

## DECODING THE CONTROVERSIAL LAND ACQUISITION ORDINANCE

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Land acquisition remains at the centre of many controversies and public policy paralysis in India. Land is the basic infrastructure required for any project. It is the platform without acquiring which we cannot set up manufacturing units. Historically, the authority to acquire the land is a sovereign power. The concept of Land Acquisition has been derived from the concept of the *Eminent Domain*<sup>1</sup> which authorizes the State to take away the private property owned by the public for development, industrialization and urbanization of the State.

Until 2013, the Land Acquisition in India was governed by the Land Acquisition Act, 1894.<sup>2</sup> Over the 120 years the Land Acquisition Act, 1894 had become obsolete and needed amendment. The compensation provisions were inadequate and there was call for a legislation that would provide higher compensation coupled with a rehabilitation and resettlement package. The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act, 2013 repealed the Land Acquisition Act, 1894. The Act of 2013 was passed by the UPA government with the objective to promote transparency and participative governance in the acquisition of land for industrialisation and urbanisation and ensure overall socio-economic development. The new legislation was an attempt by the UPA government to fine-tune the need of development of India and protecting the interest of the most fragile socio-economic segment of Indian population – farmers and tenants. In the pursuit of this objective, the law introduced mechanisms as Social Impact Assessment, Consent, and Rehabilitation, *etc.*

On December 31, 2014, the President of India promulgated an ordinance with an official mandate to ‘meet the twin objectives of farmer welfare along with expeditiously meeting the

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<sup>1</sup> The doctrine empowers the sovereign to acquire private land for public use, provided the public nature of the usage can be demonstrated beyond doubt. The doctrine is based on the following two Latin maxims: (1) *Salus populi suprema lex* (Welfare of the People Is the Paramount Law) and (2) *Necessitas publica major est quam* (Public Necessity Is Greater Than Private Necessity). See: M.R. Biju, ‘Land Acquisition Amendment Bill, 2014: U-Turn by the BJP’, Mainstream, VOL LIII No 33 New Delhi August 8, 2015.

<sup>2</sup> Vinod Madhavan, ‘Controversy Over Land Acquisition Bill: All You Need to Know’, The New Indian Express, 07th March 2015

strategic and developmental needs of the country’.<sup>3</sup> The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (the LARR, Act) has been amended by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014. What was the need to amend the Land Acquisition Bill that the Bharatiya Janata Party (BJP) had helped vote into law only 15 months ago? The need for the Amendment arose because the LARR Act, 2013 established an extremely complex and impractical land acquisition process which resulted in infrastructure bottleneck, high inflation and fall in GDP.<sup>4</sup> A highly complicated process of acquisition can upset India’s development to a large extent. Notable in this direction is an excerpt from an article<sup>5</sup> by *Sanjoy Chakravorty*<sup>6</sup> where he argued that the LARR Act, 2013 is a law ‘*that carries within it the seeds of its own destruction*’.

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<sup>3</sup> Article 123 of the Constitution enables the President of India to promulgate an ordinance if both the Houses of Parliament are not in session and circumstances exist, which render it *necessary* for him to take *immediate* action’. Every ordinance had to be laid before Parliament, and ceased to exist six weeks from the end of the next sitting of Parliament. Since the Constitution mandated that Parliament to be called into session at least once every six months, an ordinance has a *de facto* expiration period of approximately seven and a half months.

See: G. Raghuram and Simi Sunny, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance 2014: A Process Perspective, IIM Ahmedabad W.P. No. 2015-07-03, July 2015

<sup>4</sup> Thirteen Acts of Parliament, which provided for land acquisition, were put in the Fourth Schedule of the Act. Section 105 of the 2013 Act made the provisions of the Act inapplicable to these exempted Acts. The said Section provided that the Government could issue a notification and direct ‘any’ provision of the Act relating to compensation or R&R would be made applicable to the exempted acts. The “Proposed” notification had to be placed before Parliament for a period of 30 days and Parliament was expected to approve, disapprove or modify the said proposed notification. The need for an ordinance arose because such a notification would have to be put before Parliament in the Budget session itself in July-August, 2014 and the approval or disapproval taken accordingly. 31st December, 2014 being the last day for such a notification, the Government decided to amend the Section 105 and apply all the compensation and R&R provisions of the 2013 Act to the thirteen exempted laws. Through this provision the present ordinance provides that the farmers’ would get higher compensation if land is acquired under any of the exempted laws. It goes a step further than the 2013 Act itself. This also explains the urgency of issuing the ordinance on the last day of the year since otherwise the Government would have been in default of the complicated approval provisions outlined in the 2013 Act.

See: Shri Arun Jaitley, *Amendments To The Land Acquisition Law – The Real Picture*, Available at: <http://www.bjp.org/en/mediaresources/pressreleases/articleshriarunjaitleyonamendmentstothelandacquisitionlawtherealpicture>

<sup>5</sup> Sanjoy Chakravorty, How to Design the Next Land Acquisition Law, the Center for the Advanced Study of India (CASI) of the University of Pennsylvania, Available at: <https://casi.sas.upenn.edu/iit/sanjoychakravorty>  
EXCERPT: How should a new acquisition law be designed in light of this history and present reality? Some of the clearest thinking on the subject is by Maitreesh Ghatak and Parikshit Ghosh. They argue that there are three possible broad approaches. “One is to let money speak—hiking minimum compensation amounts significantly to win farmers’ support. The second is to let farmer’s speak—making project clearance contingent on a referendum among affected households. The third approach is to let the bureaucrats and experts speak—getting it vetted by an empowered committee doing its own social cost benefit assessment.” The problem, Ghatak and Ghosh argue, is that rather than being alternative methods, the Congress law uses the “kitchen sink” approach and makes these

LARR was political and fundamentally bureaucratic approach based on little or no recognition of some simple economic principles — on land markets and on transaction and opportunity costs. The basic presumption was that the price of land matters to the land loser but not to the land acquirer. Consequently, LARR raised the price of land acquisition to unsustainable levels. The new Bill is based on the principle that price matters to both.<sup>7</sup> The key changes made by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 are:

The Bill allows the government to exempt five categories of projects from (i) Social Impact Assessment, (ii) limits on acquisition of irrigated multi-cropped land, through a notification, and (iii) consent provisions. However, the compensation provisions remain untouched.

These five categories are:

- (i) defence
- (ii) rural infrastructure
- (iii) affordable housing
- (iv) industrial corridors and
- (v) Infrastructure and social infrastructure.

The amendments make the following changes to this provision:

1. The LARR Act, 2013 requires that the prior consent (the consent clause) of at least 80% of land owners for private projects and the consent of 70% of land owners be obtained for PPP projects. The Bill exempts the five categories mentioned above from this provision of the Act. Acquisition, being different from purchase, implies that land owners were unwilling to part with the land. In such a situation, requiring consent from them may be impractical. It is not comprehensible why the consent requirement varies on who owns the project.

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complementary methods. All are now in the law. The result is what I had argued when the bill was being debated—a law “that carries within it the seeds of its own destruction.”

<sup>6</sup> Sanjoy Chakravorty is a Professor in the Department of Geography and Urban Studies, Temple University, and the author of *The Price of Land: Acquisition, Conflict, Consequence*. He is a CASI (Center for the Advanced Study of India) Non-Resident Visiting Scholar.

<sup>7</sup> See: Sanjoy Chakravorty, ‘Improving an unworkable law’, *The Hindu*, January 07 2015, Available at: <http://www.thehindu.com/todayspaper/tpopinion/improvinganunworkablelawarticle6761692.ece>

2. The LARR Act, 2013 exempted 13 laws<sup>8</sup> from its purview. The Bill brings the compensation, and rehabilitation and resettlement (R&R) provisions of these 13 laws which govern land acquisition in specific sectors in line with the provisions of the Act. The Act had required that this be done within a year of its enactment (January 1, 2015), through a notification.
3. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 says the land unutilised for five years should be returned to the owner, but the amendment proposed by the NDA Government intends to change it to five years or any period specified at the time of setting up the project.
4. Under the 2013 Act, land can be acquired for the government, a public private partnership, or a private company, if the acquisition serves a public purpose. The Bill changes the term 'private company' to 'private entity'. This means that land may now be acquired for a proprietorship, partnership, corporation, non-profit organisation, or other entity, in addition to a private company, if the project serves a public purpose.
5. The 2013 Act entailed that if an offence is committed by a government department, the head of the department will be held guilty unless he can show that he had exercised due diligence to prevent the commission of the offence. The Bill removes this section and adds a provision that if an offence is committed by a government employee, he can be prosecuted only with the prior sanction of the government. It may be pertinent to note that the changes made by the Bill raise the threshold to hold government employees accountable for offences committed under the Act.
6. The 2013 Act provides that the provisions of the Bill would apply to any acquisition initiated under the Land Acquisition Act, 1894 under two conditions: (a) an award had been made under Section 11 of the 1894 Act, five years or more prior to the commencement of the 2013 Act, and (b) the physical possession has not been taken or compensation not been paid. The Bill adds a proviso to state that the computation of the five year period should exclude any period during which a court has granted a stay

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<sup>8</sup> The Ancient Monuments and Archaeological Sites and Remains Act, 1958; The Atomic Energy Act, 1962; The Damodar Valley Corporation Act, 1948; The Indian Tramways Act, 1886; The Land Acquisition (Mines) Act, 1885; The Metro Railways (Construction of Works) Act, 1978; The National Highways Act, 1956; The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962; The Requisitioning and Acquisition of Immovable Property Act, 1952; The Resettlement of Displaced Persons (Land Acquisition) Act, 1948; The Coal Bearing Areas Acquisition and Development Act, 1957; The Electricity Act, 2003; The Railways Act, 1989.

or possession has been taken but compensation has been deposited in a court or a designated account.

7. The 2013 Act excluded acquisition of land for private hospitals and private educational institutions from its purview. The Bill sought to include these two within its scope. However, the Lok Sabha removed this provision of the Bill. Thus, in its present form, the Bill does not include the acquisition of land for private hospitals and private educational institutions.<sup>9</sup>

In addition to removing social infrastructure from one of the five exempted categories of projects, clarifying the definition of industrial corridors, and removing the provision related to acquisition for private hospitals and private educational institutions, the Lok Sabha made a few other changes to the Bill, prior to passing it. These include:

- (i) Employment must be provided to ‘one member of an affected family of farm labour’ as a part of the R&R award, in addition to the current provision which specifies that one member of an affected family must be provided employment as a part of R&R;
- (ii) Hearings of the Land Acquisition, Rehabilitation and Resettlement Authority to address grievances related to compensation to be held in the district where land is being acquired; and
- (iii) A survey of wasteland must be conducted and records of these lands must be maintained.<sup>10</sup>

Unlike the upper house, the lower house, where the NDA holds a majority, passes the bill. Opposition parties continue to fight against it. In May 2015 the Lok Sabha referred the bill to a joint parliamentary committee under the Chairmanship of Shri S.S.Ahluwalia, M.P. for examination and presenting a Report to the Parliament, consisting of 30 members. The committee comprises members from both the Lok Sabha and the Rajya Sabha.<sup>11</sup> Eleven members in the Joint Committee of Parliament on the Land Bill on August 3, 2015 moved amendments seeking to bring back the social impact assessment and consent clauses. With the NDA government’s Land Acquisition (Amendment) Ordinance set to lapse on August 31, the government is likely to issue a fresh ordinance in order to accommodate the 13

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<sup>9</sup> Joyita, ‘Land Acquisition: An overview of proposed amendments to the law’, The PRS Blog, March 16<sup>th</sup>, 2015, Available at: <http://www.prsindia.org/theprsblog/?p=3515>

<sup>10</sup> Ibid.

<sup>11</sup> Available at: <http://www.prsindia.org/parliamenttrack/parliamentarycommittees/jointparliamentarycommittee3882/>

legislations excluded under the 2013 law, while dropping a majority of key amendments brought in through its earlier ordinances. The government had earlier re-promulgated its ordinance three times, bringing extensive changes to the 2013 law. However, in a major climb-down earlier this month, the government agreed to drop most of its controversial amendments to the Act in order to bring back the crucial clauses on consent and Social Impact Assessment. This change in government's stand was made clear by the amendments moved by the BJP members of the Joint Committee of Parliament examining the issue.<sup>12</sup>

Land Acquisition stands at the political fault line of a changing India, undergoing significant transitions: political, economic, social, environmental. There is keen contestation along a variety of fronts, actors, structures and visions, and with deepening democracy and a savvy 24/7 media, the salience and political articulation of such contestation has become more visible. These debates are part of a greater emerging story that engages with processes and governance deficits in the country.<sup>13</sup>

The future of the land acquisition is still in jeopardy. The author believes that the government is honest in emphasising on public infrastructure in rural and urban areas. Undoubtedly, India suffers from an infrastructure deficit and resultantly, developmental bottle neck. 21st century legislation must cater to the developmental needs of the 21st century India. It cannot utterly disregard the developmental needs of the society and mandate that India does not grow. Land acquisition is fundamental to the infrastructure development and the success of the Make-in-India programme designed to boost manufacturing and job creation with the goal of amplifying the growth of India.

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<sup>12</sup> Pradeep Kaushal and Ruhi Tewari, 'Government climbdown: Fresh land ordinance minus key amendments likely by month-end', The Indian Express, August 26, 2015, Available at: <http://indianexpress.com/article/india/indiaothers/govtclimbdowndownfreshlandordinanceminuskeyamendmentslikelybymonthend/>

<sup>13</sup> Amlanjyoti Goswami, Land Acquisition, Rehabilitation and Resettlement: Law and Politics, IIHS Working Paper.