is legitimised and the battle shifts to adequacy of R&R. It is further clarified that no change in land use shall be permitted till R&R is complied with. The R&R award would include the R&R amount, house sites or lands to be allotted, as well as employment to at least one member of an affected family. While this is laudatory, the issue is implementation, where land is not available nearby, or where employment opportunities are not considered viable.

For the record:

* When government acquires land for its own use, hold and control, and 'public purpose' is satisfied, the provisions pertaining to acquisition, compensation and R&R would apply.
* The provisions on acquisition, compensation and R&R would apply in cases of 'public purpose' acquisition by government for PPP projects and for private companies.
* R&R provisions would be attracted in privately negotiated acquisition by private companies beyond a prescribed limit or where private company requests government for partial acquisition of land for public purpose, in which case R&R would be applicable for the entire area. An earlier draft of the bill introduced in the Lok Sabha had specified the minimum land size as 100 acres in rural areas and 50 acres in urban. The LARR Act contains no specific numbers and leaves it to the states. It remains to be seen if states would prescribe any numbers, or if it would be prodded to do so by the judiciary.

The then central government's political gamble was to rely on the inevitability of providing R&R, with a strong judiciary advocating it, as a redistributive move. However, its political compromise was to leave the specifics of precise numerical triggers to respective states. If a state wants to enter a race to the bottom to attract private investment, it would keep numbers unspecified. On the other hand, a government concerned with redistribution (especially before an election) could set a race to the top, and with consent provisions above the central percentages specified. However, recent state legislative drafts such as the Rajasthan Land Acquisition Bill, 2014, monetise R&R by creating particular percentage values for 'R&R costs' and do not provide for separate R&R facilities.

The need for R&R as a right is significant after multiple R&R policies at the centre, where there are reports that about 60 million people have been displaced or affected by development projects in India

(Fernandes, 2008, as cited in Chakravorty, 2008). The quest of reaching out to the most vulnerable-those who bear the brunt of acquisition decisions-seems to have found some echoes in the definition of 'affected family', which includes not just the owners of the land but also those whose primary livelihoods stand affected, without necessarily owning the land. This includes agricultural labourers, tenants, sharecroppers, artisans, forest dwellers, families and also urban dwellers living for the last 3 years, whose primary livelihoods are affected. This implicitly recognises the historical failings of land reform policies to ensure redistribution of land, and that a significant share of the population remains landless, but dependent, on the land in various ways.

PROCESSES AS SAFEGUARDS

The abuse and misuse of the erstwhile colonial enactment of 1894 created the foundations for revisiting the law, and creating safeguards. The plethora of process mechanisms includes SIA with public hearing, new positions and authorities (e.g., Administrator, R&R; LARR Authority, National Monitoring Committee, etc.) and multiple new processes on R&R and acquisition. These are further clarified in relevant central rules and respective state rules.

Safeguards under the LARR Act are a number of institutional check posts, each one taking off from the previous one, as a mechanism to ensure institutional redress. However, in its reliance on multiple bureaucratic procedures, ostensibly to check abuse of process, it has invited criticism on delays and possibilities of rent seeking. This has been one of the more significant critiques of the Act that because of the elaborate bureaucracy created, it might stall acquisition altogether, or limit the Act's use to particular limited instances.

The 'Urgency' Clause

The LARR Act restricts the 'urgency clause' to the very urgent-requirements of defense, national security, emergencies arising out of natural calamities or any other emergency (with parliamentary approval). This attempts to plug the 'urgency clause' loophole under the erstwhile colonial law which had allowed the state to willy-nilly dispense with due process (especially the right to object to a collector) and transfer the land for other uses. The Land Acquisition Act (LAA) 1894 did not specify exact circumstances where the urgency clause could be invoked, thereby creating room for abuse. The recent draft Rajasthan Land Acquisition Bill, 2014, while discussing urgency, does not define the term. The LARR Act states that in such cases, 80 per cent of the compensation has to be paid before taking possession, and an additional amount of 75 per cent of the market value shall be paid where acquisition proceedings have already been initiated. The government would take possession of land acquired under the urgency clause within 30 days of issuing the notice declaring the intent to acquire.

Compensation

In KT Plantation's case, the Supreme Court read 'compensation' into requirements of law under Article 300 A. Compensation, in previous decisions, had been held to be 'just equivalent of what the owner has been deprived of' (Bela Banerjee's case), 'something not illusory' (Shantilal Mangaldas case). Yet, the same Supreme Court has also held in Bhim Singh's case that rupees 200,000 was adequate, whatever was the value of the property.22 In the recent case of Rajiv Sarin, the Supreme Court held that:

• the adequacy of compensation cannot be questioned in a court of law, but at the same time the compensation cannot be illusory…the criteria to determine possible income on the date of vesting would be to ascertain such compensation paid to similarly situated owners of neighboring (forests) on the date of vesting.

According to the LARR Act, market value is the higher of: average sale price of surrounding lands for the past 3 years, the price mentioned in the Stamp Act for registration of sale deeds or the consented amount of compensation (in case of PPP or government-enabled acquisitions for private companies for public purposes). This value is then to be multiplied by a factor of 1-2 in rural areas (based on distance from urban area) and by 1 in urban, plus an amount of 100 per cent more added as solatium. It is unclear why the ratio of 2:1 was chosen if such questions are of relative economic value, determined by the manner the market operates. It is possible that urban land prices, already so expensive, might become prohibitive. The LARR Act computes market value on the

basis of the documentation available with the official records. Such official value will under-represent the real value of the land, to evade high stamp duty payments. The LARR Act relies on retrospective price, based on previous and not future use. Kerala did initially discuss redeemable infrastructure bonds/transferable development bonds instead of cash; Rajasthan's original Bill (pre LARR Act) explored the possibility of providing 25 per cent of developed land in lieu of cash for urban development and housing purposes; Gujarat has followed a town planning (TP) scheme model where the losses are spread across a demarcated broader area and plots are reconstituted after land development; in Magarpatta, Maharashtra, there are instances of the community organising themselves to form a corporation, where farmers pooled their lands and each farmer became a shareholder of the company in proportion to the value of the respective land vis-à-vis the cost of the total land. The LARR Act could have done more to provide for a spirit of partnership, without which other distributive suggestions are inadequate.

One way of ensuring such partnership is through incentives in the actual benefits of the land acquired for newer and more productive uses. This assumes that all lands acquired are not the same. The LARR Act does provide that where the land is acquired for urbanisation purposes, twenty per cent of the developed land will be reserved and offered to land owning project affected families, in proportion to the area of their land acquired and at a price equal to cost of acquisition and the cost of development. (Banerjee, 2011; Chakravorty, 2011; Kumar, 2011; Sarkar, 2011; Sarma, 2011) How does one take care of potential value-the price paid by a willing purchaser to a willing seller after taking into account the existing and potential possibility of the land? In its absence, it is likely that arguments about computation will persist: lack of adequate tenurial information, under-valuation of land for stamp duty purposes, information asymmetries, delays pushing cost of land up; lack of speedy implementation and so on. In R&R, the responsibility of the state (and private companies) will be particularly tested. Is there enough land for R&R, especially to implement the 20 per cent land-for-land provision The land market is beset with information and other asymmetries, including poorly kept and dated land records which deter correct identification of 'affected families' as well as the nature of the land, on which market value is applied.

New Urbanisation: Corridors and Vertical Growth

The LARR Act's provisions on R&R, prior consent, compensation and market value will decide where new urbanisation takes place. Corridors such as Delhi Mumbai Industrial Corridor (DMIC), the proposed Mumbai-Chennai-Bangalore Corridor and the Amritsar-Kolkata Industrial Corridor (AKIC) are locations for new corridor urban development. The recent Central Ordinance and Amendment Bill proposed to create regimes of exception for industrial corridors (up to 1 kilometre on either side of a designated railway or road) by exempting them from requirements of SIA, consent and those pertaining to food security. The judiciary's admonitions would continue to be relevant in such cases in future.

The LARR Act states that a project for, inter alia, 'industrial corridors' or 'national investment and manufacturing zones, as designated in the National Manufacturing Policy' would come under 'public purpose', and the provisions relating to acquisition, compensation, R&R would apply (not consent). The 'appropriate government' in such cases 'where more than one state is involved would be the central government. Where such acquisition is for PPP or for private companies, consent requirements would also apply.

The need for rural–urban balance comes in the face of growing urbanization, with over a third of the country's population living in a bare fraction of the country's land, and producing more than 50 per cent of the country's economic output. The Draft National Land Reforms Policy document (July, 2013) produced by the Department of Land Resources, Ministry of Rural Development, cited the following revealing figures from the NSSO figures of 2003-2004 (Government of India, 2013): 31.12 per cent households are landless; 40.63 per cent households hold no land other than homestead; 63.85 million hectares (or 20.17 per cent of geographical area of India) are wastelands. Of barren and uncultivable land, 177 lac hectares are unused. Eight million rural households have no house of their own. As per the recent Socio Economic and Caste Census 2011, a staggering 56.35 per cent are rural households with no land. The historical failure of land reform is also the context within which the fractured politics of rural–urban and land acquisition play out.

To stay below R&R requirements, it is possible that future new urban centres, developed through privately negotiated acquisition, could become relatively smaller townships with high-density structures. Small townships, 'inter-gated' (rather than 'integrated' communities) with environmentally efficient high rises-could that be the Indian urban story of the future? This will also depend on the resolution of questions regarding optimal Floor Space Index (FSI) viability. The political debate on FSI will vary across locations: Newer peripheries will be different from greenfield sites and they, in turn, will be different from inner city areas.

Exceptions Proposed by the Centre: The 'Balance' Tilting

The Exceptions to SIA, Consent and Food Security Requirements

The changes proposed by the recent central ordinance clarify that for the following projects, the provisions of the LARR Act pertaining to SIA, prior consent and safeguards for acquisition of fertile multi-cropped land (and protection of food security) will not apply: projects vital to national security or defence; rural infrastructure including electrification; 'affordable housing and housing for poor people'; industrial corridors (up to 1 kilometre of both sides of road or railway) and infrastructure projects including PPP projects. These are proposed carve outs or exceptions.

What Is So Exceptional about These Exceptions

The principal argument in favour of the exceptions is that the consent, SIA and food security clauses delay acquisition and thereby derail the new central government's promises of ensuring fast-tracked infrastructural growth and ensuring speedier investment in the country. The 'Make in India' plans for large-scale manufacturing and service-driven growth make speedy land acquisition a pre-requisite. The LARR Act, in its reliance on multiple bureaucratic procedures, ostensibly to check abuse of process, had invited criticism on delays in land acquisition and opened the possibilities of rent seeking.

However, if under the LARR Act SIA and consent are the twin pillars of ensuring social equity, and by that token, were indispensable to the very spirit of the LARR Act, the new changes, by creating fresh exceptions, have generated debate as to whether the exceptions are a throwback to the erstwhile colonial enactment of 1894. The principal criticism of the Ordinance and the Amendment Bill is that these exceptions have created a 'legal bypass' whose consistent and prolific use will soon render large portions of the LARR Act redundant. This makes the whole balancing motive of the LARR Act itself redundant, by essentially introducing two parallel legal regimes within the same legislation, one whose purpose is to speed up acquisition by dispensing with processes, and the other whose object is to create redistributive processes which would inevitably delay acquisition. Can two regimes so divergent in purpose and scope coherently exist under the same Act These exceptions proposed seem to indicate not just where SIA and consent could have become potential stumbling blocks to acquisition, but also in turn implicitly point to the modes of future acquisition in India. It is here that questions would be asked whether such exceptions would become the preferred route for acquisition. It is argued that national security and defence needs were, in any case, covered under the urgency clause of the LARR Act.

Further, on food security, exceptions to the clause on acquisition of irrigated multi-cropped fertile land were already built in the LARR Act for 'exceptional circumstances', 'demonstrable last resort' and, critically, for all 'projects linear in nature' such as 'railways, highways, major district roads, irrigation canals, power lines and the like'. To carve out further exceptions implies the possibility of acquiring multi-cropped land for purposes other than highways, railways, roads, irrigation canals and power lines. Such purposes could potentially include PPPs, industrial corridors, infrastructure and the like. This has the potential for litigation, especially on abuse of process.

Whether the Ordinance(s) and Amendment Bill(s) have such effect as to revisit the situation under the repealed 1894 enactment and make the LARR Act itself redundant depends on how the exceptions are used. The Supreme Court had already stated earlier that (the provisions of the LAA of 1894) do not adequately protect the interests of owners/persons interested in the land to say the least, the Act has become outdated and needs to be replaced at the earliest with fair, reasonable and rational enactment in tune with the constitutional provisions, particularly Article 300 A …we expect the lawmaking process for a comprehensive enactment with regard to

acquisition of land being completed without unnecessary delay.

The LARR Act also adds that where physical possession has not been taken or compensation not been paid in cases of land acquisition under the erstwhile act, where more than 5 years have elapsed since the award prior to the commencement of the LARR Act, such earlier proceedings would be deemed to have lapsed and fresh proceedings would be initiated as per the LARR Act. It is quite clear that the LARR Act does not envisage revisiting of the 1894 Act. It remains to be seen how an amended LARR Act or any new state laws, aimed at making land acquisition more facilitative for private industry led 'development', would assuage concerns expressed by the Supreme Court.

REVERSION IN CASE OF NON-UTILISATION

The changes proposed attempt to change the LARR Act's earlier provision that allowed land to revert to original land owners or the land bank of the state, in case of non-utilisation for a period of 5 years. The revised formulation proposes that such reversion could be possible after 5 years or 'a period specified for setting up of any project, whichever is later'. This raises the question on the appropriate time period within which projects should be completed, and related questions of non-utilisation. A recent report of the Comptroller and Auditor General (CAG) remarked that in the case of special economic zones (SEZ), as much as 52 per cent of the land remained idle in 2012–2013 for approvals made as early as in 2006 (Comptroller and Auditor General of India, 2014).

This will invite judicial attention, especially where fertile multi-cropped lands are otherwise acquired and the land remains unutilised. Where 63.85 million hectares (or 20.17 per cent of geographical area of India) are estimated to be wastelands and around 17.7 million hectares of barren and uncultivable land are unused, it is only expedient that such lands rather than fertile multi-cropped lands be the primary focus for acquisition.

The Case of the 13 Exceptions to the LARR Act

The Ordinance and the Amendment Bill clarify that in the case of the exceptions to the LARR Act (i.e., the 13 enactments specified in the 4th Schedule of the LARR Act), the provisions relating to compensation, R&R and infrastructural amenities would now be applicable. In other words, if the proposed amendment becomes law, the 13 exceptions would come under the purview of the LARR Act.

Schedule IV contains the following enactments:

1. The Ancient Monuments and Archaeological Sites and Remains Act, 1958
2. The Atomic Energy Act, 1962
3. The Damodar Valley Corporation Act, 1948
4. The Indian Tramways Act, 1886
5. The Land Acquisition (Mines) Act, 1885
6. The Metro Railways (Construction of Works) Act, 1978
7. The National Highways Act, 1956
8. The Petroleum and Minerals Pipelines Act, 1962
9. The Requisitioning and Acquisition of Immovable Property Act, 1952
10. Resettlement of Displaced Persons (Land Acquisition) Act, 1948
11. The Coal Bearing Areas Acquisition and Development Act, 1957
12. The Electricity Act, 2003

The Railways Act, 1989

These are largely strategic state interests, which were allowed to be governed by their respective enactments, as part of the state's historical dominion over strategic defence, atomic energy, resource extraction, railways and highways. Critically, the SEZ Act, 2006 is not among the exceptions, which means that the LARR Act will apply for SEZ-related acquisition.

CONCLUSION

The first is the claim of private enterprise, preoccupied with the state's inability to create an enabling regulatory environment for markets and property rights to function better. The other imperative, relying on an entitlement framework, is disgruntled about forced displacement and concerned about the marginalised that have historically borne the brunt of land acquisition decisions. Environmental and food security concerns also coalesce. Caught between the two competing maelstroms, the LARR Act, in trying to cohere among competing imperatives, also finds itself sandwiched between the two. The recent changes proposed by the centre further complicated the legal situation by creating regimes of exception that inevitably create a legal bypass under the same Act.

The federal question remains politically pertinent, depending on who is in power in particular states and potentially creating two frameworks: A national legal framework and overlapping, and at times, contradictory state frameworks. In future, if respective state laws on LARR are also enacted and receive presidential assent, that in turn dilute provisions on SIA, consent and food security, etc., it would invite a constitutional discussion, where the Supreme Court could be called upon to decide, particularly in the light of its recent judgments. Land pooling is being suggested as an alternative to Eminent Domain, where land owners agree to land being acquired (without compensation), land is developed and consolidated and smaller reconstituted plots are subsequently transferred to land owners, after infrastructure and common areas are developed. These are variants of TP schemes which have been attempted on smaller parcels of land, especially in Gujarat and parts of Maharashtra, and now in Delhi and Andhra Pradesh. Land pooling as an 'efficient' and politically feasible method of acquisition, requires more extensive study across scales, regions, chronologies and types of land (Sanyal & Deuskar, 2012). It is particularly necessary to inquire whether:

1. All persons affected are covered (or only owners and not tenants and sharecroppers; and among owners, large or wealthy land owners);
2. Such arrangements involve relatively large land owners and smaller parcels;
3. Tracts of land (such as corridor or capital city development) are at all amenable to pooling and if there are optimal sizes beyond which pooling becomes politically impossible;
4. Reconstituted plots are considered satisfactory by all erstwhile landowners or if more privileged landowners acquire better reconstituted plots;
5. The amount of time taken for the entire process of pooling is less than that of land acquisition and how;
6. Land pooling (done by the same state) enjoys any greater legitimacy and trust than conventional land acquisition; and how such trust, if any, is built among stakeholders.

Formal law is only the tip of the iceberg and the law works within the political economy of institutions and frameworks, which are interpreted and implemented by people. The LARR Act works on a compromise: create the law, attempt a framework, but subject it to numerous exceptions, provisos and caveats, for the lawyers to later dissect. This has been the result of the act of political balancing through legal means. The thrust of the debate has moved from year to year: from the urgency clause, to the meaning of public purpose, to R&R, to exceptions, to, now, the federal issues. Battles over land acquisition and R&R will continue to be fought out institutionally, within the complex politics and the federal set-up of the country.

The question of balance nevertheless predominates and will refuse to go away. Ironically, even as the quest for balance remains elusive, it is in the very attempt that may ensure LARR Act's continued relevance. Ensuring 'balance' is an organic process that depends on how effectively political support is leveraged by bringing diverse stakeholders to agree to political compromises that democracy demands. This sometimes becomes less about the letter of the law and more about politics and the role of law within such political contexts, where perceptions about fairness matter as much as the tinkering details.

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