

LAND ACQUISITION AND ENVIRONMENTAL CLEARANCE FOR LARGE SCALE PROJECTS-A PERSPECTIVE

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1. Introduction

Large scale infrastructure projects in India, primarily in the road and power sector, receive a sizable investment (~10%) of the gross fixed capital formation in India. These investments have been made by both the Central Government (CG) or the State Government (SG) and the private sector. The proportion of private sector investment has been increasing over the years. An analysis of 897 projects, implemented between March 1994 and September 2007 and having project costs over Rs 200 million (\$ US 4 billion), revealed that 31% of the projects faced cost overruns, while 35% of the projects faced time overruns. 10% of the projects faced both cost and time overruns'. Various committees have identified environmental and land acquisition issues as the two largest sources of delay in megaprojects. This article endeavours to throw light on the evolution of law and discuss practical experiences with respect to acquisition of land and obtaining environmental approvals for large scale projects in India.

2. Evolution of Regulatory Frameworks

2.1 Land Acquisition Regulation

The law governing land acquisition is, quite frankly, archaic and not in tune with the rapid economic growth. Originally, the Constitution of India consisted of provisions under Article 19(f) and Article 31 which constituted the 'Right to Property.' But there were a number of difficulties that the CG or SG was confronted with, Right to property, Articles 14, 19, and 31, read in tandem by the Courts, proved to be anti developmental, as the courts struck down various Acts of the State. In a number of cases, the courts declared the reforms initiated by the State as being ultra vires, which hampered the development, by means of growth of infrastructure, which was essential for development soon after independence. It was because of the difficulties in the functioning of the right to property, that had been brought to light by the judicial

decisions, that the Constitution (First) Amendment Act, 1951, was enacted; and the Right to Property was done away with. Article 31(A), which was enacted categorically, states that no law which provides for acquisition by the State of an estate can be held void, as being ultra vires Article 14 or Article 19. It also provided for payment of compensation at a rate not less than the market value of the property².

Acquisition and requisition of property falls in the concurrent list of the Constitution of India, which means that both the CG and SG can make laws on the matter. There are a number of local and specific laws which provide for acquisition of land under them but the main law that deals with acquisition is The Land Acquisition Act, 1894 (LAA). The law was enacted by the British government and by virtue of the Indian independence (Adaptation of Central Acts and Ordinances) Order, 1948, continues to exist as the law of land acquisition in India. Given the fact that land acquisition falls under the concurrent list, both the SG and CG have amended the law, evolving it with time and according to the local needs.

Land can be acquired either by the SG and CG for the purposes listed under the State and Central lists respectively, unless the central government delegates the task to the SG under Article 258(1) of the Constitution. The term "appropriate government" in the Act would imply the government, whether Centre or State, that issues a notification under section 4 of the LAA to acquire the land.

2.1.1 Definition of Public Purpose

Article 31(2) categorically states that land can be acquired by the State only for public purposes. Broadly speaking, 'public purpose' would include a purpose, in which the general interest of the community, as opposed to a particular interest of the individual, is generally and vitally concerned. In a generic sense, the expression public purpose would include a purpose in which where even a fraction of the community would be involved. It has been identified as a work from which the public in general would derive benefit or be benefited. Anything which is useful to the public, in the sense that it confers some public benefit, or conduces to some public advantage, is a public purpose. It is the requirement of public purpose that is the determining factor on the question of whether or not a particular land should be acquired, and the consideration of hardships to the individuals cannot outweigh the question of public demand. The expression public purpose is not to be strictly construed under Section 3(f) of the LAA; it is an inclusive definition of public purpose and from time to time the courts have held different purposes to be a public purpose. It is not pos-

sible to give an exact and all-embracing definition of public purpose. One of the tests of public purpose is if the purpose would satisfy the expenditure of public funds and, in a number of judgments, courts have said that the government is the best judge of public purpose. The declaration of public purpose by the government is final, except if there is a colourable exercise of power.

2.1.2 The Process of Land Acquisition

For the purposes of LAA, the proceedings are carried on by an officer, appointed by the Government, known as a Land Acquisition Collector. The proceeding under the Land Acquisition Collector is of an administrative nature and not of a judicial or quasi judicial character. When a government intends to occupy a land in any locality it has to issue a notification under Section 4 in the official gazette or newspaper giving a public notice which entitles anyone on behalf of the government to enter the land for the purposes of digging, taking level, set out boundaries, etc. The notification puts forward the intention of the government to acquire land and entitles government officials to investigate and ascertain whether the land is suitable for the intended purpose. The section also makes it mandatory for the officer or person authorized by the Government to give a notice of seven days signifying his intention to enter any building or enclosed court in any locality. This is a mandatory provision of the process of land acquisition (Please see Table 1 for a diagrammatical explanation of the procedure for acquisition of land).

An officer or authorised person of the Government has to tender payment, for all necessary damages, and disputes with regard to insufficiency of amounts to the collector. Under Section 5(a), any person interested in land which is notified under section 4 (who is entitled to claim an interest in compensation) can raise an objection, in writing and in person. The collector, after making inquiry with regard to such objections, has to forward the report to the Government whose decision in this respect would be final. After considering the report made by the collector under section 5(a), the Government may issue a declaration within one year of the notification under section 4 to acquire land for public purposes or for the company. This declaration is a mandatory requirement of the acquisition.

After the declaration under Section 6, which is the declaration by the appropriate government to intimate the land owners that the land is required for public purposes, the collector has to take the order from the appropriate government, whether SG or CG, for the acquisition of land under section 7. The next step in the process of

acquisition is that the collector has to cause the land to be marked out, measured, and the appropriate plan to be made accurately, unless it is already done. Requirement of this section deals only with approximation and does not require an exact measurement. An important process that takes place under this section is demarcation; which consists of marking out the boundaries of the land to be acquired, either by cutting trenches or fixing marks as posts. The object is to facilitate measurement and preparation of the acquisition plan, but also to let the private persons know what land is being taken. It is to be done by the requiring body, i.e., the government department or company, whichever may be the case.

Section 9 requires the collector to put up public notices at convenient places expressing the Government's intention to take possession of the land and requiring all persons interested in the land to appear before him personally and make claims for compensation before him. In effect, this section requires the collector to issue two notices, one to the locality of the acquisition, and the other to the occupants or people interested in lands to be acquired, and it is a mandatory requirement.

The next step in the process of acquisition requires a person to deliver names or information regarding any other person possessing an interest in the land to be acquired and the profits out of the land for the last 3 years. If the person does not disclose such information, then the person is liable under sections 175 and 176 of the Indian Penal Code. The object of this step is to enable the collector to ascertain the compensation by giving him a rough idea. Further, the LAA provides three methods for arriving at the value of the land, which are: (i) government approved rates, (ii) capitalized value of the average annual income from the land, and (iii) prevalent market rate based on the land transactions data.

2.1.3 Rehabilitation and Resettlement

Rehabilitation and Resettlement (R&R) is another contentious issue, in so far as land acquisition for large scale projects is concerned. The experience in India evidences the fact that the governments, both Central and State, have been lackadaisical in adopting a coherent R&R policy. The Narmada dam project and Tehri dam project were prime examples of an incoherent R&R policy which eventually delayed the projects. However, the Central Government has taken its first baby step in evolving a law for victims displaced by large scale projects. The Central Government notified the National Rehabilitation and Resettlement Policy in 2007 (NRRP) which seeks to provide adequate protection to people displaced because of large scale projects. The

NRRP, in its preamble, recognizes the traumatic, psychological, and socio-cultural consequences on the displaced populations which call for affirmative State action for protecting their rights, in particular of the weaker sections of the society which include women, marginal farmers, schedule castes, and scheduled tribes. The preamble of the NRRP promises all happiness to displaced person that he or she could desire. But the "Preamble" is, necessarily, not the actual part of the Policy and hence does not constitute a safeguard. We must also take into account that the NRRP is still a policy which is only suggestive in nature and does not have the legal sanction of a statute. The Government has proposed passing an appropriate legislation in Parliament to enact a statute, but lack of support from its principal ally has delayed the passage of such a statute.

The NRRP, since its inception, has been scrutinized and criticized heavily by the media and by experts on the subject. The NRRP is, at best, inadequate in a framework where there are no adequate checks and balances. The processes are open to abuse and the appointment processes of all bodies raise serious questions about its independence. The process wholly excludes the affected groups from having a say in their own future. Unless the Government of India addresses the issues raised by the misuse of the LAA, the LAA will continue to be a cause of conflict. India needs development, but not at the cost of burgeoning conflict. A development policy that inflames conflict at the local level is counter-productive. It is bad for business. The NRRP suggests that the Government has yet to understand the relationship between the application of its policies at the State level and the consequent rise in conflicts across India³.

The duty of the State is to provide an environment where development can flourish but also allows all players equal opportunities to derive rewards. The duty of the State is not to stack the odds in favour of the powerful, force land acquisition, and to disempower the weak and most vulnerable. The abuse of a law, designed for allotting land use for 'public purposes,' for private gain is a cause enough for reviewing that law. But the fact that the NRRP also provides a catalyst for blatant human rights violations suggests that the whole question of land acquisition for so called 'public purpose' must be re-examined with urgency⁴.

3. Environmental Regulation

Initially, laws were enacted for environmental concerns related to water, air, noise, etc, as and when they became areas of concern. Later, an integrated law was passed

by the Government. As the number of projects and private investments increased, bureaucratic delays became a concern. Laws were modified to overcome these delays. Between 1980 and 1998, nine Acts, Bills, and Amendments related to the environment were enacted. These included the Forest Conservation Act, 1980 (FCA), the Environment Protection Act, 1986 (EPA), the National Environment Appellate Authority Act, 1997 (NEAA), and the Coastal Regulation Zone notification, 1991 (CRZ).

The EPA came into existence soon after the Bhopal gas tragedy in order to impose liability on individuals for mass scale environmental tragedies. However, this debate is still raging and the Government now plans to enact the Nuclear Liability Bill to limit the liability on nuclear power producers. It became an umbrella legislation, and attempted to seal the existing gaps in the law. It empowered the Central Government to take measures to protect and improve the quality of the environment, by setting standards for emissions and discharges, by regulating the location of industries, and by protecting public health and welfare. The need for the Environmental Impact Assessment (EIA) was formally recognized at the Earth Summit held at Rio de Janeiro in 1992. In India, the EIA Notification was enacted in 1994, with the EPA as its legislative foundation. The EPA has been amended in 1997, 2006, and 2007. The process of getting the clearances as per the EIA Act is illustrated below:

Thirty-two categories of developmental projects require EIA approval and large scale projects in the infrastructure and real estate sectors have mandated the obtaining of EIA approval. The procedure to obtain EIA approval has been explained diagrammatically in Table 2. In addition, all developmental projects, whether or not mentioned in the Schedule, and if located in an environmentally fragile region, must obtain clearance from the Ministry of Environment and Forest (MoEF), a Central Government entity set up in 1985. Prior to this clearance, they must also obtain clearances from the State Pollution Control Board (SPCB). If the location involves forestland, a No Objection Certificate (NOC) shall be obtained from the State Forest Department (SFD). Both SPCB and SFD are the state entities functioning in the geographical region where the project exists.

Over the years, regulations have been simplified with the aim of reducing the total time required for the approval process. The simplifications include reducing the number of interfacing agencies and approvals, and allowing parallel activities for clearances. As per the EPA Amendment Act, 2007, environmental clearances for

project proposals were to be granted usually within the mandated time frame of 120 days from the date of receipt of complete information from the project authorities. The project clearances had been delayed due to non-submission of the requisite information. Some of the steps taken to expedite the process to obtain EIA approval include:

- A time limit of 90 days for completing appraisals, 30 days for communicating the decision, and 60 days for completing the public hearing by SPCB, was fixed.
- The investment limit for a project requiring MoEF clearance was raised from Rs 500 million (\$ US 10 billion) to Rs 1000 million (\$ US 20 billion) for new projects.
- The requirement of a public hearing for Small Scale Industries (SSIs) located in industrial areas/estates. These include widening and strengthening of highways, offshore exploration activities beyond 10 km (6 mi) from the nearest habitat, mining projects of major minerals with lease upped to 49 acres (20 hectares), modernization of existing irrigation projects and units to be located in Export Processing Zones (EPZs) and Special Economic Zones (SEZs).
- The requirement of the EIA report for pipeline projects was dispensed with.
- NOC/consent to establish was not insisted upon at the time of receipt of the application for environmental clearance.
- Authority was delegated to the SG for granting environmental clearances for certain categories of thermal power projects.

4. Practical Experience

Notwithstanding the applicable law discussed hereinabove, past experiences show that, even if the due process of law is followed in land acquisition matters, there have been protests against land acquisition by peasants. The controversy over the allocation of land in Singur to Tata Motors to develop the Nano car is a case in point. Further, we have seen similar agitations by the peasants (supported by some political party to gain political mileage) over the allocation of land to build a SEZ in Nandigram, against the Bangalore Mysore Infrastructure Corridor and by the peasants against the proposed steel plant by POSCO in Orissa. Stung by the developments in Bengal and Karnataka, governments in the Centre and the States are now

reluctant to acquire the land and hand it over to the private parties and instead are now encouraging the private parties to acquire the land directly from the farmers, as was evident in Jhajjar, Haryana. This has also met with limited success because we have noticed that Arcelor Mittal has faced a lot of opposition in its bid to acquire land in Jharkhand. In addition, the present government in the Centre has decided not to table the LAA Amendment Act, 2007 in the Parliament because of stiff opposition from its largest ally.

5. Conclusion

Agitations against land acquisition puts the ruling parties on the defensive and they do not want to take any political risk on a sensitive issue such as land. Industry bodies and investors are not averse to dealing directly with private landowners, but the problem crops up when they have to handle small parcels of land with dozens of, sometimes even over a hundred, owners. That is where the role of a government agency becomes important. What they want is a "complete, transparent, and flexible land acquisition policy," that can help both the investor and the landowner. On a case-by-case basis, a compensation package - land for land, jobs, equity share in the project, and profits or royalty, will be mutually advantageous. Further, the industry would like to see a political consensus evolve on the land acquisition issue so that irrespective of which party is in power, the projects can progress without a hitch or political vendetta. In addition, the economic costs of delays are very high for mega projects. In case of a road or a power project, congestion would lead to higher inventory carrying costs, higher inventory requirements, increased pollution, and higher fuel consumption. In most cases, the cost gets transferred to the tax payers and users of the facility in the long run. The fairness of this transfer can be questioned.

The acceptance of a user fee and development of alternate sources of revenue had helped attract larger investments in megaprojects. With increasing private sector participation, delays due to project management is expected to reduce significantly and the focus would be left to environmental and land acquisition issues. The modifications in the regulatory framework on these issues are moves in the right direction. However, methods used for assessments related to environmental impact and land acquisition are still conducting manual surveys, making the whole process time consuming. Technology could be a good instrument in reducing the time required for these studies as well as in bringing transparency into the system. Decentralization with capacity building at the State level would also help in the long run in reducing these delays.

TABLE 1

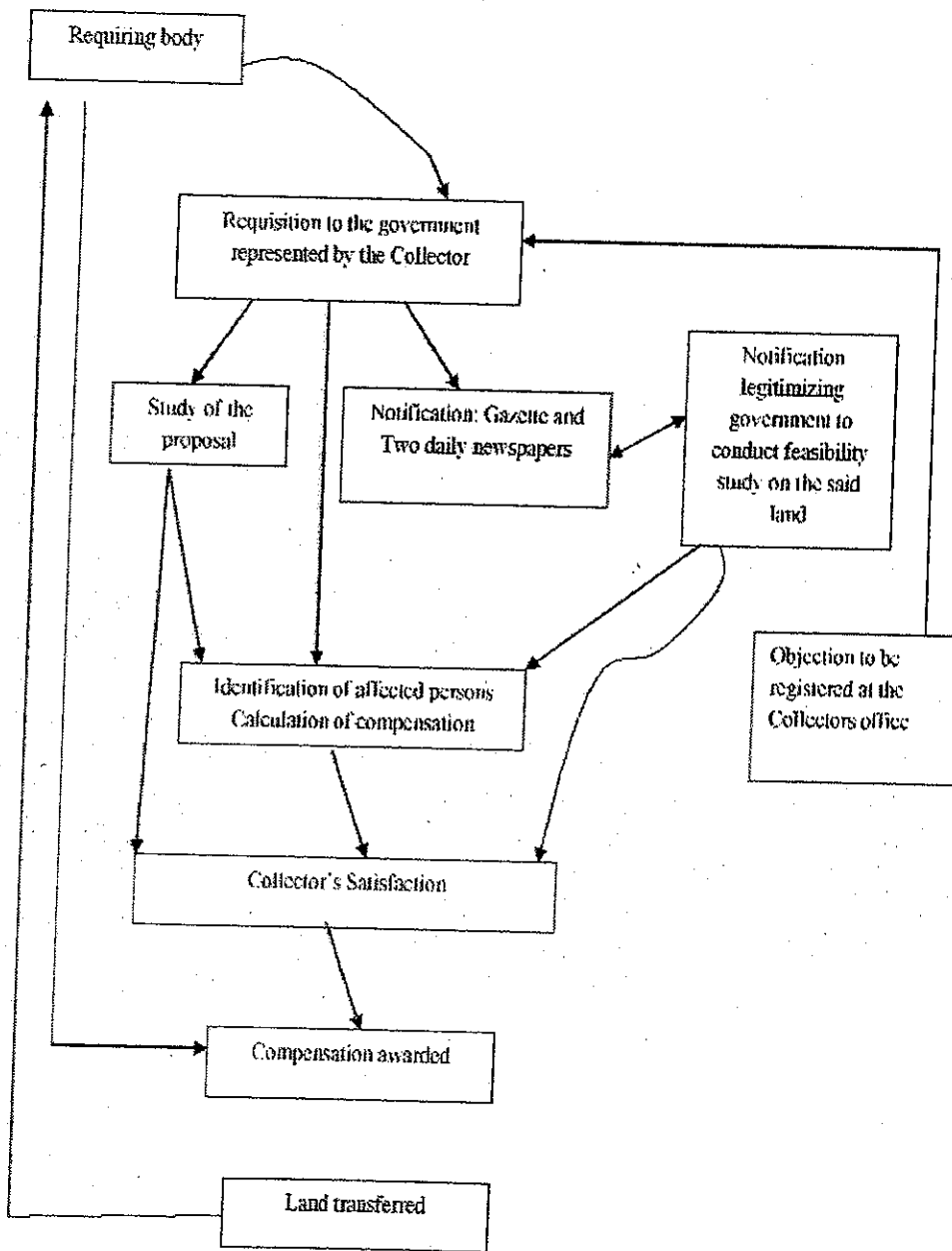
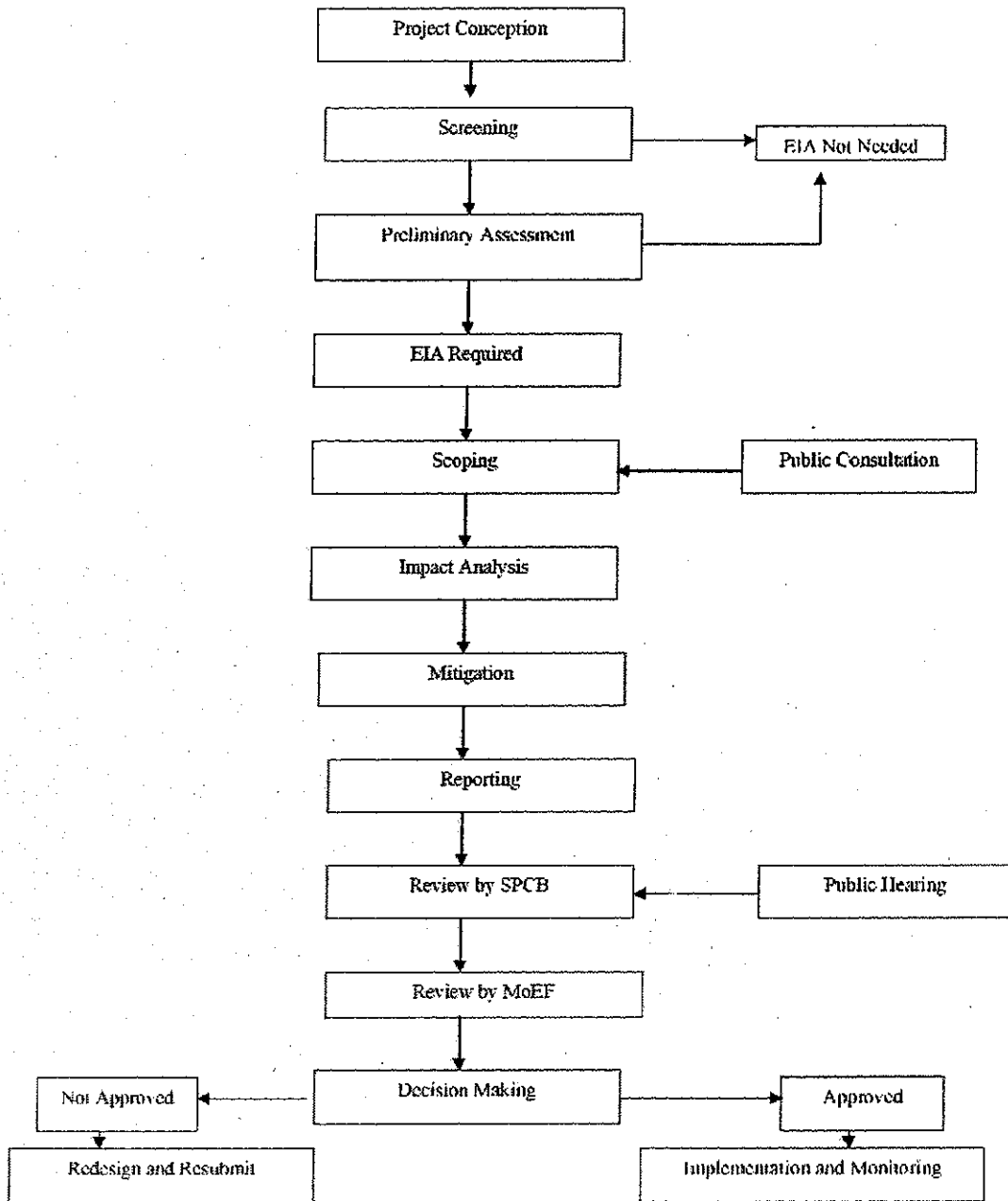


TABLE 2



References

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- ⁴Id.

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