Land acquisition legislation: the core issues involved

The government's effort to bring amendments to the land acquisition Act of 2013 has caused such political rancour that it has become difficult to form an unbiased assessment of the issues involved. The government and the opposition are engaged in a fierce political battle; in the process, they are obviously taking positions that do not necessarily correspond to the facts of the situation. A proper assessment of the facts in this case is anyway not easy because of the complexity of the original Act; it runs into 114 sections, each with several clauses, sub-clauses and provisos besides several schedules. The amending act, as passed by the Lok Sabha, itself has 14 sections, again each with several clauses, sub-clauses and provisos, all of which have to be read in conjunction with the original Act to assess what exactly is being changed. The following is an attempt to make such an assessment.

The Act of 2013

Until the enactment of 2013, compulsory acquisition of land in India was regulated by the Land Acquisition Act of 1894. That Act was based on the colonial presumption that the State had the absolute sovereign right over all land; therefore, there was little scope in that Act for of any consultation or negotiation with the affected people. The determination of the location and amount of land to be acquired and the compensation to be paid was largely left to the discretion of the State. The Act of 1894 was indeed amended several times; but the essential arbitrariness of the acquisition and compensation process remained unaltered. In addition, there were several other laws under which the State could requisition or acquire land for specific public purposes, such as roads, railways, atomic energy related projects, defence requirements, rehabilitation and resettlement of displaced persons, and so on. These specific Acts gave the State even more freedom and arbitrariness than the Act of 1894.

Land has been acquired at a very large scale in India under the Act of 1894 and the various other Acts mentioned above. Since Independence alone, millions of people have been dispossessed of their lands and displaced from their homes to make way for various development activities. The burden of such displacement and dispossession is known to have fallen disproportionately on the poorer and the tribal people. In most cases, the amounts of compensation and the associated resettlement and rehabilitation efforts have been highly inadequate, leaving large numbers in a state of destitution and distress. This was bound to cause resentment. Such resentment has become more widespread and acute during the last couple of decades, when the various governments, in their effort to woo private and even foreign enterprise and investments, began to acquire vast tracts of land on behalf of private interests. This led to many well-known instances of large-scale protests; the upsurge in armed rebellion fomented by extreme left groups, especially in parts of central India that are rich in

natural resources, is also widely believed to be a result of such forced acquisition of land and consequent dispossession and displacement.

It was in this climate of rising tensions, protests and rebellions that the Land Acquisition Act of 2013 was enacted with the support of the entire political establishment. The Act, which repealed the corresponding Act of 1894, was an attempt to bring some level of transparency and some sense of consultation with the affected parties without, however, compromising on or diluting the sovereign claims of the State. The Act also aimed at making the compensation amounts and resettlement and rehabilitation efforts more generous and less arbitrary. These objectives are stated in the preamble itself; and, to emphasise these, the Act is named "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013" instead of the imperious "Land Acquisition Act, 1894".

The salient features of the Act of 2013 relevant for this discussion are the following:

1. *Definition of Public Purpose*: The Act offers a very expansive definition of "public purpose" which includes all conceivable legitimate purposes for which land may be required. However, it explicitly excludes "private hospitals, private educational institutions and private hotels" from this list.

2. *Consent Clause*: The Act circumscribes the sovereign right of the State to acquire land by requiring it to seek consent of some proportion of the "affected families". This clause of the Act, spelled out in the two provisos of subsection (2) of section (2), is highly limited; it *does not* apply to any acquisition for the purposes of the government. But in cases where land is sought to be acquired for public-private partnership projects, it mandates prior consent of 70 percent of the "affected families"; and of 80 percent of the "affected families" where the acquisition is for private companies. It bears repetition that in the Act of 2013 no consent is required when the government is acquiring land for its own projects or use. Incidentally, the term "affected families" in the Act means all those whose livelihoods are likely to be lost by the acquisition and not merely the landowners whose lands are to be acquired.

3. *Social Impact Assessment*: This is the most innovative part of the Act, where an attempt was made to seek the participation of the constitutionally established institutions of local self-government, including the *gram sabhas*, in the process of acquisition. The Act devotes a whole Chapter, Chapter III, entitled "Determination of Social Impact and Public Purpose". The Social Impact Assessment is meant to establish that: i) the proposed acquisition indeed serves a legitimate public purpose; ii) the land proposed to be acquired is the bare minimum required and there is no alternative, less disruptive place feasible for the project; and iii) there is no previously acquired but unutilised land available with the government in the project area. The Assessment is also meant to estimate the number of affected families and the extent of private and common lands and other properties likely to be covered by the acquisition; to list the public and community assets and infrastructure likely to be affected; and, to estimate the costs and ways of addressing the social impacts of the project.

The Act indeed makes the process of Social Impact Assessment quite onerous. It requires that the preliminary investigation of the social impact shall be carried out in consultation with the local bodies; the report of such assessment shall be appraised by an expert group; and finally the government, after considering all the reports, shall make a determination of the minimum and the least disruptive extent of acquisition. The process as laid out in the Act is likely to take about a year. However, in cases of acquisitions under the emergency provision provided in the Act (section 40), it exempts the government from the Social Impact Assessment Study. It also allows the government, in the second proviso to subsection (4) of section 7, to overrule any recommendation of the expert group against acquisition by merely recording its reasons in writing. Thus, while the process of social impact assessment obliges the State to engage in discussion with the local bodies and expert groups and to carry out detailed due diligence, it does not take away the sovereign authority of the government in the matter of acquisition.

4. *Safeguarding of Food Security*: The Act makes a "Special Provision" for this purpose, in a separate Chapter, Chapter III. The Chapter provides that no irrigated multi-cropped land shall be acquired except "under exceptional circumstances, as a demonstrable last resort". And, in such cases of unavoidable acquisition of multi-cropped land, it requires the government to develop equivalent agricultural land or make an equivalent investment in agriculture.

5. *Generous Compensation*: Unlike the Act of 1894, the Act carefully defines the amount of compensation to be paid for any acquired land and the method of calculating it. In general, the Act provides for compensation at the rate of double the market value of the land in urban areas, and between 2 to 4 times the market value of land in rural areas, depending on the distance of the project from urban areas. The details of the actual process of acquisition and calculation of compensation are set out in Chapter IV and the First Schedule of the Act.

6. *Resettlement and Rehabilitation*: The Act makes the government responsible for resettlement and rehabilitation of all "affected families"; this includes both the land owners and those whose livelihood is primarily dependent on the land acquired. The Act makes careful, fairly generous and detailed provisions for such resettlement and rehabilitation in Chapters V and VI and in the Second and Third Schedules of the Act.

7. *Offences and Penalties*: Since land acquisition so far entailed fairly arbitrary exercise of authority by various officials of the government, the Act seeks to curb such arbitrariness by making the officials liable to prosecution if they contravene any of the provisions of the Act relating to compensation or resettlement and rehabilitation. The Act places this liability both on officials of the companies involved (section 86) and the government (section 87).

8. *Exempted Acts*: The Act of 2013 exempts 13 Acts dealing with acquisition for specific purposes, such as the Atomic Energy Act, the Railways Act, the National Highways Act, etc., from the provision of this Act. But section 105 of the Act mandates the Central Government to make the compensation, rehabilitation and resettlement provisions of the Act applicable to acquisitions under these 13 Acts within a year of the commencement of the Act of 2013.

The Amending Ordinance of 2014 and the Bill of 2015

Repeal of provisions concerning consent, social impact assessment and food security

The Government of India decided to amend the Act of 2013 through an ordinance issued on December 31, 2014. The main thrust of the ordinance and the corresponding Bill passed by the Lok Sabha on March 10, 2015 is to exempt five specified categories of projects from the provisions regarding consent, social impact assessment and safeguarding of food security. There are also several other amendments that the government has proposed, which we shall discuss in due course. But the purport of the amending bill is to get around the provisions regarding consent, social impact assessment and food security safeguards.

The amendments supposedly grant exemptions from these provisions only for a specified category of projects. But the five exempted categories of projects listed in the amending ordinance and bill are so exhaustive that these not only cover every public purpose mentioned in the Act of 2013, but in fact add some new purposes to that list. A comparison of the categories listed in section 10A of the amending ordinance and bill and the definition of public purpose in section 2 of the Act would show that every purpose listed in the latter can be read into one or the other of the five categories of the former. The amendment, therefore, is not limited to any specified projects, but amends the Act as a whole. The exemptions granted in fact amount to the deletion of Chapter II and Chapter III of the Act, which relate to social impact assessment and safeguarding of food security, respectively. These also amount to the deletion of the consent clause of the Act for all projects undertaken in the public-private partnership mode; government projects are already outside the purview of the consent clause.

As we have seen, the Act of 2013 has three distinct objectives: 1) To bring a consultative, participative and transparent approach into the process of compulsory land acquisition; 2) To safeguard food security by curtailing the acquisition of irrigated multi-cropped land; and, 3) To make provisions for adequate compensation, resettlement and rehabilitation for the families affected by the acquisition. The Act meets the first two objectives through the provisions concerning consent, social impact assessment and food security safeguards. These parts of the Act stand essentially repealed. Thus two of the three main pillars of the Act have been demolished. But the amendments keep the third pillar of the Act, that of awarding well-defined and adequate compensation and making adequate and mandatory provisions for the resettlement and rehabilitation of the affected families, intact. The amendments do not reduce any of the entitlements created through the Act, except in a few instances that we mention below. On the other hand, the amendments indeed occasionally enhance these entitlements.

Other Amendments

Among the other amendments, some are merely technical in nature. Of the substantial amendments, there is at least one that enhances the entitlements created in the Act of 2013. Section 7 of the amending bill specifies that the Rehabilitation and Resettlement Award

under the Act must include "compulsory employment to at least one member of such affected family of a farm labourer". The Act already provides this as an option to the affected families (provision 4 of the Second Schedule). Another amendment (section 9) specifies that the adjudicatory authority created under the Act shall "hold the hearing in the district where the land acquisition takes place". Such a provision could of course have been made in the rules framed under the Act. The more important provisions of the amendment are, however, the ones discussed below. Of these, the first extends the benefits of the compensation, rehabilitation and resettlement provisions to acquisitions made under other Acts. The remaining three tinker with certain provisions of the Act in ways that are not entirely understandable and create unnecessary doubts about the intent of the government.

Bringing exempted Acts under the umbrella

The amending ordinance and bill extend the compensation, rehabilitation and resettlement provisions to the thirteen Acts listed in Fourth Schedule of the Act of 2013. As we have mentioned earlier, section 105 of the Act of 2013, required the government to carry out such an extension of these provisions by January 1, 2015. This could have been done through a notification. The government has now done it by amending section 105 accordingly.

This amendment is indeed a positive measure offering enhanced compensation, rehabilitation and resettlement benefits to persons and families affected by land acquisition undertaken through those thirteen Acts. A considerable part of land acquisition in fact happens under some of these Acts. However, the government was anyway bound by the Act of 2013 to extend these benefits.

Depriving certain acquisitions from the benefit of the Act

The Act of 2013 in section 24 (2) provides that where in a case of land acquisition under the Act of 1894, an award has been made five years or more prior to the commencement of the Act, but physical possession has not been taken or compensation has not been paid, then the acquisition proceedings shall have to begin afresh under the Act of 2013. The amending ordinance and bill dilute this provision by extending the period of 5 years in an indeterminate manner. Similarly, section 101 of the Act provided that when any land acquired under this Act remains unutilised for a period of five year from the date of taking over the possession, the same shall be returned to the original owners or to the land bank of the appropriate government. In this case also the amending ordinance and bill extend the period of five years almost indefinitely.

These two amendments are difficult to understand. Projects that have not been able to take physical possession of acquired land for five years, or that fail to utilise the land for five years after taking possession, could not be of any great urgency. The two amendments seem to have been undertaken merely with an intention to protect imprudent acquisitions and reward carelessness and procrastination.

Extending protection to offending government servants

As we have mentioned earlier, section 87 of the Act of 2013 holds the government servants who contravene provisions of this Act liable to prosecution. The ordinance amends this section to provide for prior sanction of the Government under section 197 of the Criminal Procedure Code. The amending bill removes the phrase "prior sanction of the appropriate Government", but retains the requirement of following the procedure under section 197 of CrPC, which, of course, mandates prior sanction of the appropriate government.

If the land acquisition process is indeed to be made less arbitrary and more humane, it is necessary to put some fear in the minds of the acquiring authorities at the field level. This was the intention of section 87. But the government probably feels that officers shall not apply themselves to the task of acquisition with sufficient enthusiasm if section 87 remains in its original form. In that case, the government should find some way of both reassuring the government servants and ensuring that they do not act arbitrarily. To play with words and phrases, as has been done, does not solve this rather intractable issue; it only creates doubts about the intentions of the government.

Allowing compulsory acquisition for private entities

The Act of 2013 already provides for acquisition on behalf of private companies. The definition of "company" in the Act includes a company registered under the Companies Act or a society registered under the Societies Act of 1860 or any corresponding law. The amending ordinance and bill change the phrase "private company" to "private entity" throughout the Act. "Private entity" is then defined to include "a proprietorship, partnership, company, corporation, non-profit organisation or other entity under any law". The amendment thus empowers the government to undertake compulsory acquisition of land on behalf of even unincorporated private owners and sundry NGOs. It is difficult to comprehend the intention of the government in so extending the scope of compulsory acquisitions.

Inclusion of private hospitals, etc., in the list of public purposes

As we have mentioned earlier, the Act of 2013 specifically excludes private hospitals, private educations institutions and hotels from its definition of public purpose. The ordinance explicitly deletes this specific exclusion in the case of private hospitals and private educational institutions. An early version of the ordinance even deleted the exclusion of private hotels; but the final ordinance avoids it, though it can be read into it as part of "social infrastructure" which is specifically mentioned in the ordinance. In the bill as passed by the Lok Sabha, the amendment in favour of private hospitals and educational institutions has been withdrawn and specific mention of social infrastructure has also been removed. But the bill retains "infrastructure projects" as one of the exempted categories without defining "infrastructure". In the Act of 2013, "infrastructure" is defined to include all activities or items listed in a specified notification of the Government of India; that notification covers

social infrastructure including educational institutions, hospitals and high-end hotels. This is the reason why the Act specifically excluded these three from its list of public purposes. From the language of the amending bill, it is not clear whether these categories of projects, which the government originally intended to include, have been excluded or not. But since the amendment removes the specific exclusion of these in the Act of 2013, it should probably be presumed that these are now included in the definition of public purpose.

Industrial Corridors

The amending ordinance and the bill specifically include "industrial corridors" as one of the exempted categories of projects. Neither the Act of 2013, nor the amending ordinance of 2014, nor the amending bill of 2015 gives any definition of "industrial corridors". In the amending bill, a qualification has been inserted to the effect that in the case of industrial corridors "the land shall be acquired up to one kilometre on both sides of *designated* railway line or roads". This does seem to limit the freedom of acquisition. But *designated road* need not mean the main road of the corridor; the amendment in fact mentions "railway line" in the singular, but "roads" in the plural. This probably means that even minor roads within the corridor may be *designated*. In that case, the limit of one kilometre on both sides becomes meaningless. At least that is how this particular proviso has been read in parts of the economic press.

Incidentally, the Act of 2013 itself includes "industrial corridors" in its list of public purposes without limiting the extent of land that could be acquired under this head. The concept of industrial corridors was in fact initiated by the previous government. The project reports for industrial corridors, prepared largely during the earlier regime, bring a substantial part of the landmass of India within the range of various corridor projects. Those reports indicate that for the Delhi-Mumbai corridor alone the proposed acquisitions run into several lakhs of hectares and a large part of the land has already been acquired by the various state governments. It is odd that the present government wants to take the blame for what has been already done by the previous regime by unnecessarily tinkering with the Act of 2013.

Conclusion: What may be done now?

From the discussion above, it is clear that the main intent of the amendments introduced by the government is to repeal the provisions concerning consent, social impact assessment and food security. It is probably possible to make a case for such repeal for the first two on the grounds of feasibility and practicability, though the same cannot be said about provisions concerning safeguarding of food security and about many of the other seemingly minor but entirely indefensible and unnecessary amendments. If the intent of the government is only to simplify and expedite the process of land acquisition and the government finds the consent and social impact assessment provisions of the Act of 2013 cumbersome, then it would perhaps be more expedient to proceed as below:

Do away with the stratagem of specified categories

As we have described, the five categories specified in the amending ordinance and bill cover all legitimate public purposes defined in the Act of 2013. What the government is proposing is, in fact, an amendment of some provisions of the Act as a whole and not merely exempting of certain categories of projects from these provisions. This convoluted way of amending the Act raises doubts about the intentions of the government. It would be proper to redraft the bill so that the amendments are clearly stated rather than presented as exemptions for certain specified categories. In case the government finds that the list of public purposes in section 2 of the Act of 2013 needs to be expanded then that may also be done by appropriately amending this section, rather than by specifying a new set of categories.

Repeal social impact assessment provisions if you must

As we have mentioned, the process of social impact assessment as defined in Chapter II of the Act is fairly onerous and the government may legitimately believe that it would be impossible to complete any acquisition in a reasonable time while following this process. The government could have probably gotten around it by appropriately drafting the detailed rules for the process of social impact assessment; but it could have also legitimately determined that keeping the social impact assessment makes the Act impracticable.

For this purpose, a straightforward amendment repealing Chapter II of the Act, which sets down provisions concerning Social Impact Assessment, would suffice. Such an amendment, and some other minor changes, can be easily defended on the grounds of practicability. By removing the provision of social impact assessment the government would be taking away the right of consultation from the affected families. That provision was perhaps important to convey to the people of India that the State has moved away from the colonial assertions of sovereignty and eminent domain and is willing to consult and negotiate with them in cases where land is required for genuine public purposes. But that right does not bestow any substantive benefits. The substantive benefits are conferred by the provisions of compensation, rehabilitation and resettlement. If the government does not do any tinkering with these provisions, the question of discriminating against the farming community would not arise with such salience.

What is more, the essential requirement of determining the number of families and the extent of private and common lands, common facilities, etc., likely to be affected by any land acquisition remains even after Chapter II is repealed. No acquisition can proceed without making a determination of such impacts. Therefore, in section 16 of the Act of 2013, the acquiring authority is obliged to make a list of affected families and properties, etc., through detailed census and survey. This requirement serves some of the purposes of social impact assessment, though it does not amount to consultation as envisaged in the Act of 2013.

Incidentally, the present government seems to find the consultation processes laid out in various laws impacting local communities obstructive and cumbersome. Efforts are afoot to repeal, abridge or bye-pass similar provisions in the environmental, forest and mining laws. The repeal of social impact assessment provisions of the Act of 2013 would be in line with that general trend and would probably cause no special alarm.

Repeal the consent clause if you must

The amending ordinance and bill also intend to repeal the consent clause provided in a proviso of section 2(2) of the Act. The original proviso is already very weak; it applies only to acquisitions made on behalf of private parties. The government could probably live with this clause, because it does not affect any acquisitions made for government use. And, in case of private parties, it is expedient for them to negotiate with the affected persons and families and convince a majority of them of the benefits of their project. The government need enter into the picture only to ensure that the project does not suffer because of the recalcitrance of a small minority. That seems to have been the intent of the clause in the original Act. Failure by private parties to directly deal with the affected families can lead to problems, even when the government stands by them, as happened in the celebrated case of Singur.

But the government can perhaps legitimately insist that this clause is impracticable, especially because it requires the consent of a certain proportion of not merely the landowners but the "affected families". The "affected families" can be determined only through social impact assessment; that is why the consent, wherever required in the Act of 2013, is to be obtained as a part of that assessment. If the provisions of social impact assessment are repealed, the consent clause also probably has to go. This can be done simply by repealing one or both of the provisos to section 2(2) of the Act.

But food security safeguards cannot be removed

The repeal of Chapter III of the Act, which sets down provisions concerning food security safeguards, is difficult to comprehend or defend. That Chapter only requires the government to restrict acquisition to barren lands in general and avoid acquiring multi-cropped lands except in cases of *demonstrable last resort*. Irrespective of any Act, this has to be the ordinary prudent policy of any government in India. Per capita production of food-grains in India is among the lowest in the world and a large proportion of the people of India still live off the land. In this situation, it can never be prudent to lightly divert highly productive multi-cropped agricultural land for other purposes. In fact, the Prime Minister of India has explicitly stated this policy on several occasions. In his radio talk to the farmers in the context of land acquisition and other problems faced by the farmers, the Prime Minister stated the policy more or less in the very words found in Chapter III of the Act of 2013. If that is the policy, then why remove it from the Act?

The government has indeed tried to meet objections in this regard by introducing a proviso in the amending bill requiring the Government to undertake a survey of wasteland and maintain

a record of such lands. But this proviso is couched in the manner of a directive principle and cannot adequately replace Chapter III of the Act.

It cannot be and is not the intention of this government to callously acquire irrigated multi-cropped land. The government cannot even afford to give an impression of being callous on this issue. Perhaps, there are some specific projects that the government has in mind which require the acquisition of productive lands. The government can always make specific Acts for those specified projects and purposes and exempt those from Chapter III of this Act. But to completely remove provisions regarding food security from the main act is hardly proper or defensible.

And acquisition for entirely private entities must be avoided

Other minor amendments, like authorising the government to acquire land for entirely private entities make no sense. Similarly, minor amendments to save acquisitions made under the Act of 1894 or acquisitions made without sufficient need or requirement do not seem to serve much purpose. Such amendments only cast doubt on the intentions and seriousness of the government in matters of land without bringing any tangible benefit in terms of simplifying or expediting the process of acquisition.

It seems the issues have been complicated because the government has gone about its main purpose of the repeal of consent and social impact assessment provisions in a convoluted way. Instead of making an upfront and reasoned case for the repeal of these, the government created the stratagem of seeking exemptions for a specified category of projects. And then it tinkered with so many other provisions of the Act that doubts began to arise about the intentions of the government; this has complicated the issues beyond comprehension. Take the example of introducing proprietorship business as one of the "entities" on whose behalf the government may acquire land. No government would ever think of doing any such thing. Then why bring the issue in?

On balance it seems that through the amending ordinance and bill the government only wants to make the process of acquisition somewhat less cumbersome. It does not intend to abridge any of the entitlements for the landowners and affected families created in the Act of 2013; if anything, the government has enhanced the entitlements in certain cases and extended these benefits to acquisitions made under several other Acts. The government indeed intends to curtail consultation with the affected families and protect its officers from any prosecution for acts performed in pursuance of the process of acquisition. But these do not cause any direct loss to the affected families and could have been explained.

Even now the best course for the government would be to withdraw the amending ordinance and bill and bring a new simpler bill repealing Chapter II of the Act and introducing a few other necessary amendments. Reasons for such simple amendments can be explained to the

people without raising the spectre of a government ranged with the corporates against the farming community of India.

The government should, however, abide by the safeguards for food security and refrain from achieving extraneous objectives through incomprehensible amendments. Persisting with these indefensible amendments is only leading to the dilution of the extraordinary mandate that this government received less than a year ago and depletion of the high political capital and goodwill it commands. The government it seems has been badly advised. The objective of expediting the process of land acquisition could probably have been met by making the administrative machinery at the district level more efficient and responsive. But if the government finds that some amendments are absolutely essential, these must be carried through in a transparent manner. We have tried to outline such a transparent procedure here.

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