



For a colonized people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity.

Frantz Fanon (1961)

The difficulty of justifying eminent domain: The Indian scenario

Shruti Yerramilli

Abstract

Eminent domain is the right of a government to expropriate private property within its territory or jurisdiction, for what it deems is 'public purpose'. To understand eminent domain, we need to understand how the interpretations of property rights have changed over time. Property rights have been viewed as natural rights and also as rights as a result of birth of the sovereign state. One such thinker, Hugo Grotius, introduced for the first time, the notion that these rights were alienable and transferable. It strengthened the idea of eminent domain as a mechanism to improve allocative efficiency in markets where high transaction cost may not result in mutually agreeable contract. However, eminent domain is a right attributed to the sovereign state, outside the property market. There are no naturally existing checks to the scope of power it can wield. We study the Indian scenario in this context, to understand how eminent domain is interpreted within Indian legal system and how it is a difficult concept to justify in terms of the social benefits it is supposed to facilitate. The most recent law that governs the issue in India is the Right to fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. In the absence of land ownership records and formal land markets, the idea of 'reallocation' of property rights seems misplaced.

Introduction

Eminent domain is the right of a government to expropriate private property within its territory or jurisdiction, for what it deems is 'public purpose'. Historically, it has often been subsumed within sovereignty and counted as its attribute. Eminent domain comes from the Latin phrase *dominium eminens*, taken from Hugo Grotius's legal treatise, *De Jure Belli et Pacis* (on The Law of War and Peace), written in 1625 (Fellmeth and Horwitz, 2009). It allows the government to transfer or reallocate private property rights against the payment of 'just compensation'. Though the concept has evolved over time, it is distinctly different from forceful acquisition of property, in an exhibition of power by the state or ruler. Here, 'just compensation' becomes a defining and distinct feature of eminent domain. It is difficult to categorize eminent domain as right of the government or its power. As a right, it's a feature of the government's power; however, unlike the concept of power, rights are not absolute. They are truncated to ensure minimum overlap of conflicting interests.

We know that property rights add substantial value to a piece of property by conferring ownership, use, modification and transfer rights (among others) to the owner of it. In the absence of duress-free consent or transfer of rights, in an in-

voluntary exchange process, property rights lose a part of their monetary value as well as their ability to secure the socioeconomic status of the private owner. This is especially true in case the owner derives his primary livelihood from land or is dependent on it for sustenance.

Eminent Domain lowers the bargaining power of the private owner, and yet this expropriation by law is said to be aimed at a 'public purpose'. This statement is not to discredit the importance of a government's 'transcendental propriety' (The American Law Register, 1856, 642-3) in regulating property rights and reallocating those rights towards creation of a social value from a product, for which transaction costs are very high for private investment to exist in the market. It is, however, to focus on when eminent domain becomes imperative or best solution and if there are pre-requisites for better implementation of the same. At the end of the day, it is a compulsory transfer of property rights and is not a mutually agreed transaction between two contracting parties. In the following sections, we will look at how 'public' or social-value-generating must this purpose be, to justify use of eminent domain and if there is a threshold value for the same.

Our discussions so far help us tie together two concepts, namely eminent domain (the right to expropriate private

property) and public purpose (the justification behind invoking the right). Public purpose remains a limitedly defined term within most acts governing implementation of Eminent domain, within different countries. In India, the concerned legal framework is laid down by the *Right to fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* (LARR 2013, hereon). Section 2(1)(a-f) of the Act outlines what is meant by Public Purpose in six indicative and broadly spelt sub-clauses. These sub-clauses are fairly broad, in that they cover items like infrastructure projects, projects for industrial corridors, tourism and projects for residential purposes, among others. This makes the scope of 'public purpose' wide enough to incorporate a large variety of projects, effectively reducing the threshold level of net social value, that the projects must be able to generate to be considered as fulfilling 'public purpose'.

How do we justify eminent domain if not on the basis of a strong 'public purpose'? The subsequent sections will discuss the concept of eminent domain and how it developed with time; the need for it (or not); its effects and problems. The scope of this paper is limited to the Indian scenario, save the examples that have been taken from certain other countries to establish context. The paper will focus on the nature and effects of eminent domain in India, particularly its socio-economic effects.

The idea of property rights

Eminent domain, by virtue of its definition, may have followed two important changes in history- the institution of benevolent rule or government that was responsible for creating public works/goods like roads and water-sewage systems; and the establishment of demarcated property rights for the people (The American Law Register, 1856, 642-3). Clear property rights characterized either by the bundle of rights allowed to owner of the property like use rights, right to exchange etc.; or by benefit of exclusion- one person's property right excludes all others in ownership and sharing of benefits arising out of ownership.

A lot has been said about property rights of individuals and their relationship with the society and state, mostly in political contexts and later involving legal connotations. Several aspects of these have been covered in the writings of Plato, Aristotle, Hegel, Grotius, Hobbes, Locke, Rousseau, Hume, Marx, and Mill. Aristotle's Athenian Constitution (discovered in 1891) is one of the earliest accounts of discussion on expropriation by fiat and payment of compensation. It talks about "...the adjustment of a dispute between the cities of Athens and Eleusis, among the agreements of settlement was one providing for the transfer of property in Eleusis to the Athenians, on terms that imply the use of an existing rule for the valuation of private property by representatives of the city" (The American Law Register, 1856, 642-3). The same extract within the American Law Register also discusses the Roman interpretation of the same. For the Romans also the property rights were political matter and expropriation was the symbol of power of the state. However, the requirement of compensation and consent was observed.

It was an important process for these thinkers to evaluate the

need for property rights and to some extent examine the moral justification of same in a free society. Where Plato argued that collective property rights were necessary to achieve common interests of the society (Bloom, 1968); Aristotle believed that private ownership of rights will reduce free-riding, improve a sense of responsibility (as a result of ownership) and propel greater progress (Jowett, 1984). Their discussions revolved around debating the form of ownership. Discussions about how they were established and in what manner they must be interpreted, flourished later in time.

Around the 17th century thinkers like Grotius started to focus their attention to the structure of society and what caused societies to abandon or move beyond anarchy and become part of governed communities- effectively giving up a part of their freedom in the process. Grotius, unlike his predecessors, looked not at the rights of people but at the powers and entitlements that came with this right. Miller discusses that, "...he [Grotius] played a crucial part in the commoditization of rights. Once rights became possessions, they can be traded away just like all other possessions" (Miller, 2014). This was new and transfer of rights had not been discussed in this light before. This is unlike the understanding of exchange of commodity rights. These were understood as natural rights of the individual and their alienation had never been discussed.

Hobbes and Locke, however, discussed that property rights were in no way 'natural'. Their theories differed significantly, even as they shared this common belief. Hobbes believed that the beginning of property rights must have come with the creation of the state, to provide stability and security to the individuals as they grew within this co-dependent setup (Waldron, 2012). Locke, on the other hand, believed that the natural resources belonged to everyone equally and the creation of property rights in itself posed a moral dilemma. Property rights must have been established when the first individual to claim a natural resource (land), must have done so without dispossessing anyone (First Occupancy theory) and then sustained the right on his property by improving it through his labor (Locke 1988 [1689], II, para. 27).

A few years later, Vattel also formalized his theory about the formation of a society and the distribution of rights between them. He expressed clearly that shedding a part of individual freedom was necessary to consolidate a governed society (The Law of Nations, Ch-4 §38).

"This authority originally and essentially belonged to the body of the society, to which each member submitted, and ceded his natural right of conducting himself in everything as he pleased, according to the dictates of his own understanding, and of doing himself justice. But the body of the society does not always retain in its own hands this sovereign authority: it frequently entrusts it to a senate, or to a single person. That senate, or that person, is then the sovereign."

While this is by no means an exhaustive list of the important landmarks in history of development of idea of property rights, a detailed discussion on the same is beyond the scope of the paper. However, our discussion was aimed at tracing how the idea of property rights changed and eventually morphed into what it is today. It follows from the arguments mentioned that two main characteristics of property rights are in fact residuals of the ideas discussed-

1. These rights are transferable, and not above the overarching rights of the sovereign (as the protector and guarantor of these rights). The Lockean concept adopted by the US constitution also stresses that *"the concept that rights, in addition to being individually held, may also be held collectively by the body politic, which creates and provides the justification for civil government"* (Doernberg, 1985); and
2. These rights needed to be limited but justifying limits to property rights is as difficult as justifying the idea of private property itself. However, *"...philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents."* (Stanford Encyclopedia of Philosophy, 2004)

Eminent domain and its evolution as a legal concept

We start with the assumption that for a stable society, the sovereign government must be the protector of the property rights. For property rights to aid value-addition in any way, they should be justiciable. Clearly defined rights, in terms of ownership, permitted use, and value, allow for a well-established market for its exchange. The limits on property right are essential to safeguard them against infringement, misappropriation of the same and any conflict of interest that may arise due to exercise of excessive freedom. Intuitively, benefits arising out of ownership of private property rights accrue to the individual, however, these may not generate greater net social benefit. Also, several productive activities involving a trade of the right (purchase of land), may have very high transaction costs and generate market failures that reduce the net expected benefits. These are the two most important reasons why government must step in to facilitate creation of net social benefits and improve expectation of private benefits, to the extent. This role of government, ideally, must be the essence of eminent domain.

Given the understanding we just established, it is not difficult to see why the power of eminent domain had usually been limited to expropriations for a public service enterprise which *"serves the public so directly that it would be subject to such incidents as public supervision and regulation of rates."* (HCK, 1914). However, the scope is no longer limited to public sector enterprises and in many cases today (like in India) expropriations may also be on behalf of a private entity that contributes to a public purpose. This change leaves us with one question—when is it justified to invoke eminent domain?

Land markets, in the absence of titling and maintenance of records, are beset with problems of asymmetric information and high transactions cost. Land is a limited resource. This means that for a country like in India where majority holdings are small, purchase of large portion of land requires integration of several plots and just as many mutually agreeable transactions. We can see how this may be a problem. With every additional fragment of land purchased for a large project, every next fragment becomes more important. As willingness to pay increases, prices also escalate. This increases the total transaction cost and may render the project infeasible. This is the hold-up problem. If the project can generate

enough social benefit, this is a case for eminent domain.

Eminent domain becomes appealing if the number of landowners is large (Shavell, 2010). Calabresi and Melamed, in their seminal work, explained that when mutually-agreed-upon transaction becomes difficult due to high transaction costs and property cannot be re-allocated to improve private and social benefits, we need to switch from *"property rule to liability rule protection to achieve allocative efficiency"* (Calabresi and Melamed 1972, pp. 1106–7). Property rules are in the interest of protecting against infringement of property rights; liability rules are focused towards internalizing cost of negative externalities, no matter the ownership. This gives some legal basis to our understanding of Eminent Domain.

Eminent domain offer eclipses private property rights and one may question the extent to which government interference can serve either the market or the purpose of social benefit. In the light of our previous discussions, it is clear that the impact of eminent domain is equivocal. Eminent domain could aid economic growth not only through provision of public goods like roads etc. and as a solution to hold-up problems; it could also help in blight removal (Collins and Shester 2011).

However, eminent domain removes the element of free bargaining power between contracting parties and even with payment of 'compensation', it distorts expected value of land. Continued presence of the government could, therefore scar the market's ability to natural move towards optimal prices. Chen and Yeh, empirically studied this phenomenon in their paper and concluded that, if eminent domain seized to be a special case scenario and government's easy access into the market is exploited, it would lead to reduction in economic growth *"because of distortion in investment incentives, unless the public use channel dominates."* (Chen, Daniel L., and Susan Yeh 2013)

The way eminent domain has been understood, it is seen as a part of sovereign rights of a government focused towards facilitating 'public purpose'. It is, therefore, not something that may be used by individuals or is in private domain, nor must it be used by the government to run its everyday roles. So it must also be distinguished from the public domain (The American Law Register, 1856). Eminent domain is not 'enjoyed' by governments. It is an acknowledgement that limited resources like land must have belonged to the society as a whole before becoming demarcated and therefore, they may be re-allocated for benefits of the society. The effects of eminent domain, thus, depend heavily on administration of it use and strength of legal standards to prevent its abuse. We will discuss the same in the context of India. Examples from the extensive discussions on subject, in USA, would aid our understanding. Both countries largely follow a common law system, as a residual of the British Imperialist influence.

Eminent domain in India: Practice and problems

The constitution of Indian drew its sources from The Government of India Act, 1935 and Universal Declaration of Human Rights, 1948, among others. Both of these included specific

provisions to safeguard property rights. Section 299 of the Government of India Act stated that private property could not be expropriated without payment of just compensation and only for public purpose. The Universal Declaration of Human Rights recognizes the right to private property under Article 17. However, The Indian Constitution no longer recognizes right to property as a fundamental right. The 44th amendment eliminated Article 19(1) which guaranteed “the right to acquire, hold and dispose of property”. Article 31, which stated that “no person shall be deprived of his property save by authority of law” (not fiat) was also removed. Article 31 in a way morphed into Article 300 (A), so that property rights were no longer constitutional but just statutory. This was almost like perversion of law that diluted the strength of the state’s guarantee of property rights and expanded its powers of appropriation.

Land is largely a state subject however ‘Acquisition and requisitioning of property’ is listed as Entry 42 in the Concurrent List. This meant that both the Centre and States could make laws governing land acquisition. Land Acquisition in India was governed by the Land Acquisition Act (LA), 1984 for the longest duration since independence. In the same vein, “Public purpose” was described as projects which fell under the planned development schemes of the government or projects sponsored by them; projects for public enterprises; and any other welfare projects like housing, education and health. The acquisition for Private Companies was explained in a different section. Perhaps the idea was that acquisition for private companies does not directly point towards a public purpose. Therefore, the company needed to enter into agreement with the concerned government, regarding the nature of its need (with for dwellings for workers or construction which has public use) and the timeline within which it would realize its proposed projects. With time, the nature and extent of acquisition for private companies took new shape.

The Standing Committee on Rural Development (SCRD), in its report on the Land Acquisition, Rehabilitation and Resettlement (LARR) Bill 2011, explained the amendments made over the years:

“Initially, the exercise of the doctrine of Eminent Domain was limited to acquiring land for public purpose such as roads, railways, canals, and social purposes like state run schools and hospitals. The Act, however, added the words ‘or Company’ to ‘public purpose’ to distinguish land acquisition by the State for ‘public purpose’ from land acquisition by the State for a ‘Company’.” (Department of Land Resources, Ministry of Rural Development. 2015)

Initially, the idea of ‘Companies’ was restricted to Railway Companies. The amendment in 1933 amended this to include private companies as well. Acquisition was permitted for the ‘...erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith.’ (Department of Land Resources, Ministry of Rural Development. 2015).

Since property rights had been demoted from having a constitutional status, the Act acknowledged them only providing for “just compensation”. The questions concerning rehabilitation and resettlement of affected persons or families were not addressed till Land Acquisition, Rehabilitation and Resettlement (LARR) Bill was introduced in Lok Sabha in 2011.

It took sixty-four years and several acquisitions to give resettlement issues the discussion space they needed.

Although, the Bill touched upon the issue of displacement, it is the Act which succeeded it that acknowledged the right to property, even if the scope remained limited. Although, National Policy on Resettlement and Rehabilitation for Project Affected Families, 2003 and subsequently, National Policy on Rehabilitation and Resettlement, 2007, addressed the question of minimization of displacement and rehabilitation & resettlement plans for the affected people; their efficacy was constrained by the fact that these were only policy documents and did not enjoy the legal status of an Act. To this extent, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement, 2013 (hence mentioned as RLARR, for brevity) was significant milestone in improving our legal framework for land acquisition.

RLARR, 2013 came into force on January 1, 2014. ‘Public purpose’ was repurposed, such that acquisition must not only be for reasons laid down in Section 2(1)(a-f) of the Act, but must be mindful of its impact on the affected parties. The latter statement points towards the inclusion of the provision for Social Impact Assessment in the Act. It was aimed at informing decisions regarding rehabilitation and resettlement provisions that would be provided to the affected parties.

The noteworthy change that came with this Act was the inclusion of the word ‘Right’ in its title. The Act recognized that compensation was not a necessary accompaniment to eminent domain, but the right of affected people. It seemed that the Act acknowledged their rights to their properties and also that compensation in effect should be representative of the value of their properties and loss of expected increase in value. The Compensation amounts thus were increased significantly. Not surprisingly, this increased the cost of projects and caused delays in their implementation (Economic Times, 2015). Favoring social benefit here reduces net benefits from the projects. It seems a flat increase in compensation may not be the ideal way of dealing protection of property rights and increasing their allocative efficiency. This brings us to the concept that forms the base for the idea of eminent domain – well defined property rights.

Why eminent domain fails in India: Expropriation of property rights that may not exist

Proof of existence of property rights lies in its documentation. In India, we are still struggling with rudimentary paper documentation of the same. The step towards digitization of the records and their e-maintenance is of course next, but a significant leap from our present situation, when we do achieve it. In the absence of clear ownership, ‘reallocation’ of the right is meaningless. How can you transfer a right that has no legal existence?

The *right* to compensation has preceded the idea of right to property in India and poses several questions regarding the understanding of eminent domain. In the State of Bombay v.

R. S. Nanji 1956, the SC judgment spelled out the difficulty in providing a binding definition for 'public purpose'. *"Prima facie, the government is the best judge as to whether public purpose is served by issuing a requisition order, but it is not the sole judge. The courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a public purpose"* (Somayaji and Talwar, 2011, Ch-2, 18).

Although, several states are now moving towards formalizing and digitizing rights to property (e.g. Karnataka) (Bhatnagar and Chawla, 2005), these will address only questions of existing paper-right holders. This does not address the problems of unidentified ownership or multiple possessors. Affected families are recognized by the head of the family, usually a male member, or a lady (in case she is a widow). This recognition comes from a stake in the title deed. Abandoned women, child widows usually get neglected, if they are not supported by the rest of their kin. It is easy to see how record of ownership and type of ownership can lead to gendered responses to land acquisition. Even if gendered responses to displacement are ignored, lack of formal titling could mean that some affected parties may be missed out completely from the count.

If all goes well, the administrative efficiency in dealing with compensation and rehabilitation & resettlement planning may leave much to be desired. Several Studies show that the number of people displaced due to dams alone during the first four decades post-independence, is upwards of 20 million. *"According to another estimate, the country's development programmes have caused the displacement of approximately 20 million people over roughly four decades, but that as many as 75 percent of these people have not been rehabilitated"* (Cernea, 1996).

Even as the new act attempts to better the provisions of the older acts, several caveats have been built into it to allow for the most latitude in interpretation of the act by the government. For instance, as Section 105 of the RLARR 2013, 13 Central Acts have been left outside the direct purview of the act, since these acts governed sectors that were considered to be strategic or critical for development (Raghuram and Sunny, 2015).

Government has tried justifying these exemptions by differentiating between *"enmass acquisition and row acquisition"*. The concerned ministries believe due to the critical nature of their work, provision of rehabilitation infrastructure (as specified in Schedule III25 of the RLARR 2013) will be tedious and will escalate project costs (Raghuram and Sunny, 2015). There exists a struggle between maintaining a balance between pace of positive changes in legal interpretations of eminent domain and improved efficiency in implementation of the laws.

Conclusion

Eminent domain is severely constrained and also defined by how it views the "public purpose" for which this right may be invoked and the administrative/ legal strength to back its implementation. In case either is lacking, eminent domain will lead to less than optimal solutions for property allocations and lower overall social benefit.

With years, the interpretation of the laws governing land acquisition has undergone several changes. For comparison, let us consider its treatment in another legal setup, namely that of the USA. The Supreme Court of California deliberated on the question of extent to which an affected party may be compensated.

"... unless the constitution or legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is damnum absque injuria and does not form an element of the compensatory damages to be awarded." (MPG, 1916)

Though, this is an old judgement, it signposts the path that understanding of eminent domain has taken. The judgment followed the long held understanding that compensation under eminent domain only covered bare property and not injuries to the business on it. It is interesting how the onus of expanding the extent of coverage under eminent domain, for compensation, was left to the legislature. In case of India, The Land Acquisition Act of 1984 did specify that the compensation amount needed to take into account, the damages to movable or immovable property, due to the expropriation, into consideration. However, it did not need for the value of property or business on identified piece of land to be included in its market value. A decided thirty percent of the market value of land had to be paid on account of the compulsory nature of the acquisition. Where this acknowledged the damages to the business and livelihood of the affected parties, calculation of damages offers a lower value as compensation than the actual value of business or property (attached to land) lost. The RLARR 2013 tried to remedy that by including the value of the standing property on the land being acquired, when the compensation value is calculated. This was a step forward. However, in the absence of formal land records and asymmetric information in the land markets, proper valuation of land is a far cry. The distortions created by high compensation values (four and two times that market value of land, in rural and urban areas, respectively), not backed by market clearance values, have led to an increase in farmland values due to spike in speculative interests.

The price of land must include both its present value as well as its expected future value. Arbitrary calculations of land prices, lack of documental evidence of ownership creates asymmetry in the information available in the market. This, in the long run neither serves a public purpose, nor does it improve social benefits.

Eminent domain, if invoked for the cause of a public purpose, must be supported by will of the government, strength of the administrative and judicial machinery and well established documentation of property rights.

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