

The Truth about Land Wars

Land is a finite resource and a good store of property and wealth. It has been one of the most sought after possessions human beings have always longed for and fought for. Long history of land wars have led to different schools of thought. A Conservative or *Right* of centre thought process says that government is appointed by the people for protecting their private property, and thus it cannot 'take' these except for a clearly established public purpose (e.g. building a road), and that too after adequately compensating the person from whom it is being 'taken' so that he is at least as well off. This power is called the power of *eminent domain* in legal circles. The other is revolutionary or *Left* thought process which says all lands and properties belong to the society, and hence Government can take any of it from anyone, by paying little or no compensation.

Legal luminaries educated in the West drafted our Constitution. Many of them belonged to the *Right* and many others to the *Left* thought processes. After much debate in the Constituent Assembly, a compromise was struck by which position of the *Right* was secured by guaranteeing fundamental rights to the people to acquire, own and dispose off property, under Article 19(1)(f) As it was a fundamental right, it could not be taken away by any future Government or at least that is how it was supposed to be. With a bit of compromise for the *Left*, a provision for 'reasonable restrictions' was inserted which said the government could legitimately curtail individual rights (including property rights) to some extent, as long as it was reasonable. Another separate provision under the heading '*Right to Property*', guaranteeing full compensation in case of compulsory acquisitions (Article 31) was also provided as a fundamental right. So the two articles 19(1)(f) and 31 under Chapter III (Fundamental Rights) of the Constitution tightly protected private property rights against abuse from the state.

The *left-leaning* government policies of independent India faced legal problems in carrying out their various programmes of land redistribution and nationalisation of some businesses (e.g. Banking and Insurance), as the courts would come in the way if the government acquired any of these without paying adequate compensation. This led to a series of court battles, many of which were lost due to above provisions. Successive Governments of the day responded by constitutional amendments aimed at curtailing property rights, most of which was again challenged in courts on the ground that fundamental rights could not have been watered down. The final blow came in the 44th amendment of the Constitution in 1978, which removed property rights and guarantee of full compensation, from the Constitution altogether*. As a bargain, the same amendment inserted a much more watered down provision (Article 300A) which simply meant that government could now acquire any property by paying any compensation as long as it followed some procedure for it! The proverbial baby was thrown with the bathwater.

By this time and later, various state governments carried out large-scale land redistribution and nationalisation programmes, without having to pay much compensation. It also meant that most of the landholding now was small, unless it was a '*benami*' or *illegal* holdings. This might have also led to some positive effect like crores of smallholders could claim to have some property of their own. At the same time, there were inevitably some negative consequences like these holdings were too small to be viable for modern agriculture that increasingly required large scale.

If we turn to the global scene in the period after the 44th amendment (80s and 90s), we know that that the *left* thought processes gradually lost favour all over the world including the Soviet Union. In India too around that time we saw economic reforms tilting from *left* to somewhat *right*. This led to programmes for selective denationalization (disinvestment) and stress on private enterprise and greater public-private partnerships even in large-scale public utilities and infrastructure like power, airports and the likes. These policies paid good economic dividend. But the 44th amendment remained intact. As a result, we have a bizarre situation in which

the government is left with unlimited power to 'take' any property for any purpose and it could and does apply that on smallholdings, to pursue its newfound public purpose of promoting private industry or public-private partnerships! What is more bizarre is that one of the rationale advanced is that the present landholdings are too small to be viable, without any discussion on what made those so small and hence unviable. It could indeed be argued, though at a great risk in a *left-leaning* environment such as ours, that so called land-reform could have been a bad idea in retrospect, perhaps a tightly enforced minimum wages for agricultural labour could have tackled the problem then better, but that is another matter.

Be that as may be, it would be good to recapitulate the present legal position of property rights in India, in the light of above checkered history:

- a) The fundamental right to own and dispose off property and the fundamental right against compulsory acquisition for non-public purposes and the fundamental guarantee of full compensation do not exist after 44th amendment.
- b) Any state government can acquire any piece of land for any purpose at whatever or no compensation, as long as it calls it public purpose e.g. building a golf course or holiday resort is a perfectly legitimate public purpose for which any private lands can be acquired at whatever little compensation a state government decides.
- c) There are various other restrictions on land dealings in private domain, e.g. restrictions on buying and selling of land, in terms of who can buy (in many states only a farmer can - remember the hue and cry when Rani Mukherjee tried to buy a small piece of land in Shirdi?), how much can be bought (there are land ceilings in most states) and for what purpose (e.g. farming only and not anything else).

If we analyse the present land wars in the above context, it is not very difficult to understand that though there is demand for large parcels of land for various projects like housing, infrastructure and industries, there are mostly smallholders – many of them beneficiaries of earlier redistribution and often without clear titles. As a result of the 44th amendment, citizens and businesses, in general, do not have free right to acquire, hold and dispose off properties. So the state governments are a compulsory agent in all such dealings, so to say.

Though all the legal provisions above are apparently against the rich and aimed at protecting the poor and the smallholder, there is no guarantee the same could not be applied the other way round. This possibility of abuse is very real if anyone has absolute powers, including elected governments; thus the *centre-right* concept of democratic governments limited by inalienable private property rights.

The only way forward for a just and peaceful resolution of land wars engulfing the entire country, appears to be some forthright truth and reconciliation over a period of time to correct the sin of disrespecting private property rights. It may look very difficult in the muddled waters and desperation prevailing, though the prospects look better to alternatives currently visible. The fundamental right to property must be restored by annulling the provisions of 44th amendment that repealed articles 19(1)(f) and 31. Other restrictive provisions in various laws as explained above will have to go, also as a consequence of restoration of property rights. This is easier said than done, because of the inevitable complexities like multiple interests (e.g. that of the Owner and *Burgadar*), which will have to be reconciled. Perhaps this could be done by innovative programmes like giving a specific share to each, or a joint title with equal shares, which can be cashed only if both parties act as partners. It could indeed be very complicated in some situations, like in West Bengal.

Even if the above is done, viz. all the holders or multiple holders have clear transferable titles and there are no restrictions like ceiling and usage etc, one could argue that the remaining problems would be:

a) Prospects of owner holding-out to his property, for better price or otherwise - political or competitive instigations etc.

It should be seen as necessary evil in all markets and not a problem impossible to negotiate also because the buyer will always have some options to buy consolidated land elsewhere, which might be at a lesser cost - social or real, compared to forcing those holding-out. Sooner or later, those holding out will learn that there may be a cost of doing so unnecessarily, perhaps leading to peer pressure and some equilibrium. The *eminent domain* is designed to solve the hold-out problem in an overbearing public purpose, but it does not mean it can be applied in situations where market forces are best arbiters. However, 70:30 or better still 90:10 type of legislation proposed in the land acquisition amendment bills might be desirable, if it could be resolved through some good amount of national debate that PPP infrastructure and even factories could form public purpose to some extent or the other. It could also be graded, e.g. 70:30 for infrastructure PPP and 90:10 for factories, etc.

b) Prospects of gun-trotting-arm-twisting agents being unleashed

This clearly appears to be a bogey of *left* mindset- it's a law and order problem - can one unleash gun-trotting agents in any other market even if one wants to buy small quantities of a precious commodity in short supply, from many? Secondly, if the seller does not want to sell, is gun-trotting party/policemen any better private agents? (One would choose a hundred such agents over a few policemen, simply because one could still go to the latter in case of the former!)

c) Gullible naive smallholders falling prey to cheating, lower valuations, frittering away money received etc.

This may indeed be a genuine problem. Some of this could be handled by innovative state interventions designed to educate smallholders and tackle market failure situations e.g. by declaring reasonable minimum floor price that must be paid depending on perceived market rates (e.g. circle rates), reasonable moratorium on transferability of new titles issued as a result of these reforms (on the lines of ESOPs), conditions like sales proceed will be deposited in interest bearing escrow account before any transfer or acquisition, involving reputed NGOs (as is being done in NREGA), etc.

There can be independent tribunals including eminently impartial members representing private citizens, to bring about some of the above programs. Citizen's right to go to the High Court and Supreme Court in case of property rights abuse will be the final check, once article 19(1)(f) and 31 are restored in the Constitution.

By correcting the blunder of undermining private property rights, the land wars could thus be turned into a golden chance for India to evolve as a property-owning democracy, like post-New Deal US when easy mortgage ushered in large scale home ownerships. The alternatives appear horrible – endless land wars, frittering away gains of so-called land reforms, and giving credence to ultra-*Maoists* as the only credible defenders of smallholders – we don't deserve any of these after 60 years of freedom!

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*The Constitution (44th Amendment) Act, 1978 narrated the following object while repealing fundamental right to property:

“3. In view of the special position sought to be given to Fundamental Rights, the Right to Property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted. It would, however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice.”