

# THE LAND ACQUISITION BILL, 2011: ONE STEP FORWARD AND TWO STEPS BACK

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*On September 7, 2011, the Land Acquisition, Rehabilitation and Resettlement Bill was introduced in the Lok Sabha in the backdrop of several large scale protests by farmers across the country. This paper provides a brief comparison of the new bill with the present Land Acquisition Act, 1894, introducing the key features of the bill. It discusses the legal framework relating to the power of acquisition and argue that it suffers from shortcomings in not fully accounting for social costs and not ensuring an equitable distribution of benefits. It neither recognises all affected persons nor allows them to participate in decision-making. Instead, it allows for a policy of targeted displacement of vulnerable groups. In relation to resettlement, the paper considers how the Impoverishment Risk and Reconstruction model allow to set a benchmark for the resettlement process and entitlements. Lastly, it evaluates the monetary and non-monetary entitlements under the bill in this context.*

## I. INTRODUCTION

Between 1947 and 2000, about fifty million people have been forcibly displaced or directly affected by development projects across India and as a result, a majority of them have been left worse-off.<sup>1</sup> Considerable opposition, violent and otherwise, has been expressed by the displaced and civil society, motivated by dissatisfaction with a number of facets of the displacement process. Much protest centres on the inadequacy of compensation as a recompense for lost social and cultural value of land. When communities are displaced to make way for housing for high income groups or for the tourism industry, protest is directed against the nexus between the State and powerful private interests, coupled with the complicity of the judiciary.<sup>2</sup> Opposition also stems from the process of acquiring the land, which deprives the displaced of their autonomy, their right to decide their fate and their right to seek the real justification for government interference. In addition, some have argued that the issue goes to the root of a particular paradigm of economic growth, where

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<sup>1</sup> Walter Fernandes, *Rehabilitation Policy for the Displaced*, 39(12) EPW 1191 (2004).

<sup>2</sup> See generally Kenneth Bo Nielsen, *Land, Law and Resistance*, 46(41) EPW 38 (2011).

large projects are seen as symbols of progress and growth and therefore desirable in themselves.

Crucially, these struggles have inevitably centred on the legitimacy of the government action, as opposed to its legality.<sup>3</sup> This is because the legal and constitutional framework, as well as the treatment of this process by courts, has removed the issue from the binary function of ‘legality’ or ‘illegality’ of government action, recasting it instead as a question of the manner of exercise of legal power (or ‘policy’ as courts phrase it). The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 (‘LARR Bill’), which was introduced in Parliament on September 7, 2011, attempts to bring the issue of forced displacement and rehabilitation into the folds of legality.<sup>4</sup> In this paper, we examine how far the provisions of the LARR go in addressing the issues that the State’s power of acquisition and the exercise of that power raise.

In Section II, we briefly introduce the changes that the LARR Bill makes to the Land Acquisition Act, 1894 (‘LAA’). In Section III, we consider the doctrine of eminent domain in constitutional law and its implementation in the current statutory framework. This comprises the statutory and constitutional discourse that is applied to acquisition, compensation, resettlement and rehabilitation. Section IV then sets out the failings of this framework, with reference to acquisition, in not addressing the concerns of distributive justice, equality and the construction of public interest. Section V then evaluates how the LARR Bill addresses these concerns with respect to the regulation of acquisition. Section VI focuses on resettlement and rehabilitation and puts forth a general model prescribing what a resettlement law should do and the shortcomings of the current framework in relation to it. In Section VII, we examine how far the new LARR Bill goes in providing for effective and meaningful resettlement and rehabilitation. The issues of food security and environmental damage relating to land acquisition are beyond the scope of this paper.

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<sup>3</sup> Usha Ramanathan, *Eminent Domain, Protest, Discourse on Rehabilitation* in *CAN COMPENSATION PREVENT IMPOVERISHMENT?* 208, 220 (2008) (quoting KG KANNABIRAN, *THE WAGES OF IMPUNITY: POWER, JUSTICE AND HUMAN RIGHTS* (2004)).

<sup>4</sup> Land Acquisition, Rehabilitation and Resettlement Bill, 2011, Bill No. 77 of 2011 (‘LARR Bill’), available at <http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf> (Last visited on July 18, 2012) (As of the writing of this paper, the Bill has been introduced in the Lok Sabha and referred to a Standing Committee for comments and changes).

## II. AN OVERVIEW OF THE LAND ACQUISITION ACT AND THE PROPOSED LARR BILL

### A. SCOPE OF LEGISLATION

The LAA governs the acquisition of land both by the Union and the states, and in particular, the procedure of such acquisition, payment of compensation and the adjudication of disputes regarding the same. The LARR Bill, in addition to this, also provides for the resettlement and rehabilitation of displaced persons. If passed, the LARR Bill will be the first of its kind where resettlement, rehabilitation and acquisition are all covered in the same legislation. The LARR Bill would replace the current LAA.<sup>5</sup> Some legislation relating to land acquisition, however, is not superseded by the LARR Bill. Sixteen such enactments are listed including the National Highways Act, 1956, Special Economic Zones Act, 2005 and the Railways Act, 1989.<sup>6</sup>

In terms of federal division of powers and responsibilities, although land acquisition is a concurrent subject,<sup>7</sup> both the LARR Bill and the LAA provide for a common mechanism for land acquisition by the Centre and the states.<sup>8</sup> With reference to resettlement and rehabilitation, while states are mandated to provide for the minimum entitlements under the new bill, they are free to legislate to provide for higher entitlements.<sup>9</sup>

### B. TRANSFERS REGULATED BY LEGISLATION AND 'PUBLIC PURPOSE'

Under the LAA, land may be acquired by the government for public purpose and separately for companies. Some decisions have, however, held that the provisions for acquiring land for public purpose and for companies are not mutually exclusive and hence, land may also be acquired for companies for public purpose under the Act.<sup>10</sup> Public purpose under the §3(e) LAA includes the acquisition of land for village sites, town or rural planning, 'planned development', providing for the residence of poor or landless displaced by natural calamities or any government scheme, for carrying out any social welfare and

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<sup>5</sup> LARR, §107.

<sup>6</sup> *Id.*, §98.

<sup>7</sup> Constitution of India, 1950, Entry 42, List III, Schedule 7.

<sup>8</sup> LARR, §3(e); LAA, §3.

<sup>9</sup> *Id.*, LARR, §100.

<sup>10</sup> *Pratibha Nema v. State of Madhya Pradesh*, (2003) 10 SCC 626; *See also* Colin Gonsalves, *Judicial Failure on Land Acquisition for Corporations*, 14(32) EPW 37 (2010) (which comprehensively discusses similar judgments).

slum clearing schemes, for any ‘other scheme of development’ locating a public office or for any corporation owned by the State.

In contrast, the LARR Bill recognises and regulates three modes of transfer of land. The first is compulsory sale of land to the State for uses that fall under the heads (i) to (v) of the definition of ‘public purpose’.<sup>11</sup>

The second is a partly-compulsory sale of land that requires the prior informed consent of at least 80% of the affected families. Such acquisitions may take place where the benefits accrue to the general public, or for the private corporation for the production of public goods or services or for a Public-Private Partnership project.<sup>12</sup> The third is a private, voluntary sale of land of more than 100 acres of land in case of rural areas and 50 acres in urban areas.<sup>13</sup> The provisions relating to resettlement and rehabilitation apply uniformly, and indeed are pre-condition for all of these three transfers.<sup>14</sup> Crucial to the first two modes of transfer is the contentious ‘public purpose’ clause.

The LARR Bill defines public purpose in a relatively narrow manner, specifying five heads:<sup>15</sup> The first is for strategic purposes for use by the Union or work vital to the State police or national security, the second is for constructing railways, highways, ports, power stations or irrigation projects, the third is for project affected people, the fourth is for development or improvement of rural or urban areas and land required thereby for residential purposes of the ‘weaker sections’ and also land for Government administered education and health facilities or research projects and the fifth is for residential use by communities affected by natural calamities and any governmental scheme or policy.

### *C. THE PROCEDURE FOLLOWED IN ACQUISITION*

As with the current LAA, the procedure for acquisition involves notification by the District Collector and invitation of objections. It is after the adjudication of such objections that the acquisition is carried out. The LARR, however, adds a preliminary procedure and a bureaucratic framework to administer such procedure before the Collector is involved. This procedure determines whether the land chosen should be acquired with regard to the social costs involved in such acquisition.

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<sup>11</sup> LARR, §3(za) (i) – (v).

<sup>12</sup> *Id.*, §3(za) (vi), (vii).

<sup>13</sup> *Id.*, §42.

<sup>14</sup> *Id.*, §42 (4), (5), §2 (2).

<sup>15</sup> *Id.*, §3 (za) (i) – (v).

## 1. Social Impact Assessment

The preliminary procedure, only in the LARR Bill, which determines whether or not a particular area of land should be acquired, consists of three phases. First, the Appropriate Government must conduct a Social Impact Assessment ('SIA') 'in consultation' with the Gram Sabha or equivalent body in urban areas.<sup>16</sup> The SIA must, *inter alia*, study the nature of public interest involved, socio-economic impact on the families, whether the bare minimum area of land is being acquired, whether alternate sites have been considered and found feasible.<sup>17</sup> The SIA Report is required to record the views of the affected families and to this end, the Appropriate Government must hold a public hearing with the affected families.<sup>18</sup>

The second stage of this process is the evaluation of the SIA Report by an 'Expert Group' under §7. This expert group will evaluate the SIA and examine whether the project serves the stated public purpose, whether it is in the larger public interest and whether the costs and adverse impacts of the project outweigh the potential benefits. On these grounds, individually, the expert group is required to express its opinion as to whether the project should be allowed to continue or not.<sup>19</sup>

The third and final stage is the examination of the initial proposal to acquire the land by a Committee appointed by the Appropriate Government. This Committee consists of at least seven members of the executive and not more than three non-official experts nominated by the Government.<sup>20</sup> The task of the Committee is to consider whether there is a legitimate and *bona fide* public purpose which justifies acquisition of land, whether the long-term benefits to the general public would justify the costs (in terms of social impact) identified by the SIA, whether the minimum required area is to be acquired and whether the Collector has considered possibility of acquisition of non-agricultural lands as opposed to agricultural and irrigated land.<sup>21</sup> The Committee, under §8, considers the recommendations of the SIA Report and the Report of the Expert Group, and is the final authority to determine the viability of the project. This committee also verifies that the consent of the affected families is taken in accordance with the second mode of transfer (i.e. partially compulsory sale).

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<sup>16</sup> *Id.*, §4 (1).

<sup>17</sup> *Id.*, §4 (2), (3).

<sup>18</sup> *Id.*, §4 (4).

<sup>19</sup> *Id.*, §7 (1), (5).

<sup>20</sup> *Id.*, §7(1).

<sup>21</sup> *Id.*, §7(2).

## 2. Preliminary Notification and Acquisition

Under the LAA and the LARR Bill, once the government determines that land is likely to be required for a public purpose, it must issue a preliminary notification.<sup>22</sup> As per §4, the LAA provides that such notification must be issued by the Collector, and subsequently, objections regarding the acquisition may be raised. §5A provides that such objections shall be heard and finally decided by the Collector. Subsequently, the government may issue a final notification that the land is required for a public purpose and the Collector may acquire the land as provided under §16, LAA.

According to the procedure in the LARR Bill, the preliminary notification must contain a statement of the nature of public interest involved and a summary of the SIA Report.<sup>23</sup> The notification must be issued within a year of the Expert Committee Report, or the SIA will ‘lapse’ and the procedure must be renewed.<sup>24</sup> Further, the preliminary notification stands rescinded one year after it is issued, if no action is taken pursuant to it. At this stage, §11 provides that any persons affected by the acquisition, may challenge the notification, objecting to the area and suitability of the land for acquisition, the justification for public purpose or the findings of the SIA Report. These objections are heard and recorded by the Collector, who further makes recommendations as to the objections. The Government finally decides the claims. Finally, after deciding these objections, under §19(1), the Appropriate Government may issue a declaration that the land in question is required for a public purpose. Subsequently, the Collector must issue another notification that identifies the resettlement area and provides a summary of the Resettlement and Rehabilitation Scheme for the affected persons.<sup>25</sup> §19(4) states that such a declaration amounts to conclusive proof that the land is required for public purpose and the Government may commence acquisition of land.

After this final declaration, the Collector settles the compensation, rehabilitation and any disputes arising out of the two. Under §21, the Collector must issue a public notice to all persons interested in the land to be acquired and require their presence (and allow objections to be raised) to issue an award of compensation.<sup>26</sup> Thereafter, the Collector makes an award with regard to the compensation payable and the entitlements under the resettlement and rehabilitation provisions.<sup>27</sup> §37 provides that the Collector must ensure that full compensation and monetary component of resettlement and rehabilitation entitlements are tendered to the affected families within three months and six

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<sup>22</sup> LARR, §9; LAA, §4.

<sup>23</sup> LARR, §9(2).

<sup>24</sup> *Id.*, §9(1).

<sup>25</sup> *Id.*, §14(1).

<sup>26</sup> *Id.*, §21.

<sup>27</sup> *Id.*, §22.

months respectively from such award. Only once the conditions in §37 are fulfilled will the land vest in the Government.

### 3. Effect of the Urgency Clause

Under the LAA, land may be acquired by the government in cases of ‘urgency’ any time after fifteen days from the publication of the preliminary notice even if the Collector has not passed any award.<sup>28</sup> There is, however, no explanation as to in what circumstances this clause may be invoked. In contrast, per §38(2) of the LARR Bill, the government may invoke the urgency clause only for acquiring the ‘minimum area’ necessary for the “defence of India or national security or for any emergencies arising out of natural calamities”.

When the urgency clause is invoked, the government may exclude any or all of the provisions of Chapter II (relating to SIA) and Chapter VI (relating to resettlement and rehabilitation provisions).<sup>29</sup> Before taking possession of such land, as with the LAA, the Collector must allow 48 hours’ notice to the affected persons and pay 80% of the estimated compensation.<sup>30</sup> The LARR, additionally, provides for another 75% of the market value of the property to be paid to a person so displaced.<sup>31</sup>

#### *D. CALCULATION OF COMPENSATION*

The LAA provides that compensation shall be made to persons whose land is acquired by award of the Collector, which is to be based on the market value of the property and other quantifiable losses suffered in the course of the acquisition process.<sup>32</sup>

Similarly, market value is the basis for calculating compensation in the LARR. Once market value is calculated, together with solatium,<sup>33</sup> the total amount of compensation equals four times the market value in rural areas and two times the market value in urban areas, plus the value of the assets fixed to the property in each case.<sup>34</sup> The LAA provides that a sum of 30% of the market value shall be paid as solatium.<sup>35</sup>

The market value of the land is calculated on the basis of the minimum value prescribed by law for registration of sale deeds or the average price

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<sup>28</sup> LAA, §17.

<sup>29</sup> LARR, §38(4); LAA, §9.

<sup>30</sup> LAA, §17(3A); LARR, §38(2).

<sup>31</sup> LARR, §38(5).

<sup>32</sup> LAA, §23.

<sup>33</sup> *Id.*, §3, Schedule I.

<sup>34</sup> *Id.*, §29(2), Schedule I.

<sup>35</sup> *Id.*, §23.

of land in the surrounding areas (whichever is higher).<sup>36</sup> If this information is not available, the state government will fix a minimum price of land based on the price in adjacent areas.<sup>37</sup> Alternatively, the requiring body (which may be a private or state-owned corporation) is allowed to offer shares whose value does not exceed 25% of the market value of the land.<sup>38</sup> §26(3) provides that where such shares are voluntarily accepted by the affected families, they are accepted in lieu of compensation and the market value is reduced by the value of the shares.

### *E. REHABILITATION AND RESETTLEMENT*

The LAA does not govern the resettlement and rehabilitation ('R&R') of the displaced, other than the provision for compensation. The resettlement and rehabilitation provisions of the LARR, as discussed above, apply in three scenarios; when land is acquired by the government, when a private corporation acquires more than 100 acres in a rural area, and more than 50 acres in an urban area and when a private corporation approaches the Government for assistance in acquiring a certain portion of land.

The extension of entitlements to persons affected beyond just title-holders is perhaps the most important provision of the LARR Bill. The definition of 'affected families' in the LARR includes not just title holders of the land that is acquired, but also families whose livelihood is dependent on the agricultural use of the land (share-croppers, agricultural labourers, tenants) or on the other natural resources of the land (hunters, fisherfolk, gatherers).<sup>39</sup> It also recognises community property rights ('CPRs') by including those families who have traditional rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.<sup>40</sup> In urban areas, families that have resided on that land for more than three years, and whose primary source of livelihood is affected by the acquisition are said to be affected families.<sup>41</sup>

The first step in the process of R&R begins with the appointment of an Administrator for Rehabilitation and Resettlement. The Administrator is primarily in charge of the formulation and execution of the R&R scheme subject to the supervision of two authorities: the Commissioner of Rehabilitation and Resettlement and the Project-level Committee on Rehabilitation and Resettlement.

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<sup>36</sup> *Id.*, §26(1).

<sup>37</sup> *Id.*, 26(3).

<sup>38</sup> *Id.* §9, Schedule II.

<sup>39</sup> *Id.*, §2(c).

<sup>40</sup> *Id.*, §2(c)(iii).

<sup>41</sup> *Id.*

The responsibility of the Administrator begins with the publication of a preliminary notification (under §11, LARR) by the Collector. At this point, the Administrator must conduct a survey to document the extent of land that will be lost, connected livelihoods, as well as the Government buildings, public utilities and the infrastructure that will be affected.<sup>42</sup> After this survey, the Administrator must draw up a draft R&R Scheme, which specifies the entitlements of *each* affected family, the Government buildings and public infrastructure to be provided in the Resettlement Area.<sup>43</sup> This draft is then put for a public hearing in the Gram Sabha or Municipality.<sup>44</sup>

The Administrator then sends the draft Scheme to the Collector along with a record of the claims and objections raised in the public hearing.<sup>45</sup> The Collector then shares the draft for comments and approval with two bodies created under the LARR; the first is the Resettlement and Rehabilitation Committee and the second is the Commissioner for Resettlement and Rehabilitation. The Government must constitute the Resettlement and Rehabilitation Committee under the chairmanship of the Collector, when the land to be acquired is more than 100 acres. The Committee is intended to serve as a forum for the participation of the affected people. It consists *inter alia* of one representative each of the women, Scheduled Castes and Scheduled Tribes, a voluntary organisation, member of Parliament, member of Legislative Assembly and the Requiring Body. After the Committee considers the draft Scheme, it is referred to the Commissioner for Resettlement and Rehabilitation. This Commissioner is appointed under §40 of the Bill and it supervises the drafting of the Scheme and is responsible for a post-implementation social audit.<sup>46</sup>

### III. THE CURRENT FRAMEWORK EXAMINED: THE CONSTITUTIONAL AND STATUTORY POSITION

The doctrine of eminent domain is traditionally read as the source of the State power of compulsory acquisition of land. The first recorded exposition of this doctrine is in the writings of jurist, Hugo Grotius:

“The property of subjects is under the eminent domain of the State, so that the State ... may use and even alienate and destroy such property, not only in the case of extreme necessity ... but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that

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<sup>42</sup> *Id.*, §17(1).

<sup>43</sup> *Id.*, §17(2).

<sup>44</sup> *Id.*, §17(5).

<sup>45</sup> *Id.*, §17(6).

<sup>46</sup> *Id.*, §40(3).

private ends should give way. But it is to be added that when this is done the State is bound to make good the loss to those who lose their property.<sup>747</sup>

Grotius' doctrine places two constraints on the exercise of the power of eminent domain: first, that the acquisition be for the purpose of 'public utility' and second, that the owner be compensated for the loss of his property. Its justification may also be found in liberal political theory, which posits that it is the responsibility of the State to protect private property, and at the same time, to move society toward higher social good that is achievable by political organisation.<sup>48</sup> Therefore, while private property should be protected from State and private interference, sometimes property must be forcibly taken by the State. The obligation to protect private property demands that the State must pay the owner just compensation. Further, the obligation to act in the public good requires that the surplus generated by the transfer be so distributed amongst individuals that all gains are assigned to individuals and none remains with the State.<sup>49</sup> Therefore, by providing compensation, the purpose of eminent domain is to distribute throughout society the loss inflicted upon the individual by the acquisition.<sup>50</sup> In the light of this principle, the amount of compensation must be such that it places the injured party in as good a condition as he would have been if the acquisition had not occurred.<sup>51</sup> Eminent domain, conceived with these justifications and limitations, is one of the most universally recognised principles of justice.<sup>52</sup> In the regulatory sense, State interference is justified to reduce the transaction costs of negotiating with a large number of owners<sup>53</sup> and to prevent the problem of 'hold outs'.<sup>54</sup>

Early cases of the Supreme Court show that the Court has adopted the two Grotian conditions (i.e. public purpose and compensation) in regulating the exercise of acquisition under the Constitution.<sup>55</sup> In subsequent cases,

<sup>47</sup> Hugo Grotius, *De Jure Belli et Pacis* in PROPERTY RIGHTS AND EMINENT DOMAIN 74-75 (1987).

<sup>48</sup> RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3 (1985) (cites JOHN LOCKE, OF CIVIL GOVERNMENT, which states, "Political power, then, I take to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good").

<sup>49</sup> *Id.*, 5.

<sup>50</sup> Joseph Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 224 (1931).

<sup>51</sup> *Id.*

<sup>52</sup> J.A.C. Grant, *The "Higher Law" Background of the Law Of Eminent Domain*, 41 YALE L. J. 221 (1931).

<sup>53</sup> ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 21 (2011) (which recognizes that high transaction cost is a circumstance in which the state may intervene in a private transaction).

<sup>54</sup> The problem of holdouts is that some owners may prevent a socially beneficial project from being implemented so that they may receive the highest societal surplus.

<sup>55</sup> *State of Bihar v. Maharajadhiraja Sir Kameshwar*, 1952 SCR 889. Recently also, the Court has quoted Grotius in *Daulat Singh Surana v. First Land Acquisition Collector*, Supreme Court,

the Supreme Court decided disputes between the government and land owners during the post-independence agrarian reform effort. Several issues including the grounds for acquisition of land, entitlement to compensation and the adequacy and justiciability of such compensation were decided by the Court.<sup>56</sup> Eventually, the 44<sup>th</sup> Amendment deleted the fundamental right to property altogether.<sup>57</sup> Today, the constitutional power of acquisition is linked only to Art. 300A of the Constitution, which provides that no person shall be deprived of his property, without the authority of law.<sup>58</sup>

In *KT Plantations v. State of Karnataka*, a constitutional bench of the Supreme Court was faced with the question of whether the two pre-conditions of public purpose and compensation derived from the eminent domain doctrine were to be read in Art. 300-A.<sup>59</sup> The Court found that while public purpose was a condition precedent for invoking Art. 300A, compensation was not necessarily one. The right to claim compensation, however, is ‘inbuilt’ in Art. 300-A and the lack of compensation or its ‘illusiveness’ must be justified with regard to fairness, reasonableness and after having regard to the object and purpose of the legislation.<sup>60</sup> It has been suggested that Art. 300-A be amended to explicitly include these two requirements, and, to guarantee a right to replacement land or adequate rehabilitation in the case of acquisition of land from the ‘weaker sections’.<sup>61</sup> No such amendment has, however, been made yet.

In sum, under the Constitution as it stands today, land must be acquired by authority of law for a public purpose. Further, the right to claim compensation is implicit in it and the lack thereof must be justified by the State. However, in practice the inadequate statutory framework, combined with the standard of review that the Court applies to such cases results in an ineffective check on the misuse of the power of eminent domain, as will be discussed below.

## A. PUBLIC PURPOSE

One consistent approach of the judiciary in cases involving justification of public purpose is to hold that courts are unable to define what

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Civil Appeal No. 6756 of 2003 and *K.T. Plantation Pvt. Ltd. v. State of Karnataka*, AIR 2002 Kant 365.

<sup>56</sup> See A.K. Ganguli, *Right to Property: Its Evolution and Constitutional Development in India*, 48 JILI 489 (2006) (which chronicles the judicial decisions and constitutional amendments culminating in the 44<sup>th</sup> Amendment Act).

<sup>57</sup> The Constitution (Forty-Fourth Amendment) Act, 1978, §2.

<sup>58</sup> Constitution of India, 1950, Art. 300A.

<sup>59</sup> *K.T. Plantation Pvt. Ltd. v. State of Karnataka*, AIR 2002 Kant. 365.

<sup>60</sup> *Id.*

<sup>61</sup> National Commission to Review the Working of the Constitution, *A Consultation Paper on Enlargement of Fundamental Rights*, May 11, 2001, ¶35, available at <http://lawmin.nic.in/nrcwc/finalreport/v2b1-3.htm> (Last visited on November 5, 2011).

public purpose means and that the government is the best judge in this respect.<sup>62</sup> Further, public purpose “should not be precisely defined”<sup>63</sup> and includes anything that furthers “welfare and prosperity of the community or public at large”.<sup>64</sup> In a decision of a seven-judge bench, the Supreme Court held that in the review of such purpose “regard is not to be given by any detailed inquiry or investigation of facts...the matter has to be examined with reference to the various provisions of the Act, its context and set up, the purpose of acquisition has to be culled out therefrom”.<sup>65</sup> This low threshold means that even a purpose by which “even a fraction of the community is benefited”<sup>66</sup> is a public purpose. Thus, the development of infrastructure and land for such industries is a legitimate public purpose.<sup>67</sup> In addition, solely specifying that the land was required for “development and utilisation of... lands as industrial and residential areas” is sufficient proof that it is required for a public purpose.<sup>68</sup> In another case concerning the acquisition of land for industrial use, the Supreme Court held that “even if the acquisition of land is for a private concern whose sole aim is to make profit, the intended acquisition of land would materially help in saving foreign exchange in which the public is also vitally concerned in our economic system”.<sup>69</sup>

## B. COMPENSATION

Under §23, LAA, compensation is based on the market value of the property, which is calculated based on the average price of registered sale deeds of similar property in the area. Further, the LAA allows a solatium of 30% to be paid above the market value. With respect to the ability of the LAA to compensate an owner for losses, courts are of the view that the compensation provided under the LAA is sufficient to avoid impoverishment or deprivation of fundamental rights. The LAA is a self-contained code and is thus exhaustive of all of the entitlements of a displaced person.<sup>70</sup> Once solatium under the Act is granted, the question of guaranteeing a job is irrelevant and over-steps the boundaries of the Act.<sup>71</sup>

<sup>62</sup> *State of Bombay v. R. S. Nanji*, 1956 SCR 18; *Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal*, (2007) 8 SCC 418; *Arnold Rodricks v. State of Maharashtra*, (1966) INSC 74; *Laxmanrao Bapurao Jadhav v. State of Maharashtra*, (1997) 3 SCC 493; *Daulat Singh Surana v. First Land Acquisition Collector*, Supreme Court, Civil Appeal No. 6756 of 2003.

<sup>63</sup> *Daulat Singh Surana v. First Land Acquisition Collector*, Supreme Court, Civil Appeal No. 6756 of 2003.

<sup>64</sup> *Id.*

<sup>65</sup> *State of Karnataka v. Ranganatha Reddy*, (1977) 4 SCC 471.

<sup>66</sup> *Babu Barkya Thakur v. State of Bombay*, (1961) 1 SCR 128.

<sup>67</sup> *Sooraram Pratap Reddy v. District Collector, Ranga Reddy District*, (2008) 9 SCC 552.

<sup>68</sup> *Arnold Rodricks v. State of Maharashtra*, (1966) INSC 74.

<sup>69</sup> *Sooraram Pratap Reddy v. District Collector, Ranga Reddy District*, (2008) 9 SCC 552.

<sup>70</sup> *Mandi Parishad v. Sohan Lal*, (2003) 1 AWC 596.

<sup>71</sup> *Ravindra Kumar v. District Magistrates*, (2005) 2 AWC 1650.

With respect to resettlement and rehabilitation, courts have found that entitlements like employment, resettlement or rehabilitation do not flow from the fundamental rights of the displaced. In *Dau Dayal v. Agra Development Authority*, the Court held that it is not within the scope of the act to provide for employment over and above compensation already paid.<sup>72</sup> Again, in *Butu Prasad Kumbhar v. Steel Authority of India Ltd.*, persons displaced by the acquisition of land for a steel mill argued that their right to livelihood was violated because they were not provided with employment and were left without a source of livelihood after their lands had been acquired.<sup>73</sup> The Court found that as long as their land had been acquired 'in accordance with law' by the LAA and compensation was paid as prescribed by the Act, there was no violation of their fundamental rights and no state was under an obligation to provide employment or resettlement.<sup>74</sup> In another decision, the Supreme Court stated that while there was a fundamental right to shelter, persons may be deprived of that right in the larger public interest. Further, the obligation to provide alternate residence to the displaced would mean that the State could not acquire any land for a public purpose.<sup>75</sup> This is despite the fact that the Supreme Court has recognised that the right to shelter and livelihood are implicit in the right to life under Art. 21<sup>76</sup> and that there is a right to monetary compensation for the violation of the same.<sup>77</sup>

In 2003 and later in 2007, the Union government formulated the national resettlement and rehabilitation policies. These policies, however, did not bind the State in any way to provide resettlement or rehabilitation as a matter of right.<sup>78</sup> Other parastatal organisations like the National Thermal Power Corporation and Coal India Limited have policies for resettlement and rehabilitation and departments that implement this policy where a project requires displacement. Maharashtra, Madhya Pradesh and Karnataka have passed legislations that provide for resettlement and rehabilitation.<sup>79</sup> There, however, exists no national legislation that provides a right to resettlement and rehabilitation upon displacement.

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<sup>72</sup> *Dau Dayal v. Agra Development Authority*, Writ Petition (C) No. 27690 of 1991.

<sup>73</sup> 1995 Supp (2) SCC 225.

<sup>74</sup> *Id.*

<sup>75</sup> *New Riviera Co-op. Housing Society v. Special Land Acquisition Officer*, (1996) 1 SCC 731.

<sup>76</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545; *Chameli Singh v. State of U.P.*, (1996) 2 SCC 549; *Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520 (which recognised the right to reasonable accommodation).

<sup>77</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395; *Hussain v. State of Kerala*, (2000) 8 SCC 139; *Bhim Singh v. State of Jammu and Kashmir*, (1985) 4 SCC 677.

<sup>78</sup> National Policy on Resettlement and Rehabilitation for Project Affected Families, 2003.

<sup>79</sup> Maharashtra Project Affected Persons Rehabilitation Act, 1999; Karnataka Resettlement of Project Displaced Persons Act, 1987; Madhya Pradesh Pariyojana Ke Karan Visthapit Vyakti (Punasthapan) Abhiyan, 1985.

#### IV. THE POWER AND PROCESS OF ACQUISITION: UNADDRESSED CONCERNS

As is apparent, the general judicial policy regarding laws related to acquisition, compensation, and resettlement and rehabilitation is to defer to the decisions of the executive. The standard of review is relatively weak in relation to such matters and the procedure and entitlements under the LAA are upheld as constitutional and exhaustive. The framework described above does not adequately address some of these problems raised by the exercise of the power of compulsory acquisition.

##### *A. ACCURATELY ACCOUNTING FOR SOCIAL COST AND THE PRINCIPLE OF MINIMISATION OF SOCIAL COST*

Even if the term ‘public purpose’ were phrased in a manner that included only cases of genuine supervening public interest, it still does not account for the social cost<sup>80</sup> of acquisition. The public purpose requirement of eminent domain is premised on the expectation of societal benefits from the acquisition of private land; however, the general framing of the legal discourse regulating acquisition seems to suggest that the taking of *any* land for any of the prescribed public purposes is justified. This ignores the problem of social cost: it is possible that the losses caused to displaced persons outweigh the potential benefits of an acquisition (even after compensation), or that less displacing alternatives are possible, with the same or comparable societal benefits. Public interest would only be served if an acquisition ultimately results in societal benefit, after accounting for the social cost from acquiring that specific land. Therefore, in each case, the costs and benefits of the acquisition to society must be considered.

It would only be equitable if the principle of societal benefit was restated by focusing on the specific land acquired in each case, such that the specificity of land required for the attaining the public benefit should justify acquisition of land.<sup>81</sup> The justification that monetary compensation is sufficient to place a displaced person in a ‘pre-acquisition’ position is not enough to address these concerns, which is further discussed in Section VI.

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<sup>80</sup> Social cost wherever mentioned in this paper, is used to distinguish it from the financial costs of a project borne by the project proponent such as expenditure on labour, raw material etc. It includes all adverse impacts on individuals that would not have been caused but for the acquisition of land or resettlement, including impact on income-earning capacity, social structures, cultural identity, political power etc.

<sup>81</sup> Sebastian Morris & Ajay Pandey, *Reform of Land Acquisition Framework in India*, 42(22) EPW 2083 (2007).

Simply accounting for social costs, however, may not be sufficient to avoid unnecessary displacement. Even if we accept this restated principle, acquisition would be justified if the total benefits even marginally outweighed the social costs of a specific project. Implicit in this position is that costs must be minimised and benefits maximised.<sup>82</sup> In practice, however, in attempting to do so policy makers fail to consider minimisation of social costs, focusing on the financial costs of producing the project.<sup>83</sup> This results in unnecessary and avoidable displacement. The World Bank and the UN Principles on Internal Displacement, both articulate this principle i.e. acquisition must be avoided as far as possible, and where necessary, social costs must be minimised.<sup>84</sup> Exploring alternative projects designs and locations with the principle of social cost minimisation in mind would contribute to avoiding displacement.<sup>85</sup> For instance, with the Narmada Dam dispute, one estimate showed that increasing the dam height by 17 metres would only marginally affect power generation and would have no effect on capability to meet irrigation and drinking water targets.<sup>86</sup> On the other hand, not raising the dam height further would spare approximately 150,000 people from being displaced.<sup>87</sup> Clearly, implementing the social cost minimisation principle would have avoided unnecessary displacement in this case.

## B. PUBLIC PURPOSE

Eminent domain is based on the premise that the benefits of forcefully taking certain land accrues to the society at large. This is the logic of conditioning the exercise of eminent domain on the concept of 'public purpose'. As discussed above, however, a public purpose would be satisfied even when a small portion of society was benefitted by an acquisition. Thus, the criterion of public interest does not account for two issues. First, it does not weigh the benefit of acquisition against its social costs. Second, it is indifferent as to who benefits from the acquisition. Inevitably, in most projects, the displaced are not part of the beneficiaries. It is therefore, required that a more suitable definition or control be placed on the purpose of acquisition of land, such that the benefits of a project are not solely appropriated by one section of society. This cost-benefit analysis is discussed in more detail later.

<sup>82</sup> David Pearce, *Methodological Issues in the Economic Analysis for Involuntary Resettlement Operations* in THE ECONOMICS OF INVOLUNTARY RESETTLEMENT: QUESTIONS AND CHALLENGES 50, 55 (1999).

<sup>83</sup> *Id.*

<sup>84</sup> UN Guiding Principles for Internally Displaced Persons; ¶2a, World Bank, Operational Policy on Involuntary Resettlement, OP 4.12, (2001), Principle 7, available at <http://go.worldbank.org/GM00E1Y580> (Last visited on November 5, 2011).

<sup>85</sup> Pearce, *supra* note 82, 55.

<sup>86</sup> International Rivers, *New Independent Review Documents Failure of Narmada Dam*, June 11, 2008, available at <http://www.internationalrivers.org/blog/peter-bosshard/new-independent-review-documents-failure-narmada-dam> (Last visited on November 5, 2011) (quoting a study conducted by the Tata Institute of Social Science).

<sup>87</sup> *Id.*

### C. EQUALITY

The law as it stands is likely to promote an outcome that reinforces existing positions of social inequality. In *Kelo v. City of New London*, the US Supreme Court was to decide whether the US Constitution's "Takings Clause"<sup>88</sup> (which provides that property can be acquired for public use) meant that property could be acquired for redevelopment by private companies.<sup>89</sup> The Court ultimately allowed this interpretation but a dissenting judge, Justice O'Connor, captured the injustice latent in such a power. She held that the ruling would mean that all private property is equally liable to be acquired, but that the consequences would not be random.<sup>90</sup> The beneficiaries would likely be "those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more".<sup>91</sup>

Similarly, in the context of the LAA and with the limited scrutiny courts apply to acquisition, there are no fetters on the State's discretion to acquire land from those who are most adversely affected by loss of land. This is a real problem in India, where members of the Scheduled Tribes make up over 40% of the displaced, although they constitute only about 7.5% of the national population.<sup>92</sup> While about 22% of dams constructed between 1951 and 1970 were in tribal areas, between 1971 and 1990, around 60% of dams constructed or under construction were in tribal regions.<sup>93</sup> The current framework, in its uniform treatment of all the displaced, *prima facie*, would seem to violate the requirement of substantive equality (or equality among equals) under Art. 14 of the Constitution.<sup>94</sup>

### D. NON-RECOGNITION OF ALL STAKEHOLDERS

Another problem with the current legal framework is the non-recognition of people other than the legal owners of the property. Acquisition displaces many people who are economically dependent on the land, but are not actual owners. However, under the current regime, only owners are recognised as 'displaced persons' or 'affected persons'. Consequently, only they are entitled to compensation or resettlement under law. Therefore, share-croppers,

<sup>88</sup> Fifth Amendment to the United States Constitution ("No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

<sup>89</sup> *Kelo v. City of New London*, 545 US 469.

<sup>90</sup> *Id.*, Dissenting Opinion of Justice Sandra Day O'Connor.

<sup>91</sup> *Id.*

<sup>92</sup> COMMISSIONER OF SCHEDULED CASTES AND TRIBES, TWENTY-NINTH REPORT, 1990.

<sup>93</sup> Central Water Commission, Register of Large Dams in India, 1990.

<sup>94</sup> Constitution of India, 1950, Art. 14; See e.g. Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.

artisans, fisher folk, hunter-gatherers etc. are not compensated for the loss of livelihood that acquisition may cause. The necessity of including persons other than property owners has increased in recent years because many large scale projects have deprived people of their livelihoods but left their property untouched, thereby disqualifying them from compensation and resettlement.<sup>95</sup> In addition, the law does not recognise persons who have interests in community owned property rights ('CPR'). The social costs of land acquisition in relation to such persons are externalised. Moreover, for effective participation in decision-making, all stakeholders must be identified.

### *E. PARTICIPATION IN THE DECISION-MAKING PROCESS AND AUTONOMY*

Under the current framework governing land acquisition, there are no opportunities guaranteed by law for public participation in decision-making. In case of large dams, evidence suggests that the most unsatisfactory social outcomes are linked to cases where affected people played no role in the process of planning and resettlement.<sup>96</sup> There is no reason to suggest that this is not true of other projects as well; local participation would help reduce confrontations, social impact and project delays.<sup>97</sup> Participation would change the purely top-down approach of planning and increase insight into local conditions including environmental, cultural or social factors that may change during the project.<sup>98</sup> Several advocacy groups,<sup>99</sup> statements of international human rights law,<sup>100</sup> and operational protocols of international financial institutions,<sup>101</sup> recognise that participation in decision-making empowers the displaced and leads to more equitable and cost-effective outcomes. This is not to say that the judiciary is always responsible for the kind of problems that are attributed to the legal framework governing acquisition. Indeed, not all questions can be decided by courts without stepping into the realm of legislating or policy making. Regardless, the framework for acquisition still raises some important questions about justice, a few of which were introduced above. The following section

<sup>95</sup> Fernandes, *supra* note 1, 1191.

<sup>96</sup> World Commission on Dams (WCD), *Dams and Development: A New Framework for Decision-Making*, November 2000, available at <http://www.unep.org/dams/WCD/report.asp> (Last visited on November 5, 2011); THAYER SCUDDER, *THE FUTURE OF LARGE DAMS* 68 (2005).

<sup>97</sup> Dolores Koenig, *Enhancing Local Development in Development-induced Displacement and Resettlement Projects in DEVELOPMENT-INDUCED DISPLACEMENT: PROBLEMS, POLICIES AND PEOPLE* 125-128 (2006).

<sup>98</sup> *Id.*

<sup>99</sup> WCD REPORT, *supra* note 96; UNEP Dams and Development Project, *Dams And Development: Relevant practices for Improved Decision-Making*, available at [www.unep.org/dams](http://www.unep.org/dams) (Last visited on November 5, 2011).

<sup>100</sup> UN PRINCIPLES, *supra* note 84, Principle 7, ¶3; Convention concerning Indigenous and Tribal Peoples in Independent Countries, September 5, 1991, ILO Convention No. 169, Art. 16.

<sup>101</sup> WORLD BANK, *INVOLUNTARY RESETTLEMENT SOURCEBOOK PLANNING AND IMPLEMENTATION IN DEVELOPMENT PROJECTS* 123-152 (2004); ASIAN DEVELOPMENT BANK, *HANDBOOK ON RESETTLEMENT: A GUIDE TO GOOD PRACTICE* 39-46 (1998).

analyses these and more problems and looks at how the LARR Bill addresses them, and whether it does so effectively.

## V. THE LARR BILL AND REGULATION OF ACQUISITION

### A. ACCOUNTING FOR THE SOCIAL COSTS OF ACQUISITION

#### 1. A Theoretical Framework for Cost Accounting

The decision to acquire land must result in a social state that balances the interests of the displaced and the benefits of the changed use of land to the public at large. Welfare economics proposes different concepts of efficiency for evaluation of social states. One of these approaches is that of a 'Pareto improvement'. A Pareto improvement is a change by which at least one person in society is in a better position, without making anyone worse off as a result.<sup>102</sup> In the context of land acquisition, however, displaced persons are almost always made worse off, and so the Pareto criterion, while it may be ideal, cannot be applied to evaluating social change of this kind. To apply this principle to a wider set of social states, the 'Kaldor-Hicks' compensation principle is used.<sup>103</sup> This principle requires first a measurement of the aggregate 'willingness to pay' ('WTP') (i.e. how much each individual will pay in monetary terms for the social change) of the individuals who benefit from the social change (this is its aggregate benefit).<sup>104</sup> Then, the aggregate of the WTP for the social change to *not* take place is measured i.e. the WTP of the persons who do not wish the change to take place is measured. This represents the costs of the social change. If the aggregate benefits outweigh the costs, then the change is socially preferred. This is because the beneficiaries can compensate the others for their losses, and still have some gains left over from the change.<sup>105</sup> This forms the basis for the cost-benefit analysis used in the evaluation of the merits of a social state resulting from an acquisition. In applying it, the aggregate WTP of the displaced persons is compared with the aggregate WTP of the beneficiaries, and if the WTP of the displaced persons is higher, then the acquisition should not take place and vice-versa.

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<sup>102</sup> KLAUS MATHIS, EFFICIENCY INSTEAD OF JUSTICE? 33 (2009).

<sup>103</sup> *Id.* (This principle would be satisfied even if compensation was not actually paid, but in the context of displacement, actual payment of consideration is usually treated as necessary).

<sup>104</sup> David Pearce & Timothy Swanson, *The Economic Evaluation of Projects involving Forced Population Displacements* in CAN COMPENSATION PREVENT IMPOVERISHMENT? 100 (2008). See also Ravi Kanbur, *Development Economics and the Compensation Principle*, 55 INT. SOC. SCI. J. 27 (2003).

<sup>105</sup> *Id.*, Kanbur.

## 2. The LARR Bill: Deciding When Benefits Outweigh Costs

Under the current LAA, the only normative yardstick to determine whether an acquisition is permissible is whether it is for a public purpose or not. The new LARR Bill, as discussed above, introduces the SIA and a mechanism to determine whether acquisition is justifiable having regard to social costs, along the lines of the Kaldor-Hicks cost-benefit analysis model. The LARR provides that the SIA study is a necessary condition for the government to initiate acquisition proceedings. It must include a public hearing and participation by the Gram Sabha, and it is mandated to take into consideration a wide number of factors to determine the social impact of the acquisition. This report is evaluated by an independent group of experts on the subject and their opinion is sought as to whether the project truly serves a public purpose, and “whether the potential benefits outweigh the costs and adverse impacts on the affected”.<sup>106</sup> The Committee that finally decides on the matter of acquisition is comprised of at least seven administrative officers and three non-governmental experts. This Committee then examines whether “the public purpose ... shall on a *balance of convenience* and *in the long term*, be in the *larger* public interest so as to justify the social impact as determined by the Social Impact Assessment (*emphasis added*).”<sup>107</sup>

These provisions of the LARR Bill are exemplary because they, for the first time, create a mechanism whereby the justifiability of an acquisition is weighed against its social costs. The criteria that the SIA must consider are wide-ranging and comprehensive.<sup>108</sup> It is, however, problematic on two fronts. The first is the issue of participation. As per the LARR Bill, the Gram Sabha and the affected persons are ‘consulted’ only at the stage of preparation of the SIA by the government. The manner and time of the process of consultation with the Gram Sabha is not provided in the Bill and ‘may be prescribed’.<sup>109</sup> The only consequence that is apparent from the statute is that their objections are recorded in the SIA report prepared by the government.<sup>110</sup> The evaluation is also carried out by experts that the government nominates. The Committee, which makes the final decision regarding acquisition, does not have any representatives of the affected persons. Further, the constitution of the Committee is not equal. It must consist of at least seven officials. While there is no limit to the number of bureaucrats that can be a part of it, there is a maximum limit of

<sup>106</sup> LARR, §7(5).

<sup>107</sup> *Id.*, §8(2)(b).

<sup>108</sup> LARR, §4(4) (They include impact on public and community properties, assets and infrastructure particularly roads, public transport, drainage, sanitation, sources of drinking water, sources of water for cattle, community ponds, grazing land, plantations, public utilities such as post offices, fair price shops, food storage godowns, electricity supply, health care facilities, schools and educational or training facilities, anganwadis, children parks, places of worship, land for traditional tribal institutions and burial and cremation grounds).

<sup>109</sup> LARR, §4(1).

<sup>110</sup> LARR, §5.

three experts (again, who are nominated by the government) that can form part the Committee.

A related problem with such low level of participation in the decision-making process is the lack of transparency. At all stages of the SIA, the State is the only entity that controls what information makes its way into the decision-making process as an input. The expert committee, even if one were to assume that it was a legitimate and independent contributor to the SIA, only has the opportunity to ‘evaluate’ the contents of the SIA Report, which is drawn up by the government.

The LARR Bill thus, exclusively allows meaningful participation to government-appointed experts and bureaucrats. Such a strategy of selective inclusion in decision-making privileges one form of expertise at the expense of others.<sup>111</sup> Therefore, externally imposed expertise and rationality decides what is technically adequate to be included as an input and how assessment is made, thereby excluding local knowledge, expertise and concerns.<sup>112</sup> The ‘techno-scientific governance language’ that such an assessment will inevitably be couched in, will require ‘social translation’ and adaptation, which in the context of a diverse linguistic country like India is a major hurdle to public participation in such decisions.<sup>113</sup>

The third problem is the potential for arbitrariness in the final determination by the Committee. In the provisions relating to the evaluation of the SIA by the expert body, the statutory language is clear on the criteria for failure of a proposed acquisition. It states that the body should recommend acquisition only if it is satisfied that the project will serve the stated public purpose, that it is in larger public interest and that the potential benefits outweigh the costs and adverse impact.<sup>114</sup> By contrast, when the Committee is to judge the decision of acquisition, it must ensure that the project “on a balance of convenience and in the long term, be in the larger public interest so as to justify the social impact”<sup>115</sup>

There are therefore, two different standards on which the acquisition is judged, and by two different bodies. The first standard is clear, and falls within the general theoretical framework of the cost-benefit analysis. It must decide whether the project actually serves public interest and whether the potential benefits outweigh the costs. The Committee’s standard which finally decides on the acquisition is, however, more confusing. The ‘balance of

<sup>111</sup> The Cost-Benefit Analysis Dilemma: Strategies and Alternatives, 36(21) EPW 1824, 1825 (2001).

<sup>112</sup> *Id.*; See also Upendra Baxi, *What Happens Next is Up to You: Human Rights at Risk in Dams and Development*, 16 AM. U. INT’L L. REV. 1507, 1526 (2001).

<sup>113</sup> *Id.*, 1525.

<sup>114</sup> LARR, §7(4).

<sup>115</sup> LARR, §8(2)(b).

convenience' that it must consider is not clear. What factors does the Committee consider when deciding where the balance of convenience lies? There is also the question of why convenience should be relevant at all in the Committee's decision. The costs and benefits are already clearly analysed by the SIA and has been evaluated by the expert committee. It is not clear what the 'convenience' yardstick adds to the decision-making process and why it should. It seems reasonable to presume, in light of the review of judicial decisions concerning acquisition above,<sup>116</sup> that a court reviewing a decision of the Committee may defer to its decisions simply because of the vagueness of the phrase 'balance of convenience'. These difficulties undermine the process of assessing social costs in the first place and allow for decisions that are not necessarily based on valid considerations. It permits arbitrariness to creep into the decisions concerning the justifiability of acquisition.

### 3. Methodological Concerns: Limitations of the Cost-Benefit Analysis

Another issue with this kind of social cost assessment, and which goes to the root of the Bill's SIA provisions, is the shortcomings of the method itself. Cost-benefit analysis, as explained above, is aggregative in nature. Social costs are calculated by adding the social costs to each individual and the net figure represents the compensation payable, which is then divided amongst the displaced equally. What this masks is the incidence or distribution of cost, which results in inequality amongst those affected by acquisition.<sup>117</sup> Some of the displaced could be more vulnerable to the risks of displacement but the cost to such individual families could be offset by a larger benefit to another.<sup>118</sup> For instance, women,<sup>119</sup> children or disabled persons would lose more due to displacement than other affected persons would, but their losses could be offset *per* the cost-benefit methodology. It has been suggested that distribution sensitive weights can be used to solve this problem, but in practice, they are almost never used.<sup>120</sup> In any case, the LARR Bill does not incorporate any provisions to remedy these distributional concerns.

<sup>116</sup> See text at note 63.

<sup>117</sup> Michael Cernea, *Risks, Safeguards, and Reconstruction: A Model For Population Displacement and Resettlement* in RISKS AND RECONSTRUCTION: EXPERIENCES OF RESETTLERS AND REFUGEES 47 (2000); Cass Sunstein, *Is Cost-Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299, 308 (2001); Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 951 (2000) (which argues that the equity claims of mainstream cost benefit analysis are 'mostly bogus').

<sup>118</sup> *Id.*, Cernea.

<sup>119</sup> See generally Enakshi Thukral, *Development, Displacement and Rehabilitation: Locating Gender*, 31 (24) EPW 1500 (1996) (which argues that women bear higher costs than men in projects that involve forced displacement).

<sup>120</sup> Sen, *supra* note 117, 951; Little & Mirrlees, *Project Appraisal and Planning Twenty Years On* in PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 20 (1990) (showing that although distributional weights were a requirement in all World Bank projects, they were almost never used because of financial pressures).

Cost-benefit analysis is also criticised as being skewed against the poor. Since, persons of low income groups do not have a high ability to pay, they may not be willing to pay much for goods from which they would greatly benefit.<sup>121</sup> On the other hand, the high income groups have a higher ability to pay and therefore, may be willing to pay higher for a reduction in risk.<sup>122</sup> Further, the use of currency as a medium of comparison may not be commensurate to actual interest at stake. A loss of one rupee may be more important than a gain of the same amount, even where the gains and losses accrue to people with the same income or wealth.<sup>123</sup> Consequently, there is a fundamental asymmetry between the value of a loss of welfare to the displaced and the value of a benefit gained instead.

### B. THE PRINCIPLE OF SOCIAL COST MINIMISATION

The LARR Bill seems to incorporate the principle of social cost minimisation in various provisions. One of the considerations of the SIA is whether the land required is the ‘absolute bare-minimum’ needed for the project and whether alternate sites had been considered and found infeasible.<sup>124</sup> The expert group, which evaluates the SIA also considers whether the area in question is the least displacing option from the alternative sites. Finally, in the provisions relating to the mandate of the Committee, the LARR Bill provides that the Committee is to recommend “such area for acquisition which would ensure minimum displacement of people, minimum disturbance to the infrastructure, ecology and minimum adverse impact on the individuals affected”.<sup>125</sup> It is clear that the LARR Bill tries to incorporate the principle of least displacement. The changes that are most significantly able to reduce the adverse effects of a project, however, are changes that can be made to the project design itself.<sup>126</sup> Authorities initiating acquisition, also known as the Requiring Bodies, are not likely to make efforts to find the least displacing project design, and on the contrary have shown a tendency to acquire more land than is required.<sup>127</sup> The LARR Bill clearly states what the level of involvement of these committees is with the Requiring Body (usually State owned corporations or private companies). In the absence of effective involvement of an overseeing body at the stage of project design, the social cost minimisation is unlikely to be pursued.

<sup>121</sup> Sunstein, *supra* note 117, 307.

<sup>122</sup> *Id.*

<sup>123</sup> Pearce, *supra* note 82, 57.

<sup>124</sup> LARR, §4(2)(e).

<sup>125</sup> *Id.*, §8(3).

<sup>126</sup> Pearce, *supra* note 82, 55-56.

<sup>127</sup> Walter Fernandes, *Rehabilitation as a Right: Where is the Policy?*, 55(2) SOCIAL ACTION 123.

### C. RECOGNITION OF AFFECTED PERSONS

The LARR Bill takes a major step forward in recognising all the parties affected by an acquisition. In §3(c), the LARR Bill recognises that ‘affected persons’ include persons who are not owners, but depend on the acquired area and its natural resources for their livelihood, tribals and traditional forest dwellers whose CPRs are affected and in urban areas, families who have resided in an area for more than three years and whose livelihood is affected by the acquisition of land. Thus, the LARR recognises that the owners of property are not the only people affected by the acquisition of land. This represents a progressive shift in acquisition policy, whereby all vulnerable groups who are affected by the acquisition are recognised and eligible for compensation, resettlement and rehabilitation.

### D. PARTICIPATION

The issue of participation has already been covered in the sections discussing the SIA and the mode of acquisition based on consent. In relation to the SIA procedure, there is very little scope for participation; at best, the displaced are ‘consulted’ and their views taken on record. The International Association for Public Participation classifies practices of public participation (in order of greater public impact) as to inform, consult, involve, collaborate, and empower.<sup>128</sup> In the instant case, the level of participation would fall in the (very basic) first and second categories, where at the most, people are informed and their views are heard.<sup>129</sup> The displaced persons, however, do not have the ability to influence the decision or make sure that the decision is affected by their views. We have shown how participation is considered to improve outcomes for the displaced and for developers, however, the nature of participation provided in the LARR Bill would clearly not result in any meaningful benefits. On the contrary, it would tend to marginalise affected persons from the decision-making process, while giving the impression of something to the contrary.

## VI. COMPENSATION, RESETTLEMENT AND REHABILITATION: ASSESSING THE PROBLEMS OF THE CURRENT FRAMEWORK

Inseparable from the process of acquisition is the process of compensating the displaced for the loss of land and providing for resettlement and rehabilitation. This is a much more complex process because it varies from one project to another depending on the nature of land acquired, the kinds of social

<sup>128</sup> International Association for Public Participation, *IAP2 Spectrum of Public Participation*, available at <http://www.iap2.org.au/resources/spectrum> (Last visited on November 5, 2011).

<sup>129</sup> *Id.*

and cultural structures affected by displacement, particular vulnerabilities of the displaced and other factors. While it is not possible to define exhaustively what a resettlement policy should achieve in each case, we borrow from the Impoverishment Risk and Reconstruction ('IRR') Model to propose a general framework for resettlement applicable to all cases. We then analyse the current framework and see how far it goes to provide adequate resettlement in light of this model.

### A. DETERMINING WHAT A RESETTLEMENT POLICY SHOULD DO: THE IMPOVERISHMENT RISK AND RECONSTRUCTION MODEL FOR RESETTLEMENT

The IRR model developed by Michael Cernea,<sup>130</sup> is a model used to explain and prevent impoverishment caused by the displacement process.<sup>131</sup> It has been adopted by the World Bank and other international financial institutions and has also been mentioned in a number of studies on displacement and impoverishment,<sup>132</sup> particularly in analysing the resettlement policy in India.<sup>133</sup> The IRR model posits that (from extensive empirical findings) eight broad risks of impoverishment are likely to be created by a project involving displacement; those are landlessness, joblessness, homelessness, marginalisation, increased morbidity and mortality, food insecurity, loss of access to CPRs and social disarticulation.<sup>134</sup> These risks are not exhaustive of all possible outcomes of displacement, and indeed, in light of India's displacement experience, researchers have also added the risk of loss of education of the displaced children.<sup>135</sup> Reconstruction is a reversal of this impoverishment process and should proceed along the same variables or risks. The IRR Model suggests policy measures that should form part of the reconstruction model. Some of such measures are as follows:

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<sup>130</sup> Michael Cernea became the first anthropologist to be employed by the World Bank in 1974 and until 1997, worked as the Bank's Senior Adviser for Sociology and Social Policy.

<sup>131</sup> Michael Cernea, *Risks, Safeguards and Reconstruction: A Model For Population Displacement and Resettlement in RISKS AND RECONSTRUCTION EXPERIENCES OF RESETTLERS AND REFUGEES 11* (2000) (which also reviews other existing models).

<sup>132</sup> WCD REPORT, *supra* note 96, 103; W. COURTLAND ROBINSON, RISKS AND RIGHTS: THE CAUSES, CONSEQUENCES, AND CHALLENGES, OCCASIONAL PAPER SERIES, THE BROOKINGS INSTITUTION-SAIS PROJECT ON INTERNAL DISPLACEMENT OF DEVELOPMENT-INDUCED DISPLACEMENT 11 (2003).

<sup>133</sup> Cernea, *supra* note 131, 52; Lakshman Mahapatra, *Testing the Risk and Reconstruction Model on India's Resettlement Experiences in THE ECONOMICS OF INVOLUNTARY RESETTLEMENT 190* (1999) (which also lists other studies on Indian policy regarding resettlement that have used the IRR model).

<sup>134</sup> Cernea, *supra* note 131, 24 (Cernea uses the sociological concept of risk to indicate the possibility that a certain course of action will trigger future injurious effects).

<sup>135</sup> Mahapatra, *supra* note 133, 218.

## 1. Land-based resettlement and re-employment

Land-based resettlement and employment are the most important means of reconstructing the livelihood of displaced persons. Acquisition of land removes the main foundation of the productive system, commercial activities, and an important source of capital.<sup>136</sup> In India, loss of land is considered the most important cause of impoverishment after displacement.<sup>137</sup> This is particularly true in the case of tribals who traditionally depend on CPRs for their livelihood. Jobs may be lost because of landless labourers losing access to lands owned by others for work or self-employed producers (artisans, craftsmen) losing access to their market, or urban displaced persons losing their jobs in industries because of relocation.<sup>138</sup> Reconstruction must ensure that displaced persons are able to access and own land, and find employment. Such employment must be long-term and suited to their skills. In some cases, they may require to be trained for certain productive skills.

## 2. House reconstruction, improved healthcare and adequate nutrition

Loss of shelter is usually a temporary condition for most displaced. Some projects, however, result in a permanent state of homelessness. This is accompanied by cultural alienation and status deprivation that is a result of losing homes.<sup>139</sup> In addition, some cases are marked by a sudden change in patterns of agriculture. Also the process of relocation increases the risk to health and nutrition.<sup>140</sup>

## 3. Social Inclusion, restoring access to community resources and rebuilding community networks

The IRR model speaks of marginalization as a process where there is a reduction in the economic power of families. This is because many displaced people are unable to utilise their skills at the new location; thus, human capital is lost. Economic marginalization is also accompanied by social and psychological marginalization, through a drop in social status.<sup>141</sup>

Further, the identification and assessment of these risks should also depend on inputs from the displaced themselves. Participation in the

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<sup>136</sup> Cernea, *supra* note 131.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

reconstruction process is necessary to include risks and threats as they identify and perceive them.<sup>142</sup>

## *B. ASSESSING THE CURRENT FRAMEWORK FROM THE IRR PERSPECTIVE*

The LAA and the current constitutional discourse are premised on the belief that monetary compensation alone is sufficient to negate the social cost of acquisition borne by displaced persons. We have described in Section III.B how compensation under the LAA is based on the market value of the property and the quantum of compensation is not usually subject to review by courts. We argue here that the current regime does not completely insure against the enumerated risks of displacement because the quantum and nature of compensation is not a just recompense for the actual costs of displacement and in any case, monetary compensation alone is never sufficient to account for social costs of acquisition.

### 1. The quantum of compensation is not sufficient

The manner of determination of market value usually makes it an inaccurate representation of the value of the land. This is because market value of a property is calculated in comparison with recently registered sale deeds from same region. In rural areas, however, there are very few recorded land transactions, sometimes as few as net transactions of one acre a year.<sup>143</sup> Further, most of these sales would be distress sales, not reflecting the value of a voluntary and free bargain.<sup>144</sup> Where rural land transactions are not recorded in accordance with procedure, the default value set by the state applies.<sup>145</sup> Consequently, in most cases, the Collector or the state will be the final judge of the market value of the property. Moreover, even if the market value is ascertainable from sale deeds, they would almost always be an undervaluation of the actual transaction. Often, the recorded price is almost half as much as the actual price at which the land was purchased.<sup>146</sup> In addition, when land in Scheduled Areas is to be acquired it is impossible to properly determine the market value because transfer of such lands is prohibited by law.<sup>147</sup>

<sup>142</sup> Chris de Wet, *Risk, Complexity and Local Initiative in Forced Resettlement Outcomes in DEVELOPMENT-INDUCED DISPLACEMENT: PROBLEMS, POLICIES AND PEOPLE* 180, 190 (2006).

<sup>143</sup> Sanjoy Chakravorty, *A Lot of Scepticism and Some Hope*, 46(41) EPW 29 (2011).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> KM Reddy, *The Political Economy of Compensation in THE ECONOMICS AND POLITICS OF RESETTLEMENT IN INDIA* 81, 87 (2006).

<sup>147</sup> *Id.*

## 2. Monetary compensation alone is always insufficient

Some of the core problems with monetary compensation have already been pointed out above. We have argued that the framework of cost-benefit analysis itself is regarded as flawed: costs to vulnerable displaced persons can be offset by benefits to other displaced persons, it values benefit to the rich higher than costs to the poor and it cannot account for the intangible losses of displacement.<sup>148</sup> Therefore, where the method of assessing costs itself is flawed, the payment of proportional compensation is bound to be insufficient.

Further, compensation is based wholly on market value, which assesses the value of land only as a commodity. Land is a source of livelihood to people, including the non-owners of that land such as artisans, barbers, agricultural labourers or nomads.<sup>149</sup> Where compensation is calculated only based on the land's value as a commodity, it neither encapsulates its value as a source of livelihood nor does it account for the replacement cost of such land.<sup>150</sup>

Another problem with market value-based compensation is the fact that it does not fully account for the cost incurred to replace the asset that is acquired. The compensation only accounts for how much the land is worth, not how much it would cost to acquire another piece of land of the same or comparable utility. Therefore, it is suggested that compensation should be provided for the cost of replacing the asset or the 'replacement cost'.

Besides, the process of securing compensation also has a bearing on the adequacy of compensation. Principles of fairness mandate that the persons whose property is expropriated have the opportunity to advance his or her own valuation of the property before an impartial tribunal.<sup>151</sup> Such a tribunal, being independent from the State, will be able to arrive at a compromise between the values assessed by the State and the displaced person. An affected person is then allowed to make a case for his or her perceived value of the property, irrespective of commercial valuation.<sup>152</sup> Indeed, it is suggested that the right to a third-party review is the democratic procedure that guarantees the existence of the right itself.<sup>153</sup> Under the LAA, however, the assessment of compensation is done by the same entity (the Collector) that condemns the property in the first place. This bars the opportunity for affected persons to make a case for a just compensation before an independent body, and leaves a considerable amount of discretion in the hands of the executive.

<sup>148</sup> See *supra* Section V.A.

<sup>149</sup> Walter Fernandes, *Is Compensation Up to its Functions?* in CAN COMPENSATION PREVENT IMPOVERISHMENT? 181 (2008).

<sup>150</sup> *Id.*

<sup>151</sup> Pearce & Swanson, *supra* note 104, 103.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*, 106.

## VII. THE LARR BILL: PREVENTING AND MANAGING THE RISKS OF IMPOVERISHMENT

The LARR Bill does embody for the first time, statutory guarantees for resettlement and rehabilitation. This section evaluates the provisions of the LARR Bill with reference to the IRR model and the problems identified with the current framework to examine whether it results in an improvement in the 'post-acquisition social and economic status' of the displaced as promised in its preamble.

### A. *MONETARY COMPENSATION IN THE LARR BILL*

The provisions relating to monetary compensation in the LARR Bill suffer from the same shortcomings as those of the current LAA. The compensation is based on the market value of the land, which is based on the sale deeds for similar land in the same region or on the value set by the government.<sup>154</sup> As pointed out above, such valuations are hardly ever accurate. Further, this would mean that the same body is assessing and acquiring the land in question, precluding an independent third-party appraisal of the value of the land. For instance, in the first draft of the LARR Bill released by the Ministry of Rural Development, the market value was to be multiplied by 'three' in rural areas.<sup>155</sup> However, in the current draft, the multiplier for rural areas is 'two'.<sup>156</sup> This suggests that this multiplication for assessing compensation payable is not based on any nexus to the actual costs suffered by the owner of that property. A just compensation can almost never result from such an arbitrary method of valuing land.

In addition, to market-value based compensation, a subsistence allowance of Rs. 3,000 is due to each affected family for a period of one year. SC/ST persons are entitled to a lump sum of Rs. 50,000 in addition to this allowance. Each family is entitled to a one-time resettlement allowance of Rs. 50,000.<sup>157</sup>

### B. *NON-MONETARY ENTITLEMENTS IN THE LARR BILL*

The LARR Bill for the first time provides non-monetary means of reconstruction. It provides for one house (as per Indira Awas Yojana

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<sup>154</sup> LARR, §26.

<sup>155</sup> Ministry of Rural Development, *Draft Land Acquisition, and Rehabilitation & Resettlement Bill*, July 27, 2011, available at [www.rural.nic.in/sites/downloads/policies/Final.pdf](http://www.rural.nic.in/sites/downloads/policies/Final.pdf) (Last visited on November 5, 2011).

<sup>156</sup> LARR, Schedule I.

<sup>157</sup> *Id.*

specifications) for persons who have lost their houses in an acquisition.<sup>158</sup> Each member of an affected family would be offered employment for at least minimum wage or a choice between a lump sum amount and an annuity.<sup>159</sup> The Bill also provides that families who have lost agricultural land shall be entitled to a minimum of one acre of land in the command area of an irrigation project when land is acquired for such purpose.<sup>160</sup> Further, in cases of irrigation or hydroelectric projects, the affected families may be allowed fishing rights in the reservoirs. In the event that land is acquired for urbanisation, 20% of the developed land will be allocated for affected families, in proportion to the land they previously owned.<sup>161</sup>

Some caveats must, however, be pointed out in these provisions. The provision for 'land for land' applies only in case of irrigation projects and even then, it is limited to one acre. Even with land that is given to the displaced as part of an urbanisation project, an equivalent amount is deducted from their monetary compensation.<sup>162</sup> In effect, families end up paying for such land. Further, the entitlements of employment only apply "where jobs are created through the project".<sup>163</sup>

Therefore, it is clear that the LARR Bill does not see non-monetary safeguards as an absolute entitlement of the displaced. Jobs and land are only provided in certain limited conditions. Such a reconstruction process is not sufficient to manage the risks of unemployment, landlessness and overall impoverishment.

## VIII. CONCLUSION

The LARR Bill represents a change in the legislative approach to land acquisition. The Bill introduces for the first time provisions for social impact analysis, recognises non-owners as affected persons, a mode of acquisition requiring consent of the displaced and statutory entitlements for resettlement. In addition, it has restricted the grounds on which land may be acquired under the urgency clause. In doing so, it has recognised some of the problems arising out of land acquisition and shifted the baseline of debate and discussion on acquisition policy. The recognition of problems is, however, one thing and the provision of appropriate policy solutions is another. We have argued that the LARR Bill is still problematic in many aspects. In relation to the decision of acquisition, we have pointed out that the SIA process still allows for arbitrary decision-making and does not meaningfully allow affected parties to

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<sup>158</sup> LARR, Schedule I.

<sup>159</sup> LARR, Schedule II, §30 (1), 37(1) and 98(3).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> LARR, Schedule II.

<sup>163</sup> *Id.*

participate in that process. The principle of social cost minimisation is recognised, but no meaningful way of implementing it has been proposed. With respect to its provisions for resettlement and rehabilitation, the Bill still continues to use the market value for determining compensation like the LAA, while non-monetary safeguards are contingent on the willingness of the government to provide them or exist only in certain circumstances. Moreover, the LARR Bill does not supersede other legislations governing acquisition and resettlement, leaving acquisition a legislatively fragmented and project-based process. For these reasons, the LARR Bill needs to be reconsidered when it is next placed before the Lok Sabha.