

The Eminent Domain of Land Acquisition: An Embedded Instrument of Economic Exclusion

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Abstract

The original and incontestable power of the state to acquire private property for any assigned purpose is known as the eminent domain (ED). Starting from the twin principles of 'public purpose' and 'just compensation' the doctrine has come to a stage where neither of the two remain inviolable components of the same. ED has become a matter of convenience to the state for novel purposes like economic growth, development, fiscal interest, job creation, employment, private business etc. Also, it seems to have shun the accountability to the land losers.

Land is a basic factor of production and thereby a major component in capital formation and GDP growth. For an unhindered expansion of capital, land availability along with supply of labour must come forth to facilitate smoother rates of growth of output and development. So goes the economic logic. However, at the heydays of neo-liberalism, state assisted, nay mandated, acquisition of land for its coerced supply to industrial and commercial sectors becomes a matter of policy conflict and concern. The eminent domain of land acquisition and displacement (LAD) seems to have become a major policy tool in the neo-liberal rhetoric of the 'rates' of economic growth whereby sustenance of growth-rate itself becomes dependent upon the extent and intensity of LAD. The definition of public interest has also assumed a value loaded developmental overtone. On the other hand, the law of land acquisition, including its compensatory dimensions, has virtually failed to incorporate the interest of the affected persons as a constituent part of public interest. It is a sort of a deficit which usually results into erosion of capital base especially for the poor ones for whom land happens to be an exclusive source of survival and sustenance

The manner and quantum of compensation are the perennial sources of conflict in any instance of land acquisition. Compensation, notwithstanding its multiplicative factor, is never based on any scientific rationality. Rather, the rule of thumb is an inalienable component of the whole exercise. ED does not take into account the socio-economic conditions of the land losers. 'One size fits all', however, remains a weaker logic throughout. Resultantly, what is observed, post-acquisition, is the incidence of capital base depreciation, especially, of the small and marginal land owners. The pecuniary compensation fast withers away and in the end the land losers feel cheated and deprived of their means of subsistence for whom the process yields nothing save the economic exclusion. The entire exercise of the eminent domain of land acquisition stands, in its essence, to rob the poor folks, on the one hand and to add to the riches of the rich ones, on the other.

The paper is based upon the observations earned through the participatory research experience in a couple of land acquisition cases for both the public and private purposes. It starts with a discussion of the political economy of the growth process and the role of the state in that process. The concept of ED is introduced followed by a critique of compensation mechanism. Effects of ED are explained through the concept of capital and productive base depreciation of the affected peoples. It is inferred, from the whole discussion, that the ED in most of the cases is a fatal threat to economic inclusiveness to the extent it excludes the land loser and/or the project ousted people from the benefits of economic growth and development by depriving them of the capital and productive entitlements on the one hand and by lessening their capability to gain from the process of growth. In its essence the eminent domain seems to have lost its eminence by becoming an instrument that produces reverse Robin Hood effects.

Keywords: Eminent Domain, Land Acquisition, Economic Exclusion, Compensation, Capital Base Meltdown (CBM)

A. Introduction

Land acquisition is a compulsory dispossession, expropriation or alienation, imposed over the owners, users and dependents of land. This “power of the sovereign to take private property for public use” (Law Commission, 1958:1) is called ‘Eminent Domain’. The doctrine of *eminent domain* is based upon two maxims: “*salus populi est suprema lex* (regard for the public welfare is the highest law) and *necessitas publica major est quam privata* (public necessity is greater than private necessity)” (ibid: 1). It, however, essentially makes conflict with the freedom of choice available to the members of any democracy. Usually it is the low end ownership of land which is most adversely affected by compulsory dispossession. It is a manifestation of democratic crisis in a liberal society and economy. The land so acquisitioned when transferred to other high end owners creates and aggravates the problem of social inequity and redistributive injustice.

The concept of the eminent domain has undergone changes commensurate with the changes in political and economic rise and philosophy of the state.

B. Rise of the Economic State

The state, as an embodiment of the supreme association and inviolable contract as well as the expression of collective volition of the constituent peoples, carries on intermingling sets of rights and obligations. The rights of the state, including a constitutional one, are stretchable to any point just short of the transgression of basic constitutional premises. The obligations of the state also emanate from the constitution and extend to the well-being of, say, poetically termed, the last person. Inevitably, therefore, the state has to strike a balance between its obligations and rights on the one hand and between its aspirations and the aspirations of its people and among the varying and conflicting interests of the citizens on the other.

The concept of the state has been an evolving one over the time, more particularly, according to the dialectics of the spiritual and material conditions. The post-industrial revolution state, in contrast to the medieval and the colonial state, slowly assumed the tag of the welfare state when it was confronted by the prospects of large scale upheavals and social revolution of the have-nots. However, there has been a remarkable shift in the persona of the state. The predominance of economic policy as occupying the core of its functional area seems to have turned it into an economic state and economic organization, leaving apart any epithet of the social state and societal organization.

The post-‘Washington Consensus’ economic character of state has originated novelties and innovations in its style of functioning on almost all critical economic variables. However, the most discerning aspect can be classified as:

- a) The introduction of economism (or the direct pecuniary cost-benefit consideration) as the behavioural guide of the state;
- b) Changing equation of the balance of power between the state and its people, signified by the rise in policing, regulatory, and controlling authority of the state; and
- c) Progressive discrimination among the people as well as the progressive preference in treatment of people directly in proportion to the economic net worth of the individuals.

C. The Eminent Domain of Land Acquisition

The Eminent Domain (ED) can be generalized as the deep presumption of everything, within the geographical extents, eminently belonging to the state. Thus, every corner of the land, every sort of natural resources, every kind of property and assets, and each and every living organism including the human beings not only subordinately belong but also are supposed to owe their existence to the state. The realm and the writ, accordingly, of the state rules unquestionably over anything and everything notwithstanding the utopia of the Magna Carte.

Practically, the eminent domain is equivalent to the state’s unrivalled and uncontested prerogative of taking or acquiring of people’s personal property and private interest in and on land, against the will of the owner and/or the possessor, in lieu of certain compensatory entitlement, whenever and wherever it is necessary for the furtherance of public interest. More specifically, the eminent domain is the (a) power of the state (b) to acquire the private land or landed property (c) largely against the owners’ will (d) for any proclaimed public interest (e) at an officially determined compensation (f) paid as per statutory modalities, where (g) the domain is never challengeable but (h) the due process and (i) the quantum of compensation as arrived at by the government can only be (j) contested before the courts (k) within the strict confines of the law in this respect.

Eminent domain is considered an efficient tool for land acquisition for officially determined purposes. However, “... contrary to traditional assumptions, eminent domain is not necessarily a more efficient institution than the free market... . In practice, prices paid under eminent domain may differ systemically from the “fair market value” standard ... due to the structure of court costs, high valued properties receive more than market value and low-valued properties receive less than market value” (Munch, 1976: 473). Munch ascertained that the eminent domain (ED) “is the legal right to acquire property by forced rather than by voluntary exchange” (ibid: 473). ED is, therefore, “a reassignment of property

rights: the seller is deprived of his right to refuse the sell and constrained in his right to bargain over price. However, because of the just-compensation provision, the curtailment of private property rights implied by ED is less than inherent in the taxing and regulatory powers of the government" (ibid: 474).

Sparsely agreeing with Munch, Chang (2008: 25) asserts that his "study on New York City's compensation paid in eminent domain settlements reveals that most condemnees have been awarded compensation that differs from fair market value estimated by hedonic regression models. Some condemnees received much more than they were due under the fair market value standard, while others got much less." Chang (2008) found that initial offers extended to condemnees who accept them can be systematically better-compensating than those extended to condemnees who dispute them. Nevertheless, accepted compensations are not necessarily better-compensating than settled compensations. Condemnees who fully accept initial offers could be compensated differently from condemnees who negotiate for settlements (ibid: 18).

Chang also quotes Merrill's (2008) opinion that the government officials have 'fiscal illusion' in having an under-compensation bias while at the same time enlarging departmental budgets. Official also have political interests and personal agenda which influence the determination of compensation value (ibid: 22).

In the words of Staley et al. (2005: 14) "Whereas eminent domain was initially intended to ensure that public services, such as roads and highways, were available to the public, local and state governments often use eminent domain for any project that is considered economically beneficial. Public use, as a practical matter, has morphed into a more ambiguous 'public benefit'. Staley et al. (2005: 3-4) further hold the opinion that the 'eminent domain in urban development projects' tends to be:

1. **Arbitrary**, driven by local politics rather than standards and objective criteria;
2. **Inequitable**, giving large and well-connected property developers an advantage over existing homeowners and businesses;
3. **Serving private purposes**, effectively becoming a legal way private developers can circumvent the conventional real estate market and force other property owners to sell their property to developers while reaping substantial financial gains; and
4. **Without substantive limits**, because statutory criteria for blight determinations are so broad they fail to constrain eminent domain's use for redevelopment purposes.

D. The Varying Domain of the Eminent Domain

The Eminent Domain of the state over land and people is nothing new. It is a historical fact, notwithstanding the theorization of the same, that the rulers enjoyed unquestioned exercise of control over the person and property of the subjects both temporally and spatially, though by virtue of might being the right. The Biblical incident of King Ahab of Samaria offering compensation for Naboth's vineyard can be presumed as a classic antecedent. Under the divine theory of state the rulers virtually could have absolute control over whatever there used to be within the realm. The European enclosures spread over many centuries were also only an outcome of the state's eminence to confer the power of alienation of surfs from the customary and common lands to the land lords. In 1789, France officially recognized a property owner's right to compensation for taken property, in the French Declaration of the Rights of Man and of the Citizen, which reads, "Property being an inviolable and sacred right no one can be deprived of it, unless the public necessity plainly demands it, and upon condition of a just and previous indemnity" (legaldictionary.thefreedictionary.com).

In the constitutional states, however, the eminent domain assumed a specific form of a state prerogative qualified by twin desirables- (a) the public purpose and (b) the payment of the just compensation. The precisely principled character of the eminent domain emerged as a justification for state's violation of individual volition and also as an indicator of state's benevolence to its aggrieved citizens. The state action relied on the absolute existence of the public interest in order to transgress a private interest. The proposition was also qualified by the presumption that the public interest represented the common interest of the nation on the one hand and the sum of common interest used to imply greater benefit than the sum of the private interests of the land loser individuals. Alternatively, eminent domain was subject to the following condition.

$$\sum I_c > \sum I_i \quad (1)$$

[Where, I_c = Common Interest and I_i = Individual Interest]

The condition (1) implied a net gain for the nation as a whole. For example a canal or a railway construction had far greater benefits after offsetting the compensatory costs of all kinds. It is not for nothing that most of the historical acquisitions left little to protest by the land losers and also the state used to be on a high moral footing. Most probably, in addition to abundant availability of land this is the greatest reason for the absence of large scale protests against early land

acquisitions and displacements despite the shrilling vastness of sufferings and losses of the ousted populations, e.g. in the cases of multipurpose projects, large dams, and population resettlements.

With the arrival of planned nationalization and development efforts the use of eminent domain became not only more frequent but also innovatively categorical about public interest vis-à-vis the private one. For instance, when India's first Prime Minister Nehru termed the large dams and other infrastructural projects as 'modern temples' he was pointing to the eminent domain with economic and developmental overtones.

The doctrine of developmental interest led to the value loaded preference for industrial and commercial activities and, thereby, land acquisition for companies became a cherished component of the eminent domain. Along the dilution of public interest to include developmental and industrial interest, including those of private entities, another very important doctrine of the 'fiscal-interest' (Staley et al., 2005) crept into the practice. Thus, if a project, whether a public or a private one, could provide prospects of taxes, public revenues, and other fiscal benefits it could well-nigh attract the power of the eminent domain.

With the arrival of the recent phase of increased integration of economies, helped and necessitated by the transnational capital and corporate firms, land acquisition by the state for private businesses has become very frequent. Presumably, if the private firms can provide the prospects of value addition in the gross domestic product (GDP) and bring in foreign exchange and capital, technology, employment, jobs, taxes, modernity etc. they serve the public interest (II & Ross, 2007) notwithstanding the counter weights of the loss of public interest in social and economic alienation of millions of households (Sainath, 1996).

The eminent domain has essentially transgressed into the realm of land use and ownership whereby it has statutorily been made desirable to acquire the land from low value addition activities like agriculture, forest, ecology etc. to higher value modern sectors as well as from low worth rural, tribal, agricultural people to the high and rich end individuals, business houses, corporates etc. the community of the mainstream political economists seems unanimous, in practice and precept, on the dilution of the definition of public interest as per the fancy of the derivatives of their discipline. For these and other reasons the "state's presumption of public interest has been forced to grapple with vital questions regarding the "development" it undertakes – for whom and at whose cost" (Sampat, 2013: 43).

The journey of the eminent domain along the economic progression might have bereft it of the 'public' interest essentially limiting it to an/any 'interest' (Khan, 2014a). Gupta (2012) argues about the futility of the eminent domain as this concept of compulsory land acquisition by the government, as inherited from the British and encapsulated in the constitution, statutory law, and in practice, is inappropriate for the reality of how property rights are held and exercised in India and incapable of being reformed toward the socially inclusive purposes for which property rights were originally included in the constitution. Because of this discord, efforts to re-formulate the law of eminent domain continue to fall short of real transformation of the property rights regimes in India (Gupta, 2012: 445).

What one finds in the present scenario is the unwarranted insistence on 'eminent domain' because land acquisition is not the only way to get land; neither for the state, nor for a non-state entity. There are other methods of land-appropriation and use as well. There is always a market largely working for land transactions there in India. Land can be rented in or out. Long-term lease contracts can be arranged. Partnership with the subsistence and other land owners can also be conveniently carried on. Temporary or fix duration land take-over mechanism with an ascertained form of land coming back to the original owners can be practiced. Land swaps can also be usefully applied. Limited scale, or spatial, reorganization of land holdings, land area and land use can also be thought of. Despite such a large array what is it and why is it that the state and the corporate business obsessively long for and rely upon 'eminent domain' for every case of land requirement large and small?

On the other hand the so called tiny people, the rural illiterate peasants, the *Adivasis*, the forest dwellers and the unrecorded historical occupiers have started asking for justice in case of their expropriation and displacement. They are also learning to stand up before the mighty system to raise their voice and register their protest whether it is listened to or not. Sampat (2013) captures the peoples' struggle in the following words

Since the 1980s, however, the enforced displacement of people for large development projects has been fiercely contested. Anti-displacement movements have raised critical questions regarding social and environmental costs, prior informed consent of project affected including landless people, their legal entitlements and livelihood security and democratic process and accountability of the state (Sampat, 2013: 43).

Though, against these genuine protesters and their genuine problems, the state is adamant and the corporate interests are in nexus with it to shirk from these people and their concerns. They go on to occupy large tracts of land by means of the all powerful weapon in their hands which is called the 'eminent domain' of the state, and by subordinate logic also of those who are the favourites of state!

E. The Land Acquisition Compensation: A Rule of Thumb

Compensation refers to an entitlement receivable by the beneficiary, in lieu of a loss inflicted upon by the 'actor' or its agents. Compensation constitutes the second component of the eminent domain, the first one being the public purpose as discussed above. However, the term compensation ought to actually imply the compensation that is an adequate and 'just compensation'. Though the justness of any compensation mechanism is open to debate, yet, in conventional discussion it implies a jurisdiction lexicon and meant an outlay of a value that is just equivalent to the usual value or normal opportunity value of the lost asset i.e. the land acquired. When, as in the past, the same grade land could be commonly and comfortably available at the ongoing stable prices the payment of the value without any lapse of time might qualify the standard of the just compensation because in such a case the compensation amount could fetch an equivalent land if desired by the beneficiary. However, the determination of and the contours of a just compensation become contestable when the acquired land fail to qualify as common land due to anything like location, size, productivity, historicity, religiosity, scarcity etc. etc. Or when the compensatory value fails to fetch an equivalent quality and quantity of land due to the abovementioned factors or due to the inability of the beneficiary, lapse of time, conditionality etc. if the designated compensation fails at least to keep the beneficiary at the pre-event level of net worth or well-being the compensation cannot qualify as 'just' compensation (Cernea, 2007; 1999).

Compensation has, more as a rule than as an exception, been defined in terms of pecuniary equivalents by the official rules of thumb methodology in India. It is quite strange to observe that the statutory basis of valuation reference goes three years back to the date of proclamation while the actual determination and payment may take as many years to actualize as pleases the bureaucratic paraphernalia, even after the physical alienation of land (Khan, 2015a; 2013). The lack of administrative accountability, corruption, and cuts apart, the methodology of compensation tends to be erratic, subjective, and arbitrary as much as the compensatory payment happens to be higher in case of high price properties and lower for the low price lands (Munch, 1976), most plausibly because of the statutory, judicial, and other institutional factors.

Contemporarily, the debate on land acquisition seems to have narrowed down, at least among the political circles and development professionals, to determining the most pacifying level of compensation multiples i.e. two times, four times etc. of the reference value without regard to any scientific principles of assessment, limitations of the bureaucratic behaviour, time lags, land-losers' conditions etc. The reality, resultantly, of land acquisition process remains diametrically opposite to the land losers' existential vulnerability. Garnett (2006: 101) rejects the suggestion that "compensation-based reforms" are "an alternative to constraints on the use of eminent domain... arguing that there are two problems, unique to takings raising 'public use' questions, that more money cannot solve: first, high compensation levels may undermine political resistance to questionable projects; second, private takings may generate noninstrumental harms that will persist even as compensation increases." Rather, the suggestions to increased compensation while leaving other 'uncompensated' components to have deleterious effects are aimed at pacifying the aggrieved ones as the 'publicness' of the projects goes increasingly decreasing (ibid: 104).

F. The Eminent Domain: An Eminency Without Eminence

"Interestingly", observes Sampat (2013: 41-42), "the power of eminent domain gained constitutional primacy over the right to property in India at the behest of land reforms for redistributive justice. However, the extent and range of the exercise of eminent domain has historically largely depended upon whom it is directed towards – the more economically, socially and politically marginal the targets, the easier to acquire their land and resources." In the same vein, II & Ross (2007) also opined that in the USA eminent domain disproportionately affects poor, ethnic minorities with lower levels of education. Minorities comprised 58% of the population in areas targeted by eminent domain, compared to 45% in the surrounding communities. They believe that eminent domain abuse is essentially Robin Hood in reverse: taking from the poor to give to wealthy, politically connected developers. Their study vindicates the warning offered by former U.S. Supreme Court Justice Sandra Day O'Connor, who wrote in her dissent in the infamous Kelo case (Kelo vs City of New London, 2005) that eminent domain would be used "to transfer property from those with fewer resources to those with more."

The working of the eminent domain, especially as a subservient tool to facilitate neo-liberalist *institutionality*, has come to a stage where land of the peasant and tribal sections can be acquired virtually on any pretension including of course the pure private interest and at any compensatory amount preferred by the state and its agencies hand in hand the assignors. Excessive acquisitions and under compensations have been and are becoming extremely difficult to be resisted in democratic arena because of the political unanimity and the policing state posing threats of physical elimination as in Bhatta Parsaul, Singur, Bareilly etc. on the one hand and the reduced capacity of the poor and intimidated people to take resort to any alternate channels, like the excessively costlier judicial remedies resulting in frustration, for most of the land losers, in the last. "The various acts of resistance occurring throughout India highlight the spaces between formal legality and accepted norms as well as the contradictions arising from the use of an institution set up to take from the people and give to a central power under the dubious guise of helping those very people" (Gupta, 2012: 489).

The very postulate of an inclusive growth implies a policy and practice framework for inclusion of increasingly large numbers of the marginalised poor people into the production and distribution channels of the economy. In fact, in any case of land acquisition, the post-acquisition benefits accrue mostly to the prevailing richer sections and the land losers stand to lose their capital and productive base without being compensated for that loss of productive capacity. Moreover, the macro-economic growth scenario increasingly being ruthless and jobless on the one hand and capital intensive and pro-concentration on the other yields clear indications that the eminent domain functions only as a fatal threat to any possibility of inclusiveness, particularly for the land loser agricultural and forest people. It is as if the eminent domain works for the reverse Robin Hood effect i.e. taking from the poor ones to give it to the rich ones (II & Ross, 2007). It suppresses the democratic rights, economic opportunity, and occupational options for the low income and lowly placed land losers.

G. Eminent Domain Effects on the Capital Base of the Affected Persons

Land loss is akin to near perfect de-capitalization of affected persons. Institutional compensation as and when received fails to regain the lost land and other capital assets (Khan, 2014b; 2015a; 2015b). Distribution of compensatory money into consumption and investment components results into a phenomenon of disappearance of productive capital stock. If we assume the lost land as a capital asset and assign to it a unit value of capital say, K , we can have a very interesting micro-economic phenomenon of *capital meltdown* or *capital base meltdown* (CBM) for land acquisition affected persons (LAPs), whereby post-acquisition capital base of peasantry, K_I , becomes significantly reduced comparative to pre-acquisition capital holding, K_0 :

$$K_I < K_0. \quad (2)$$

Diminution in capital base occurs via:

- i. The shortfall, δv , defined as the degree of inadequacy of exchange equivalence of compensatory amount as and when received; and
- ii. Assignment of compensation amount into consumption C_n , and investment I .

As a consequence of land expropriation and statutory conversion of the same into compensation money, M_C , initial capital stock, K_0 , of land-losers becomes subject to three intermittent components (consumption out of compensation money C_{nI} , investment out of compensation money I_I , and compensatory shortfall or inadequacy δv):

$$K_0 \equiv \Rightarrow (C_{nI} + I_I) + (\delta v) \quad (3)$$

Where the degree of compensatory shortfall, δv , can be imputed from a hypothetical test of 'reverse exchange'. Suppose the compensation is fixed and paid at rupees m per unit of land l , but m fails, for any reasons, to yield an exchange of l , an equally qualified l , in market place then m fails to be an adequate compensation for l . The deficiency may be ascribed, among others, to institutional deficits, intervening factors, and other adverse consequences of land acquisition.

Initial capital stock shortfall δK_0 , occurs to the extent of consumption C_n , and inadequacy δv :

$$\delta K_0 \equiv \Rightarrow (C_{nI} + \delta v) \quad (4)$$

And post-acquisition capital stock, K_I , of an affected family remains only to the extent of investment component, I_I :

$$K_I \equiv \Rightarrow \{K_0 - \delta K_0\} \equiv \{(C_{nI} + I_I + \delta v) - (C_{nI} + \delta v)\} \equiv I_I \quad (5)$$

Or, to say alternatively, there occurs a post-acquisition capital base meltdown (CBM) which is on the one hand a measure of the difference between initial capital base, K_0 , and post-acquisition capital base, K_I , and on the other an indicator of the extent of compensation shortfall δv , and transfer of the compensatory value of liquidated asset into consumption components, C_{nI} .

$$CBM \equiv \{K_0 - K_I\} \equiv \Rightarrow \{C_{nI} + \delta v\} \quad (6)$$

The hypothesis of Capital Base Meltdown (CBM) provides unambiguous inference that the land acquisition and compensatory mechanisms as practiced in India since 1894 till now fail to arrive at satisfactory economic outcomes for affected people in terms of:

- i. Compensatory survival means; and
- ii. Compensatory capital base re-entitlements.

H. Conclusion

The process of land acquisition and displacement in India happens to be a welfare reducing intervention both in terms of redistributive justice and Pareto optimality. It fails, in the first instance, to make the nation better off without making any one (badly) worse off, and it fails, secondly, to take affirmative action to provide for the means to ameliorate the degree of 'worseness'; and to these extents the entire process requires reformulation. The use of eminent domain, therefore, must be subject to the conditions (a) $\sum I_C > \sum I_I$ and (b) compensatory character equivalence.

Given the fact that there is a fundamental difference between acquisition of large estates, illegal holdings, and Zamindari occupations, on the one hand, and acquisition of small land holdings and dwellings of common people for whom land happens to be an inevitable means of subsistence and survival, on the other. Invocation of property frame in the latter case is both misguided and misconstrued. In case of poor people what is acquired by the eminent domain is not the land alone. Rather, it is the subsistence of the poor peoples, tenants, and occupants which is acquisitioned by way of land expropriation. There is a strong need for change of frame for looking at and examining the notion of land acquisition and displacement involving poor people for whom land happens to be a matter of life and death. In case of these persons for whom land is the only source of productive engagement and life-sustenance the issues involving a compensatory entitlement in all logical necessity need be viewed, examined and decided within the ambit of fundamental right to life; and not by the balance of property rights and relations. This is the minimum the nation can do for safeguarding inclusiveness in the working of the eminent domain of land acquisition.

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