

Inefficiency and Abuse of Compulsory Land Acquisition

An Enquiry into the Way Forward

RAM SINGH

This paper focuses on two aspects of the laws that govern the acquisition and transfer of agricultural land for other purposes: (a) litigation over compensation, and (b) the regulatory impediments obstructing voluntary land transactions. It shows that there is excessive litigation under the current land acquisition law. It is argued that any compulsory acquisition-based process is inherently prone to litigation, even if accompanied by presumably benevolent schemes such as land-for-land and the rehabilitation and resettlement packages. The paper offers suggestions on how to reform the regulatory framework that governs agricultural land and its use. It discusses the Land Acquisition, Rehabilitation and Resettlement Bill 2011 and reveals how the bill leaves open several back doors for states to favour companies, and how it fails to address the fundamental causes behind the rampant disputes and litigation over compensation.

I am thankful to T K Arun, Abhijit Banerji, Keshav Choudhary, Leonardo Felli, Maitreesh Ghatak, Parikshit Ghosh, Neha Jain, Rajinder Punia, and Uday B Sinha for their helpful comments and suggestions. On some of the issues, I have benefited greatly from my discussions with Kaushik Basu, Amit Bhaduri, Nira Goyal, Satish Jain, Harsh Mander, Partha Mukhopadhyay, Debraj Ray and Paranjoy Guha Thakurta. I am thankful to Dimple Kukreja, Swati Saluja and Aditi Singhal for providing excellent research inputs. Research support provided by the Centre for Policy Research is gratefully acknowledged. I am thankful to the Centre for Development Economics at the Delhi School of Economics, and the London School of Economics for their institutional support.

Ram Singh (ramsingh@econdse.org) is at the Delhi School of Economics.

1 Introduction

The Land Acquisition, Rehabilitation and Resettlement (LARR) Bill 2011¹ has been introduced in the Lok Sabha. The bill seeks to rectify the failings of the archaic Land Acquisition Act 1894 (LAA) – the existing law on compulsory acquisition of land and private property. Besides, the bill aims to facilitate transfer of land from agriculture to other developmental activities while safeguarding the interests of the affected people. The bill has several laudable provisions. The most important is the restriction of the scope of the emergency clause made notorious by its frequent misuse by states. Moreover, the bill recognises that acquisition of agricultural land affects the livelihoods of not only the owners but also many others. So, it seeks to protect the welfare of all affected parties by creating a legal entitlement to compensation and rehabilitation and resettlement (R&R) for all livelihood losers.

However, the bill has serious limitations. For instance, it completely ignores the causes behind excessive litigation over compensation. If anything, its provisions have the potential to further intensify litigation. The recent writings on the subject have also ignored this crucial issue (Chakravorty 2011; Desai 2011; Ghatak and Ghosh 2011; Ramanathan 2011; Sarkar 2011; Sarma 2011). Moreover, these otherwise important works have not explored the legal and regulatory reforms that can help facilitate voluntary transfer of land from agricultural to developmental purposes. This article analyses these issues. It offers some suggestions to mitigate the problems associated with compulsory acquisition of land.

It is demonstrated that the compulsory acquisition of land is inherently prone to litigation over compensation. Further, the litigation over compensation is socially inefficient and regressive in its effects; it is relatively much more profitable for the rich than the poor. These claims are corroborated by using statistics derived from two unique data sets; one compiled from 525 judgments of the additional district judge (ADJ) courts in Delhi, and the other from 305 judgments of the Punjab and Haryana High Court. Moreover, it is demonstrated that compulsory acquisition is intrinsically vulnerable to failures on the fronts of efficiency as well as fairness – even if it involves acquisition of only a fraction of the required land and is accompanied by presumably benevolent schemes, such as compensation in the form of land-for-land and/or the R&R packages.

Nonetheless, the LARR Bill seeks to rationalise compulsory acquisition of land by appealing to a growing national need for industrialisation, urbanisation and development in general. By diluting the crucial public-private distinction, it expands the scope of compulsory acquisition for all sorts of activities of private companies. The bill seems to be guided by the belief that in the absence of compulsory acquisition many developmental projects will get held up, a perception shared by several studies on the subject.

This paper, in contrast, demonstrates that it is the regulatory hold-up and not the hold-out by the owners that is the biggest impediment for voluntary transactions in land. At present, the use of agricultural land for other purposes is subject to many obstructive regulations. These regulations preclude a large number of potential transactions, and put heavy downward pressure on the transaction prices. Rather than increasing the scope of compulsory acquisition, there is a need to facilitate transfer of land through voluntary transactions. This calls for immediate reforms in the legal and regulatory framework governing land and its use.

Finally, we discuss the LARR Bill. We argue that in its present form the bill fails to address some of the ongoing abuses of the eminent domain – that is, the power of the State and its agencies to compulsorily acquire private property for “public purpose” activities. The bill leaves open several back doors for the states to favour the powerful and private companies at the expense of the rights of the farmer and the forest dweller. We offer suggestions for the bill, in view of the findings in the paper.

2 Misused Eminent Domain: Disputes and Litigation

The history of eminent domain in India is a saga of unmitigated abuses of the law, which is the archaic and ambiguous LAA. Part VII of the Act allows acquisition for private companies, subject to restrictions imposed by sections 38-44 of this part. However, the states have repeatedly exploited ambiguities in the Act to acquire land for companies and the powerful. To illustrate, there is no provision for emergency acquisition under Part VII. Besides, acquisition for companies is restricted to only those activities from which the public can benefit directly, such as housing for workers, setting up of schools and hospitals, etc. Nonetheless, the states have acquired land for all sorts of activities of companies, including the ones that cannot even remotely serve any public purpose; for example, for setting up of shoe-manufacturing factories, air-conditioner-compressor plants, hotels and swimming pools! Moreover, acquisition has largely been done using the infamous emergency clause.

In order to circumvent the restraining provisions of Part VII, the states have instead used Part II to acquire land for companies. This part is meant for public purpose acquisitions, and does not impose the above restrictions. LAA is ambiguous as to when acquisition for companies can be undertaken under Part II. Judicial interpretations of the Act have only aggravated its misuse. Since the 1960s, the judiciary has treated acquisition for companies as public purpose acquisition, as long as a part of the compensation cost is paid out of the state exchequer.²

Even worse, in *Indrajit C Parekh vs State of Gujarat*³ the Supreme Court upheld an incredibly bizarre contention of the Gujarat government, which claimed that a contribution of even one rupee from the exchequer is sufficient to validate the acquisition for companies under Part II! Since then, the states have been contributing nominal amounts towards the cost of acquisition, to justify acquisition for companies. Some governments have gone to the extent of contributing just Rs 100! Besides the direct acquisition for companies under Part II, there have been other abuses of the land acquisition laws as well. The notable ones include: acquisition of land citing some public purpose but covertly diverting it to private ends; adoption of the pick-and-choose method for selecting a project site; and, the use of the de-notification clause to exempt land belonging to the powerful but simultaneously acquiring all neighbouring properties. By now, these misuses of the law stand well documented in the literature (Gonsalves 2010; Guha 2007; Desai 2011; Morris and Pandey 2007; Sarkar 2007; Singh 2006).

However, the issue of litigation and its serious consequences has not received due attention from researchers. The use of the eminent domain in India is invariably followed by disputes and litigation over compensation. To put the relevant issues in perspective, the LAA entitles the affected owners to the “market value” of their property. In practice, the market value is determined on the basis of “circle rates” and/or the sale deed of a similar property. The problem, however, is that due to unreasonable restrictions imposed by the change in land use regulations, the market price of agricultural land is acutely suppressed (Section 5 discusses this issue in detail). Moreover, to save on stamp duty charges, the price reported in a sale deed is generally much lower than the actual transaction price. As to the circle rates fixed by the states, they are perpetually outdated and well below the market rates. Therefore, both sale deeds and circle rates under-represent the true market value of the land; between the two, circle rates are even lower. Taking note of this mismatch, the judiciary has held that the market value should be determined on the basis of the circle rate or the registered sale deed rates of similar properties, whichever is higher.⁴ Nonetheless, the land acquisition collectors (LACs) routinely award compensation on the basis of circle rates. This is the primary reason behind the inadequacy of government-provided compensation and associated disputes.

The excessive litigation under existing law is due to the fact that the LACs and courts use a different basis for determining compensation. While the LACs use circle rates, the courts tend to be lenient and use relatively high value sale deeds as the basis for determining compensation. Consequently, court-awarded compensation is consistently higher. An examination of court judgments confirms this claim. Table 1 (p 48) presents summary statistics of the available 525 judgments delivered by the ADJ courts in Delhi. These judgments have been delivered over three years – 2008, 2009 and 2010. As the table shows, for as much as 86% of cases the ADJ court awards are strictly greater than the LAC awards.

Moreover, litigation does not end even when the ADJ court increases the compensation amount for those owners affected

by the acquisition. As the analysis of the Punjab and Haryana High Court suggests, those who can afford it approach the higher judiciary to seek further enhancement in compensation. Table 2 presents summary statistics of 305 judgments of the high court pertaining to the year 2009. As the table shows, in as many as 63% of appeal cases, the owners did succeed in getting a compensation higher than what they had received from the ADJ court. Overall, in 97% of litigated cases, the court-awarded compensation is strictly higher than the LAC award. Moreover, average court awards are almost 200% higher than the LAC awards.⁵ Presumably, it is the people with sufficient financial resources who go to the high courts for litigation.

A preliminary examination of judgments of other courts in the country suggests that the phenomenon of court awards being greater than LAC awards is ubiquitous. In some cases, the difference between the LAC award, on the one hand, and the judiciary-awarded compensation, on the other, is startling. A few illustrative examples:

In *CESC Limited vs Sandhya Rani Barik and Ors*, 2008,⁶ the judiciary increased the rate of compensation substantially. The LAC awarded compensation at the rate of Rs 50,000 per cottah. In contrast, the judiciary awarded compensation at the rate of Rs 2,25,000 per cottah.

In *Kanta Devi & Ors vs State Of Haryana & Anr*⁷ the rate of compensation was increased from Rs 40,000 per acre (by the LAC) to Rs 3,84,000 per acre.

In *Revenue Divisional Officer-cum-LAO vs Shaik Azam Sahem*⁸ the Supreme Court increased the rate of compensation from Rs 16,000 to Rs 1,41,666.66 per acre!

Understandably, those affected by acquisition have a strong incentive to opt for litigation. Given the intensity of litigation over compensation, the neglect of the issue in the writings on compulsory land acquisition laws is lamentable.

3 Inefficiency and Litigation under Eminent Domain

Excessive litigation (as discussed earlier) is partly attributable to the callous approach adopted by the LACs in determining compensation. However, there are inherent problems with the use of the eminent domain, even if the concerned officials are competent and upright. It is inherently litigious. Moreover, it can guarantee neither efficiency nor fairness of the outcome.

At the heart of the problems with compulsory acquisition is the lack of information about owners' valuation of their properties. By definition, compulsory acquisition or reallocation of land implies a lack of voluntary transaction which could reveal the value of the land to its owner. Without this information fairness and efficiency of compensation cannot be guaranteed. As mentioned above, most eminent domain laws require the compensation to be equal to the "market" value of the property,

Table 1: Summary Statistics of ADJ Courts' (Delhi) Awards

Land Type	Number	% of Cases with Court Awards >LAC Award	% Increase in Compensation by Court				% Increase in Compensation by Court, Conditional on Positive Increase			
			Mean	Std Dev	Min	Max	Mean	Std Dev	Min	Max
Agriculture	470	90.21	18.36	49.53	0	427.63	20.35	51.76	1.0	427.63
Residential	12	83.33	29.47	38.72	0	109.09	35.36	40.01	9.1	109.09
Commercial	13	46.17	33.09	45.66	0	109.09	71.69	41.04	30	109.09
Others	30	73.33	49.21	131.91	0	514.28	67.11	150.9	1.41	514.28
Total	525	86.09	20.57	56.68	0	514.28	23.44	59.95	0.20	514.28

Source: Based on data collected from ADJ courts (Delhi) judgments delivered in 2008, 2009 and 2010 from <http://delhicourts.nic.in>. Data extracted and compiled manually by author.

Table 2: Summary Statistics of Punjab and Haryana High Court Judgments

Total Number of Judgments (305)											
% of Cases with ADJ Award Greater Than LAC Award				% of Cases with HC Award Greater Than ADJ Award				% of Cases with HC Award Greater Than LAC Award			
91				63				97			
% Increase in Compensation by ADJ Court over LAC Award				% Increase in Compensation by HC over ADJ Award				% Increase in Compensation by HC over LAC Award			
Mean	Std Dev	Min	Max	Mean	Std Dev	Min	Max	Mean	Std Dev	Min	Max
125.5	260.8	0	2,925	43.1	194.9	-54.28	3,202.22	197.6	357.1	0	3,202.22

HC=High Court.

Source: Based on data collected from Punjab and Haryana High Court judgments pertaining to the year 2009 from <http://www.judis.nic.in/>. Data extracted and compiled manually by author.

plus some solatium. However, determination of market price is a genuinely difficult task, and highly vulnerable to errors. This value is determined by considering the prices of similar properties that have been traded in the market. But many attributes of a property affect its value, and no two properties are identical. So, the officially determined compensation is bound to differ from the true market value of the property. Indeed, several empirical studies confirm this claim.⁹

As a result, however, the officially awarded compensation is inherently prone to litigation. Often, several properties can be claimed to be identical to the property in question. So, an owner can choose properties with rates higher than the received compensation, and claim these properties to be similar to his own. Therefore, there is always scope for profitable litigation, unless the LAC identifies all the even vaguely similar properties and uses the one with the highest rate to award compensation. In practice, LACs do not have incentives to assiduously search for the market value. They play it safe to avoid audit objections, and award compensation based on relatively low value circle or sale deed rates. This, in turn, means that the owners stand a very good chance of winning during litigation.

However, litigation entails unnecessary spending of a great deal of money and other resources by the acquisition-affected parties as well as by the state. Moreover, litigation is socially regressive; it is much more profitable for the owners of the relatively high value properties than for those owning low value properties. Since high value property owners can and do put in intensive efforts during litigation – in terms of choice of the quality of lawyers, search for high value sale deeds and other evidence needed to prevail in court. In contrast, small farmers and the poor, who presumably own low value properties, cannot afford excessive spending. What worsens the situation is the fact that the burden to prove the market value is on the owner, notwithstanding the fact that all of the relevant information – records of the sale deeds, land type, etc – is solely possessed by the government. So, court-awarded compensation is expectedly higher for high value properties. Ongoing research by the

author seems to support this inference. Table 1 also provides empirical though only preliminary support to this claim; the gains from litigation are higher for commercial and residential (plausibly higher value) properties than for agricultural land.

Even if it were possible to correctly determine and pay the market value, the fairness and efficiency of compulsory acquisition cannot be ensured. For acquisition to be efficient the resulting benefit should be greater than the cost; the latter is the sum of the owners' valuations and other associated costs. For the compensation to be "fair", it should at least be equal to the owner's valuation, which is invariably different from the market value of the property. Consequently, there is inescapable variance between the awarded compensation, on the one hand, and the valuation of affected owners, on the other. Moreover, land transfers may take place even though this is inefficient even from a pure cost-benefit standpoint.

Before concluding, it is pertinent to mention that some studies have proposed mechanisms to help solve the problem arising due to the lack of information on owners' valuations (Gangopadhyay 2011; Ghatak and Ghosh 2011). However, the actual use of these mechanisms is susceptible to several problems. For a critique of the suggested measures see Singh (2012). However, the proposed schemes require the state to determine the form and the magnitude of compensation, on account of quality, location and other differences between the type of land surrendered by the owners and the one given to them as part of land-for-land, and for the execution of R&R packages. Therefore, even if the state agents are honest and capable, these schemes are vulnerable to disputes and litigation, and prone to failures on efficiency as well as fairness fronts. The abuses of the eminent domain reported in the previous section show that the assumption of a benevolent state is completely misplaced to say the least.

4 A Few Transactions in Agriculture Land: All a Hold-out?

Most of the problems associated with compulsory acquisition get precluded if land transfers are voluntary. By its very nature, a voluntary transaction ensures that the land transfer takes place only if the buyer's valuation of the land is higher than that of the existing owner, and at a price at least equal to the latter's valuation. This means, controlling for third party effects, a voluntary transaction is strictly more efficient and fair than compulsory acquisition. Moreover, there is no scope for ex post disputes and litigation over the price received by the owner.

However, voluntary transactions as a means of land transfer have two limitations. First, the buyers and sellers will typically ignore the third party effects resulting from their transactions (Banerjee et al 2007; Bardhan 2011). This can be a source of serious concern. When agricultural land is put to non-agricultural ends, generally it will affect a large number of non-owners – sharecroppers, agriculture workers, artisans, etc. In some cases, these people end up losing their primary source of livelihood altogether. Nonetheless, the voluntary transaction between the buyers of land and the owner farmers will ignore these and the other third party effects.

However, whatever measures are available under eminent domain to assess and mitigate these costs and effects, the same can be adopted to regulate a voluntary transaction. For example, the buyer can be made to compensate the land dependent non-owners by the same amount as would be the case under the eminent domain; the LARR Bill has adopted some such measures. Similarly, whatever regulation is put on the activity of the project developer buyer, the same can be used if he buys land through a voluntary transaction. So, as far as the third party effects are concerned, a voluntary transaction is as efficient and fair as eminent domain.

Therefore, when the direct and indirect effects of land transfer are considered together, regulated voluntary transactions are more efficient and fair than the compulsory acquisition. Indeed, if there were well-functioning land markets, there will be no justification for the use of eminent domain. It is here that the second limitation of voluntary transactions becomes relevant. While the property market in and near urban areas is very active, in rural areas it is rather dormant. The inertness of the market in agricultural land is attributed to high transaction costs on account of poor land records, and most importantly to the hold-up by the sellers/owners who want to extract an undue share of the surplus from the buyer.

Certainly, high transaction costs owing to poor land records and other market frictions limit the frequency of transactions in agriculture land. However, there are other more crucial factors at play. First, there is limited scope for a profitable transaction, as long as the land is to be used for agricultural purpose. While a potential buyer's valuation generally depends on the economic gains from the land, for the owner/seller its worth depends on both economic and personal considerations. Therefore, a land transaction is likely to come about only if its economic value to the buyer is much more than to the owner. However, there is a limit to which the economic worth of agricultural land can vary across individuals. The profitability of agricultural land does not vary considerably with the size of the holding; if anything, the data indicate existence of an inverse relationship between the productivity and the size of landholding.¹⁰ So, it is not surprising that very few transactions are observed wherein the seller and the buyer use the land for agricultural purpose. To the extent productivity differences arise – on account of differences in the access to banking system, labour-land ratio and technical/mechanical endowments of the parties – there is empirical evidence suggesting that these factors do play a significant role in explaining whatever little transactions are observed in agricultural land (Deininger et al 2007).

Presumably, major productivity differences arise when agricultural land is used for non-agricultural purposes, say to set up an industry or develop a housing complex, etc. However, the use of agricultural land for non-agricultural purposes is subject to several regulations. The decision-makers use these regulations to extract rent from the project sponsors. As is demonstrated in the following section, it is these obstructive regulations that are responsible for the absence of frequent transactions involving transfer of agricultural land to other

developmental activities. When granted exemption from them, the project developers have been able to buy large tracts of land through voluntary transactions. Here are some illustrative examples.

The developers of the Gurgaon Special Economic Zone (SEZ) have been able to buy several pockets of hundreds of acres of contiguous agricultural land directly from the owners.¹¹ Similarly, the promoters of the Kakinada SEZ in Andhra Pradesh have bought as much as 4,800 acres by directly negotiating with the farmers.¹² In Maharashtra, the Navi Mumbai SEZ developers have been able to buy several thousand acres through voluntary transactions.¹³ The GMR group for its Chhat-tisgarh project has purchased the 428 acres that it needed directly from the villagers. Indeed, there are several other examples where the project developers have successfully purchased hundreds of acres directly from the owners.¹⁴

These examples show that the seller hold-out is not inevitable even for large projects, provided a facilitating environment is created; arguably, voluntary transactions are much more likely to succeed for small projects and those that have flexibility over location. It is not entirely plausible to attribute the lack of transactions in agricultural land only to the seller hold-out or other market frictions. Such misbelief can only serve to justify an excessive use of the compulsory acquisition laws.

It must be granted that the risk of hold-up is for really large and location-specific projects. However, even for these projects the choice of compulsory acquisition is not immediate. There is a trade-off between inefficiency on account of a hold-up, on the one hand, and the earlier discussed inefficiency associated with the use of eminent domain, on the other. Moreover, the hold-up risk for large projects can be reduced substantially by lowering transaction and regulatory costs currently associated with land deals. The next section suggests some helpful measures.

5 The Way Forward

At present, there are several institutional and regulatory hurdles that thwart a large number of voluntary transactions. Use of agricultural land for other purposes requires what is called the change-in-land-use (CLU) clearance from the state government, among many other regulatory clearances from local authorities. Some of these regulations make the large-scale purchases of land, for example, for setting up of a big industry, totally impossible. To illustrate, the land ceiling regulation limits the size beyond which agricultural land cannot be owned. So, a project developer cannot buy and own agricultural land in its current use beyond this limit, which varies from state to state. Moreover, it is not possible to buy the required land by appealing to an alternative use (so as to avoid the ceiling regulation), since to get a CLU clearance the project developer should possess the land beforehand. Therefore, the developers of big projects have no other option but to “persuade” the state government concerned to acquire the land.

Even when the land required for the project is within the permissible limits of the land ceiling rules, the regulatory hold-up is an equally serious issue. The formal and informal (kickback) costs of these clearances, especially the CLUs, are

said to be a significant component of the project costs. For the real estate projects and also for small and medium sized industrial projects these costs are comparable to the cost of land itself.¹⁵ Unsurprisingly, these “regulatory” costs preclude a large number of potentially profitable transactions. Moreover, they put heavy downward pressure on the price of transactions that still remain feasible, and thereby affect the distribution of surplus against the farmers.

To see how let us suppose there are two entrepreneurs. Both need to buy an acre of land for their projects. There are two farmers willing to sell their land. Each farmer values his (infra-marginal) acre at Rs 80 lakhs. However, while the first entrepreneur finds each of the above acres of land worth Rs 100 lakh, the second one considers it worth Rs 110 lakh. In the absence of any regulatory costs, there is scope for two mutually beneficial transactions, each involving one of the farmers and one of the entrepreneurs. But, if the “rent-seeking” costs of land use clearances are Rs 25 lakh per acre, then the first entrepreneur’s net gains from the land are reduced to Rs 75 lakh, which is less than the farmers’ valuation. Consequently, a profitable transaction between the first entrepreneur and any of the farmers becomes impossible. In contrast, a gainful transaction between the second entrepreneur and any one of the farmers is still possible. However, now the entrepreneur would not pay more than Rs 85 lakh, that is, his valuation of the land after factoring in the total regulatory costs; otherwise, he would end up paying any price up to Rs 110 lakh, depending on the bargaining skills of the farmer.

Indeed, a large set of otherwise feasible transactions gets ruled out not due to the hold-out by the sellers but by the regulatory hold-up. This regulatory hold-up has greatly added to the tendency among project developers to bribe the concerned state government to use the eminent domain. When land is compulsorily acquired and given to a private company in the name of a public purpose, the CLU clearances are not needed or are provided along with the land. Therefore, the project developers are better-off bribing the powers that be and get them to acquire the needed land. In fact, this route has added advantage for project developers. As the land price under eminent domain is much lower than the market price, the developers have been getting land at a rate much cheaper than what they would have ended up paying under voluntary transactions.

Things can be much better if the institutional and regulatory infirmities are set right. The large-scale purchases of land by the developers, as discussed in Section 4, became possible only because the project developers were granted exemptions from the CLU and other regulations. There is a need to replace the discretionary and devious CLU regulations with transparent, objective and ex ante zoning regulations, setting different zones for different activities. As long as the land is used for the purposes permitted by these regulations, the state should have no role in further governing of land transactions.

Of course, transaction costs of direct purchases can be reduced greatly if the ownership and land type records are clear and verifiable. Poor land records and the resulting disputes have held back not only development of an efficient land market,

but the overall development of the economy. There is an urgent need to update and digitalise land records related to ownership and type of land. These records should be tamper-proof and made available publicly, so that they can be used by owners, potential buyers and courts for verification of titles. There should be real-time coordination between the agencies responsible for registration of land deals and those responsible for maintenance of land records. As such, these measures will go a long way in facilitating voluntary transactions by clearing any uncertainty over ownership of land.¹⁶

Collective bargaining with the owners or their representatives seems to offer another important channel for reducing the transaction cost. There are instances wherein the owners themselves have taken initiatives to pool and provide contiguous land. For example, more than 1,000 farmers from Avasari-Khurd villages along the Pune-Nashik highway pooled about over 2,665 acres to form a special purpose vehicle to set up a multi-product SEZ.¹⁷ Indeed, there is a need to encourage collective bargaining. Besides, rather than focusing on transfers of ownership, it will help to create a facilitating environment for lease agreements over land. In addition to increasing availability of land for developmental purposes, such agreements have the advantage of permitting the sharing of ownership benefits over time, thereby making farmers stakeholders in the project rather than land losers. Magarpatta City, a 400-acre complex developed by a cooperative of farmers is an illustrative case in point. Other possibilities also exist.¹⁸ It will also help to legalise the contingent contracts for land deals. Under these contracts, the project developer can negotiate a “future sale contract” with each owner. If the developer actually buys the land, the agreed price is paid to the owner; otherwise, the developer pays a small compensatory amount to the owner to cover the time and negotiation costs incurred by the latter. These contracts will not eliminate the problem of hold-up altogether, but they can surely reduce its intensity.

The problem is that these initiatives can be undertaken only by the concerned state government, since the land, its usage and the contracts over land are all in the state list. But, the decision-makers in the state governments do not have the incentive to reduce the scope of eminent domain. Serious thinking is required to incentivise the states to undertake the above reforms. Fortunately, land acquisition is in the concurrent list. This means that there is room for a centrally enacted land acquisition law to help in the process and thereby reduce the potential for misuse of eminent domain. In particular, the central law can determine the scope and dictate the terms for the use of compulsory acquisition laws.

In the recent past, states have exhibited a strong tendency to use assembled land to attract big projects. Several states have competed with one another in offering lucrative land deals to the developers, leading to a race to the bottom. International experience shows that neither the sellers hold-out nor land scarcity is the leading cause for this race to the bottom.

It is instructive to note that the use of the eminent domain for private projects is more frequent and controversial in land abundant United States (us) than in the relatively land scarce

and population dense England! How so? The local bodies in the us as well as in England have incentives to compete with one another to attract projects. However, in England there are several effective constraints on the use of land for the purpose. While the land acquiring authority is a local body, the power to grant permission for the use of eminent domain is a central authority. This authority, which is the office of the deputy prime minister, makes sure that the local authorities do not engage in a race to the bottom. Moreover, before initiating the land acquisition process, the local authority has to publish, discuss and get the development plan approved by local legislation. This means that for a local authority to be able to use the eminent domain powers, it has to prove preponderance of benefits over the costs resulting from the project at hand. A great advantage of this process is that the crucial issues, like desirability of acquisition, alternative locations, etc, are resolved beforehand. In contrast, in the us, similar constraints on the use of eminent domain are amiss.¹⁹ As a result, while compulsory acquisition for private projects has become highly contentious in the us, by comparison, the authorities in England have rarely encountered resistance to compulsory acquisition.

Preventing a Race to the Bottom

There is a need to control the race to the bottom among the states, especially for large projects. Unfortunately, the LARR Bill in its present form does not address this serious issue. Given the federal structure of Indian politics, it is neither feasible nor advisable to have a central authority empowered to approve compulsory acquisition. However, it will help if the new land acquisition law provides an independent state-level institution to discuss all relevant project details pertaining to its size, location, costs, benefits, form of compensation, R&R package, etc. Such a discussion should be a prerequisite to the start of the acquisition process. The LARR Bill provides for a “Land Acquisition Rehabilitation and Resettlement Authority” (LARRA) as a supervisory authority. But, LARRA’s role only comes into play ex post. Moreover, most of the crucial decisions pertaining to Social Impact Assessment (SIA), R&R, etc, have been delegated to committees comprising of state-level bureaucrats whose past performance leaves much to be desired. It is important that the final reviewing authority for crucial matters like SIA and R&R is an independent and representative body.

Apart from the above measures, it is crucial that the entire cost of compensation is paid by the entity benefiting from the acquisition. Moreover, the compensation amount should be increased substantially. While it is almost impossible to determine and provide compensation equal to the valuation of land to its owners, it seems better to err on the higher rather than the lower side. As discussed earlier, when compensation is different from individual valuations, the acquisition is very likely to be inefficient. However, this risk is much higher if the compensation is generally less than the individual valuations. Since, if the compensation rate appears to be too high, the developers can always choose to go for direct purchase from the owners. The LARR Bill provides for an increase in

compensation. However, the proposed approach is problematic, a point discussed next.

6 The LARR: Additional Critique and Suggestions

The LARR Bill has several laudable provisions. The most important is the creation of a legal entitlement to compensation and R&R not only for the owners but also for all other livelihood losers. All the same, the bill fails to address the above-discussed fundamental causes behind the disputes and litigations over compulsory acquisition. Moreover, it opens up several back doors for the state to favour companies at the expense of farmers' rights and the livelihood of forest dwellers.²⁰ True, the bill drastically reduces the scope of the notorious emergency clause. However, the excessive use of the emergency clause is only one of the several abuses of the extant law. The others abuses involve covertly diverting the acquired land to companies, adoption of the pick-and-choose method during acquisition, and the misuse of the de-notification clause to exempt land belonging to the powerful.

Under the proposed law the states can continue with these practices unabated. Doubtful? Consider the following provisions in the bill. Section 69 allows the states to change the purpose for which the acquired land is finally used, that is, the public purpose can be changed after acquisition. Furthermore, Section 70 gives them unbridled power to transfer already acquired land to private companies and individuals in the name of public purpose, as long as 20% of the resulting profit, if any, is shared with the original owners. And, if this was not enough, Section 61 allows for mid-way de-notification as well! These provisions together give the states untamed powers to acquire land in the name of public purpose and transfer it to companies. As to the sharing of 20% of the profit with the owners, the ministry seems to have learnt nothing from the insidious manipulation of accounts by companies.

For obvious reasons the incentive to misuse eminent domain is especially pronounced for private projects. Therefore, the public-versus-private distinction is important. The scope of compulsory acquisition for private projects needs to be reduced drastically. The use of the eminent domain for private projects should be restricted to large projects, by providing a lower limit for government intervention. As the examples produced in section 5 show, the seller hold-up is not a serious concern for small and medium size projects. On top of it, these projects are flexible in terms of location. Unfortunately, the all-encompassing lists of public purpose activities in Sections 2(n) and 2(y) of the bill allow the states to intervene in acquisition and transfer of land to companies for all sorts of essentially private activities.

Moreover, there is nothing substantial in the bill to change the vicious cycle of litigation and the resulting wastage of private and public resources. The bill unleashes conflicting forces in terms of incentives for the affected parties to litigate, and thereby further complicates matters. To put things in perspective, Section 25 of the existing LAA mandates that the court-awarded compensation cannot be less than the LAC awarded compensation. The bill, in contrast, provides no such safeguards to the litigant owners. So, under the proposed law,

in principle, the court awards can be less than the LAC-awarded compensation. Therefore, it makes the choice of litigation a riskier proposition for the affected parties. However, this aspect of the new law per se is not going to make it any less litigious, since there is nothing in the bill to make the LAC determine compensation carefully. The LACs will continue to play it safe by awarding compensation on the basis of the low valued sale deeds or circle rates. This means that the tendency of the affected parties to litigate the LAC awards will remain undiluted. Moreover, during litigation only the owners can dispute the compensation awards; the government cannot question its own decision. Therefore, guided by the legal principle of the *prohibition of reformatio in peius*,²¹ a trial court can only decide whether compensation can be increased or not. So, the court awards can be higher or at worst equal to the LAC awards, even in absence of an explicit provision in the law. Therefore, those affected by an acquisition will continue to litigate. All that the bill does is replace the ADJ court with LARRA to adjudicate compensation-related disputes. Substitution of one adjudication authority with another cannot reduce litigation.

If anything, litigation is likely to intensify further. The bill requires the compensation, including solatium, to be four times the market value of the land for rural areas, and two times the market value for urban areas. That is, for purpose of compensation, the multiplier has been raised from 1.3 under the current law²² to two and four for urban and rural areas, respectively. To see why the increased multiplier will further intensify litigation, consider a piece of agricultural land measuring 100 square metres. Under the extant law, since the multiplier is 1.3, if compensation is determined using a sale deed rate of say Rs 1,300, instead of a circle rate of say Rs 1,000 per square metre, the total compensation will be higher by Rs 39,000. In comparison, under the proposed law, since the multiplier is four, the compensation amount will go up by Rs 1,20,000! So, under the proposed law, the gains from litigation will be much more than is the case under the existing law, given the proclivity of the LACs and the courts to use a different basis for determining compensation. The basis of determining compensation – circle rate versus sale deeds, one sale deed versus the other – becomes increasingly crucial and worth litigating, as the land size and/or the difference among sale deeds and circle rates increases. In fact, people privy to the official decisions can profit by “engineering” the high value sale deeds ahead of the acquisition, as these sale deeds can be used to get higher compensation.

In order to mitigate the problem of excessive litigation, it is important that the initial compensation itself is determined in light of all of the relevant information, such as records of the sale deeds, land type, its future value, etc. All this information should be required to be shared with the affected parties before compensation awards are made. Here, it will help if the compensation is determined by an independent and representative agency set up for the purpose. This agency should be required to use all of the above-mentioned data relevant for determining compensation. Moreover, the scope of compulsory acquisition needs to be minimised.

NOTES

- 1 Land Acquisition, Rehabilitation and Resettlement Bill, 77-2011.
- 2 See *Smt Somawati & Others vs State of Gujarat* (AIR 1963 SC 151) and *Devinder Singh & Others vs State of Punjab & Others* (2008(1) SCC728), among others. Since these judgments, courts have annulled some acquisitions, but largely on procedural grounds.
- 3 AIR 1975 SC 1182.
- 4 See for instance, *The Special Land Acquisition Officer, Bangalore vs T Adinarayan Setty* (AIR 1959 SC 429), *K S Paripoornan vs State of Kerala* (AIR 1995 SC 1012), *Panna Lal Ghosh & Others vs Land Acquisition Collector & Others* (decided on 12 December 2003 viz. Appeal (civil) 9734 of 2003), *Rameshwar Solanki & Others vs. UOI & Others* (AIR 1995 Delhi 358), and *Tindey and Others vs UOI & Others* (2000(54) DRJ(DB) 384), and *Jasrath vs Union of India* (130 (2006) DL700), among others.
- 5 Note that the results in the two tables are not strictly comparable. Apart from pertaining to different states, note that Table 2 reports a summary of awards for only a subset of the ADJ adjudicated cases, those that went to the high court.
- 6 *CESS Limited vs Sandhya Rani Barik and Ors*, 2008 (INSC 1036), decided on 7 July 2008.
- 7 Decided by Supreme Court on 8 July 2008.
- 8 Decided on 13 January 2009.
- 9 See, for example, Munch (1976), Bell and Parchomovsky (2007) and Aycock and Black (2008).
- 10 For discussion on this issue and survey of relevant literature see Gaurav and Mishra (2011).
- 11 This is not to say that any amount of land can be purchased through voluntary transactions. The SEZ project has got stuck since the developer has failed to get the needed 10,000 acres of land, all contiguous.
- 12 See "ONGC Preparing Ground for Kakinada Refinery, SEZ", viewed on 6 January 2012 (<http://hindu.com/2006/12/15/stories/2006121508510300.htm>).
- 13 "RIL Deals Directly with Farmers for SEZ Land in State", viewed on 28 November 2011 (http://articles.economicstimes.indiatimes.com/2007-01-15/news/28483538_1_maha-mumbai-sez-purchase-land-stamp-duty). Also see, "Status of MSEZ", viewed on 6 January 2012 (<http://www.docstoc.com/docs/26228984/MAHARASHTRA-SEZs-on>).
- 14 For more examples see "Who Tilled My Land and Ate My Pie?", viewed on 20 October 2011 (<http://www.rediff.com/business/slide-show/slide-show-1-special-who-tilled-my-land-and-ate-my-pie/20110629.htm>).
- 15 See "What's Wrong with the Real Estate Sector in India", *The Economic Times*, viewed on 28 November 2011 (<http://economictimes.indiatimes.com/markets/real-estate/realty-trends/whats-wrong-with-the-real-estate-sector-in-india/articleshow/8786642.cms>).
- 16 Moreover, these measures will help small farmers by easing the credit-market frictions for them, and will enable better targeting of government welfare programmes.
- 17 See "Farmers to Set Up Own SEZ Near Pune", viewed on 28 November 2011 (http://articles.timesofindia.indiatimes.com/2008-01-19/india/27773144_1_sez-avasari-khur-d-village-barren-land).
- 18 On the merits of participatory development see Bhaduri and Patkar (2009); also see Arun (2011).
- 19 For more on the comparison of the use of eminent domain in the US and England see Allen (2008) and Malloy (2008).
- 20 For some other criticisms of the bill see Chakravorty (2011), Ramanathan (2011), and Sarma (2011).

- 21 The legal principle of the prohibition of reform in *peius* does not allow a decision at appeal to put an appellant in a worse position than it was in under the impugned decision. The principle is generally applicable to the appeals against executive decisions.
- 22 Under the LA Act 1894, the provision of 30% solatium makes the multiplier 1.3.

REFERENCES

- Allen, Tom (2008): "Controls Over the Use and Abuse of Eminent Domain in England: A Comparative View" in Robin Paul Malloy (ed.), *Private Property, Community Development, and Eminent Domain* (Hampshire: Ashgate Publishing), 75-100.
- Arun, T K (2011): "Alternative to Land Acquisition", *The Economic Times*, 4 July.
- Aycock, S Alan, and Roy Black (2008): "Special Master Bias in Eminent Domain Cases", *Real Estate Issues*, 33(2): 53-58.
- Banerjee, Abhijit V, Pranab Bardhan, Kaushik Basu, Mrinal Datta-Chaudhuri, Maitreesh Ghatak, Ashok Guha, Mukul Majumdar, Dilip Mookherjee and Debraj Ray (2007): "Beyond Nandigram: Industrialisation in West Bengal", *Economic & Political Weekly*, 42: 1487-89.
- Bardhan, Pranab (2011): "An Uneven Field", *The Hindustan Times*, 10 June.
- Bell, Abraham and Gideon Parchomovsky (2007): "Taking Compensation Private", *Stanford Law Review*, 59(4): 871-906.
- Bhaduri, Amit and Medha Patka (2009): "Industrialisation for the People, by the People, of the People", *Economic & Political Weekly*, 44(1): 10-13.
- Chakravorty, Sanjoy (2011): "A Lot of Scepticism and Some Hope", *Economic & Political Weekly*, 46(41): 29-31.
- Deininger, Klaus, Songqing Jin and Hari K Nagarajan (2007): "Determinants and Consequences of Land Sales Market Participation: Panel Evidence from India", Working Paper 4323, World Bank (<http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-4323>).
- Desai, Mihir (2011): "Land Acquisition Law and the Proposed Changes", *Economic & Political Weekly*, 46(26, 27): 95-100.
- Gangopadhyay, Shubhashis (2011): "Land for Growth", *The Business Standard*, 24 September.

- Gaurav, Sarthak and Srijit Mishra (2011): "Size-class and Returns to Cultivation in India: A Cold Case Reopened", Working Paper, WP-2011-027, Indira Gandhi Institute of Development Research.
- Ghatak, Maitreesh and Parikshit Ghosh (2011): "The Land Acquisition Bill: A Critique and a Proposal", *Economic & Political Weekly*, 46(41), 65-72.
- Gonsalves, Colin (2010): "Judicial Failure on Land Acquisition for Corporations", *Economic & Political Weekly*, XLV(32): 37-42.
- Guha, Abhijit (2007): "Peasant Resistance in West Bengal a Decade before Singur and Nandigram", *Economic & Political Weekly*, 15 September, 3706-11.
- Malloy, Robin P, ed. (2008): *Private Property, Community Development, and Eminent Domain* (Hampshire: Ashgate Publishing).
- Morris, Sebastian and Ajay Pandey (2007): "Towards Reform of Land Acquisition Framework in India", *Economic & Political Weekly*, 2 June, 2083-90.
- Munch, Patricia (1976): "An Economic Analysis of Eminent Domain", *The Journal of Political Economy*, 84(3): 473-97.
- Ramanathan, Usha (2011): "Land Acquisition, Eminent Domain and the 2011 Bill", *Economic & Political Weekly*, 46(44): 10-14.
- Sarkar, Abhirup (2007): "Development and Displacement: Land Acquisition in West Bengal", *Economic & Political Weekly*, 42(16): 1435-42.
- Sarkar, Swagato (2011): "The Impossibility of Just Land Acquisition", *Economic & Political Weekly*, 46(41): 35-38.
- Sarma, E A S (2011): "Sops for the Poor and a Bonus for Industry", *Economic & Political Weekly*, 46(41): 32-34.
- Singh, Jaivir (2006): "Separation of Powers and the Erosion of the Right to Property in India", *Constitutional Political Economy*, 17(4): 303-24.
- Singh, Ram (2012): "Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward", Working Paper No 209, Centre for Development Economics, Delhi School of Economics (<http://www.cdeds.org/pdf/work209.pdf>).

Sources of Data/Judgments

- <http://www.judis.nic.in/>
<http://delhicourts.nic.in/>
<http://www.iasri.res.in/agridata/o8data/forewordo8/conversionF.pdf>

Economic & Political WEEKLY

EPW 5-Year CD-ROM 2004-08 on a Single Disk

The digital versions of *Economic and Political Weekly* for 2004, 2005, 2006, 2007 and 2008 are now available on a single disk. The CD-ROM contains the complete text of 261 issues published from 2004 to 2008 and comes equipped with a powerful search, tools to help organise research and utilities to make your browsing experience productive. The contents of the CD-ROM are organised as in the print edition, with articles laid out in individual sections in each issue.

With its easy-to-use features, the CD-ROM will be a convenient resource for social scientists, researchers and executives in government and non-government organisations, social and political activists, students, corporate and public sector executives and journalists.

Price for 5 year CD-ROM (in INDIA)

Individuals - Rs 1500

Institutions - Rs 2500

To order the CD-ROM send a bank draft payable at Mumbai in favour of *Economic and Political Weekly*. The CD can also be purchased on-line using a credit card through a secure payment gateway at epw.in

Any queries please email: circulation@epw.in

Circulation Manager,
Economic and Political Weekly

320-321, A to Z Industrial Estate, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013, India