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A WORD ON EMINENT DOMAIN

Usha Ramanathan

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'Eminent domain' is understood as the power that the State may exercise over all land within its territory. Eminent domain, and the law related to the compulsory acquisition of land, requires that the power may be invoked only for a public purpose, but what constitutes public purpose is wide open to interpretation and use. Development debates stoked by the mass displacement that accompanies large infrastructure projects have placed a severe strain on the acceptability of the power of eminent domain.

The endorsement of the eminent domain power of the State in the early constitutional years of independent India was assisted by the jurisprudence that had developed around the colonial Land Acquisition Act of 1894. That nineteenth century statute and the case law that grew around it, made the power of eminent domain, and the nature of 'public purpose', a matter solely for executive determination and statement, and, therefore, non-justiciable. Today, eminent domain is among the doctrines that have not been attempted to be tamed by constitutionalism. It has also not been tempered by altered notions of the relationship between citizens and the State which independence from a colonial power may well be expected to bring in its wake.

Hugo Grotius defined eminent domain in 1625 thus:¹

The property of subject is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in cases of extreme necessity... but for ends of public utility, to which ends those who found civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.

THE POWER OF EMINENT DOMAIN

This understanding of the notion continues to hold sway. Not long after Independence, and within a short while after the promulgation of the Constitution, the Supreme Court was charged with judging the constitutionality of certain laws, which were intended to abolish the feudal *zamindari* (landowning) system. The power of eminent domain was under the scrutiny of the court, even as that power faced severe contest from the *zamindars* (landowners). In explicating the power, the court held that eminent domain was 'the power of the sovereign to take property for public use without the owner's consent. The meaning of the power in its irreducible terms is: (a) power to take, (b) without the owner's consent, and (c) for the public use.'²

The reference to the 'sovereign' was a portent of one of the problems that has dogged the existence and uses of the eminent domain power, that is, the relationship between the State and the people. The power to take, and the unqualified nature of 'public use', has made dispossession and mass displacement possible, and is fast becoming a power which is acquiring illegitimacy, especially among the displaced. Further, the idea that the power to take will be from an 'owner' has excluded large numbers of the displaced from even the minimal consideration that the law provides—usually in the nature of entitlement to compensation—when displacement occurs. Landless labourers, artisans and others whose livelihood is not linked to land ownership as well as women have been among those whom this understanding of eminent domain has left excluded from the law. It has not mattered that women may belong in families that are losing land. They are considered outside the reckoning anyway, because the State is bound only to deal with the 'owner'. Given the laws of succession, possession and ownership that have determined ownership, the probability of women being categorical owners with whom the State will have to negotiate is remote.

The power of eminent domain finds its expression in the 1894 Land Acquisition Act. The jurisprudence that has developed around this Act has placed severe constraints on the possibility to challenge the power of the State to compulsorily acquire. It sets out what constitutes 'public purpose' and it hands over land, 'without encumbrances', to the State, to do whatever it wants with it at will. The way the law understands 'persons interested' who would have a right to raise objections, or to contest compensation, leaves no space for women, except for the exceptional woman who may have eluded the stranglehold of law and practice to become the holder of a legally demonstrable interest in the land. The computing of compensation is circumscribed by a set of pre-determined factors which are 'to be considered in determining compensation',³ and is restricted to the market value of land; the replacement value is not the norm prescribed by law. There are also 'matters to be neglected in determining compensation'⁴ which excludes 'any disinclination of the person interested to part with the land acquired'. 'In consideration of the compulsory nature of the acquisition',⁵ 30 per cent of the computed market value is to be paid, in the nature of a

solatium. That, in sum and substance, is the right of the person interested in the land. These bare procedural hurdles to taking over the land may also be circumvented when the government declares that there is 'urgency', justifying 'special powers' to take possession of the land within 15 days of the notification of intention to acquire—even before the award is decided. Such process too would result in the vesting of the land in the government free of all encumbrances. This is a law that did not, until 1984, even acknowledge mass displacement, though the law has operated to effect mass evictions. In 1984, the definition of 'public purpose' was revised to include 'the provision of land for residential purposes ... to persons displaced or affected by reason of implementation of any scheme undertaken by government, any local authority or a corporation owned or controlled by the State'.⁶ This made displacement for a project one more reason for compulsory acquisition under the Act, with no concomitant right to land on which to resettle!

CONSEQUENCES AND IMPACTS

The narrow construction of 'persons interested' thinly veils the absence of women and their condition when compulsory acquisition and mass displacement occur. The problem for women is compounded by the way 'government land' and common land are treated. Strictly construed, the notion of eminent domain does not apply to land other than private land. Yet, because it has not been challenged, and because the relationship of the State to land has not been re-worked after Independence and the promulgation of the Constitution in 1950, presumptions have arisen, and begun to set in that the 'power to take' and to convert to its priority, vests with the State. Consequently, common property has got diverted into projects by the State without even minimal due process. This has resulted in the users of these lands getting displaced without so much as a 'by your leave', and certainly without compensation.

As Fernandes (in Chapter 5 in this volume) demonstrates, women bear an unseemly part of the burden of dispossession when common property is diverted to other sources. The lack of interrogation about this sweeping power assumed by the State has been accompanied by the implicit acceptance that the power exists to take over, and convert, divert or hand over all land as the State deems fit. It is not inconceivable that the notion of eminent domain does not accommodate the existence of a power beyond the taking over of private property. Public land, and the systems of answerability for diverting public land, will indeed need to answer to a different understanding of public purpose, as also to whom the land is being handed over.

A leading constitutional expert says:⁷

Some of the *locus classicus* cases in Indian constitutional law have arisen in the area of property rights. The reason for such a development is that the central and state governments have enacted massive legislation to regulate property rights.

First, the government undertook to reconstruct the agrarian economy, *inter alia*, by trying to confer rights of property on the tiller, abolition of *zamindaris*, giving security of tenure to tenants, fixing a ceiling on personal holding of agricultural land and redistributing the surplus land among the landless.

In the early years of constitutionalism, it was about investing rights to land in the tiller and the tenant and as a move against absentee landlordism. It sought then to dispossess *zamindars* to prevent the concentration of land in a few hands, redistribute land to the landless and enforce a ceiling on how much land may be held by anyone. These were the purposes which gave constitutional sanction to the State exercise of the power to take over, redistribute and regulate ownership of land. How is it possible to justify dispossessing the tiller, mass eviction of landless labour, transfer of land rights from the farmer to corporations and facilitating the accumulation of large acreages in corporate hands based on the same Constitution?

The power of eminent domain draws its sustenance from the notion of sovereignty of the State. In 2004, while adjudicating on a dispute between two village communities in Nagaland over the ownership and use of a water source, the Supreme Court said:⁸ 'So far as natural resources like land and water are concerned, dispute of ownership is not very relevant because undoubtedly the State is the sovereign dominant owner.'

This was preceded, at the start of the judgement, with an acknowledgement of the existence of customary law in those parts:

At the outset, it may be stated that the civil rights to the water source and the land in the Hill District of Nagaland comprising the two villages mentioned above are not governed by any codified law contained in Code of Civil Procedure and the Evidence Act. The parties are governed by customary law applicable to the tribal and the rural population of Hill District of Nagaland.

The disregard of customary law, the relationship of local communities to natural resources and the presumption about the sovereign power of the State over such resources all indicate the power that eminent domain has handed over to the State. There is also the non-advertence to the Fifth and Sixth Schedules of the Constitution, which negotiates the State's right to take over land differently in a tribal area. There is a special status accorded to tribal areas, which are termed as 'scheduled areas', which includes provisions for protecting the continued possession and enjoyment of lands belonging to tribals, and circumscribes the power of the State to alienate and transfer land in these areas. In 1997, the Supreme Court had reinforced this status in what is known as the *Samatha* judgement (for a detailed account, see Chapter 11 by Rebbapragada and Kalluri, in this volume).⁹ That seems to have escaped the court when it made its comment. This is illustrative of the power that eminent domain has handed over to the State.

The question also arises as to whether sovereign power continues to be vested in the State after the promulgation of the Constitution even in non-tribal areas. The Preamble to the Constitution proclaims, 'We, the people of India' have 'resolved to constitute India into a sovereign ... republic and to secure to all its citizens justice, social, economic and political'. Does this indicate a change from the understanding deriving from sovereignty as linked with a ruler or king or queen? Can the constitutional version of sovereignty presume absolute power in the State over the people? Or is there such a notion as sovereignty belonging to the people who have arrogated a role to the State to ensure that justice, liberty and equality are delivered to all in the territory of India? To ask it differently, where does sovereignty reside—in the people, or in the State? Or is an attempt to re-conceptualise sovereignty as belonging with the people merely at the level of rhetoric, but impractical and therefore to be discarded in constitutional interpretation and state practice? What if sovereignty is demonstrably a route to absolute power?

It is not improbable that the understanding of sovereignty has been influenced by its import in international law. Characterised as a term that is 'notoriously difficult to pin down' (Koskenniemi 2000: 574),¹⁰ it has even yet had to find definition, and scholars of international law have attempted several definitions. The States' sovereignty has been described as: '(i) *a jurisdiction, prima facie* exclusive, over a territory and the permanent population living there; (ii) a duty of non-intervention in the area of exclusive jurisdiction of other states....' (Brownlie 1990: 574)¹¹ An arbitral decision defines it 'in the relations between states (as signifying) independence: independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other states*, the functions of a state' (Starke 1989).¹² What has this development in the relationship between states done to the power that a State presumes over its people?

SITES OF CONTEST

An inquiry into the power of eminent domain may be assisted by acknowledging the many sites of contest that have opened up with the recognition of the inequities embedded in the current model of development and displacement. Several questions and issues may be derived from some current concerns, including the following:

1. There are whole segments of persons who are displaced but who, it would seem, can be pushed to the margins of the State's concerns because of the limited mandate imposed on the State by the eminent domain doctrine. Since only landowners have any direct right to be considered during the exercise of the eminent domain power, those who possess no legal title or interest stand automatically excluded. The landless constitute one such segment. Women, who have at best been subsidiary constitutional subjects in the matter of landholding and ownership, and who, the laws of succession, the notion of 'family' and the presumption of dependency, especially, have disabled from holding legally defined interest in land, constitute a significant group among the excluded.
2. The transition from 'subject' to citizen has not occurred; nor has the constitutional notion that it is the people who are sovereign evolved. In January 2003, in a judgement of the Supreme Court, we read these words:¹³

The power to acquire by State the land owned by its *subjects* hails from the right of eminent domain vesting in the State, which is essentially an attribute of *sovereign power of the State*. So long as the public purpose subsists, the exercise of the power by the State to acquire the land of its *subjects* without regard to the wishes of the owner or person interested in the land cannot be questioned. [Emphasis added]

This is the entrenched understanding of the relationship between the State, the people and land. Embedded in a colonial law, and enmeshed in a jurisprudence that recognises absolute power in the State, an exploration of what changes would occur to the nature of that power when no longer 'ruled' has not taken place. So long as judge-made law continues to harbour the language of sovereign power and subject, it will be near impossible to tame the expansive use of the eminent domain power to dispossess, displace, impoverish and exclude. In the hierarchy of interests created by this reading of power is the State as being sovereign, the owner as a person interested and the rest stand excluded altogether. Issues relating to basic citizenship that are missing in this rendition include matters of equity, distributive justice, evening out the inequality of ownership and the answerability of the State in the priorities it sets under 'public purpose'. The perception that citizenship does not invade the field of acquisition has assisted in the assumption and evolution of absolute power. Even in this reckoning, the term 'subject' is confined to an allusion to those who are owners or persons interested. Those who fall further and beyond would not qualify for the law's concern. The National Rehabilitation Policy 2003¹⁴ acknowledges that such classes of people exist who do get involuntarily displaced, but does not qualify them by rights or by state answerability. Women collapse into this zone of silence, wherein they are certainly not 'citizens', and seemingly not even 'subjects', for they remain outside the orbit of recognition in law, practice and judicial dicta. This entrenched understanding of the relationship between the State and the people, and of the absoluteness of the power of eminent domain, has, of necessity, to be dislodged if the rampant use of the power to take over land is to be stemmed.

3. The idea that the State is the owner of land, and can deal with it as it will, is not rooted in eminent domain. Eminent domain only deals with the taking over of land from a person who has legally recognised rights over the land. In the transfer of land, which is under the control of the State, to a project authority—including revenue land and forest land— notions of the State as owner, possessing powers beyond that which usually inheres in any person as owner, prevails. In law, there is a procedure for 'change of user' of land, which a state must necessarily follow when diverting the land to a purpose other than that for which the land was intended. For instance, if land has been declared to be reserved for grazing cattle, it cannot be changed to any other user without going through a process of consideration and consultation about changing the nature of the use. The idea that the State 'owns' lands in its control, and that state ownership is of a higher order than private persons owning land—since the State can coercively acquire from a private owner, but such compulsory dispossession cannot be practised on the State—has allowed even this minimal procedure to descend into perfunctoriness. In the meantime, the popular understanding is that this is part of the eminent domain power of the State. Technically, this is inaccurate, for as has been explained—but as necessitates reiteration—eminent domain only addresses the taking over of land held in private hands, and does not reach land already in the control of the State. Thus, state-held lands, which are diverted to projects, have to have a different order and process of public answerability. Yet, constitutionally, there has been no investigation into the nature of the relationship between the State and the land—is it that of an owner, trustee, re-distributor, landlord, super-landlord (as the *zamindars* demanded to know, derisively, in state of Bihar vs. Kameshwar Singh 1952) or something else altogether?
4. In treating mass displacement as inevitable, and surrendering vast swathes of land to corporate houses as relatable to a calculus of opportunity costs, concerns about impoverishment and immigration, the imperative of finding the least displacing alternative, protecting fundamental human rights and state policies on housing, livelihood and protection from exploitation are elaborately ignored. The width of the power to dispossess, and transfer, that is presumed to be implicit in eminent domain, has made this possible. In fact, mass displacement is not even within the ken of the doctrine of eminent domain. So, then, where is this absolute and unilateral power of the state located? Only when that is identified can there be a re-negotiation of this power.
5. Is rehabilitation an answer to the problems raised by the coercive power that the doctrine of eminent domain gives to the State? The unwillingness to go beyond weak statements in policy, often even draft policies, and the absence of consequences for non-performance by project

authorities, does little to convince that rehabilitation is even part-solution to a mass problem. While the power of appropriation/acquisition is located in law, rehabilitation is not. A judgement from the Allahabad High Court illustrates how a court may conceive of a way to direct its antagonism towards re-habilitation into its judgement.¹⁵ The case concerned the acquisition of land for a housing scheme. A government circular dating back to 1974 provided that when land was acquired for a scheme, a member of the family would be given a job in the relevant scheme. The High Court struck down this provision on two grounds:

- The Land Acquisition Act 1894 only provides for payment of compensation, and nothing more. Since ‘there is no provision under the Land Acquisition Act under which the circular... could be issued’, and since ‘whatever compensation has to be given for acquisition of the land is provided under the Land Acquisition Act itself which is a self-contained Code’, ‘any further benefit ... would be inconsistent with the intention of Parliament ... (and) ... violative of the ... Act and would hence be invalid’.
- According to the court, such provision would also militate against ‘equal opportunity ... in the matter of any public employment or appointment’ that is guaranteed as a fundamental right in the Constitution. The court acknowledged that this is not an invariable rule, for exceptions such as ‘compassionate appointment’, which is made when a person dies in harness, is recognised, but that, according to the court, had ‘evolved purely on humanitarian ground and in the interest of justice (and)... to meet certain contingencies and to give appointment to a dependent of an employee dying in harness to prevent his family from destitution.’ But in cases of land acquisition, neither can such appointment be ‘claimed ... as a matter of right nor can the (State) make such appointment’.

The earlier decisions of other courts, including of the Supreme Court, which had worked on the basis of providing land for land, or a job for land lost *apart from compensation*, were re-interpreted as not constituting a precedent. In effect, rehabilitation, which provided anything beyond what the Land Acquisition Act 1894 provides, was struck down as being contrary to the statute, and as unconstitutional. The power of eminent domain, and of the wider power to do what the State will with land in its control, was, of course, left intact.

It is not only such antagonism that lends more than mere suspicion to promises of rehabilitation, where they are made. Impossibility of performance, wherein, for instance, the policy promises more than the project authorities are likely to be able to deliver is often indicative of the use of the rhetoric of rehabilitation unaccompanied by serious intention. This happens when land-for-land is built into the policy, but there is no land available, or no steps are taken to find the land that implementing the policy would require (see chapters by Ramkuwar and Palit, in this volume). This could also happen when an enforcing agency refers to the apathy of the State and the project authority to get rehabilitation underway, but allows them to carry on with submergence and displacement anyway. This is what happened when the Supreme Court allowed the construction of the Sardar Sarovar dam to continue though it had found that the State had failed to find the land to resettle even those whose lands risked submergence due to the height that the dam had already reached.¹⁶ The pragmatic decision to tolerate the inaction of the State extends the eminent domain power to include neglect, inaction and callousness, with no consequence.

WHY DISLODGING THE DOCTRINE OF EMINENT DOMAIN IS NECESSARY

An enquiry into eminent domain demonstrates that the power of eminent domain has been interpreted as being close to absolute power of the State over all land and interests in land within its territory. The effect of this has been that those without access to land and rights over land (including the landless, artisans, women as a composite group), those who may have use rights but no titles, communities holding common rights and others with inchoate interests, have had to bear the burden heaved on to them by eminent domain. Simultaneously, the plenitude of powers presumed to arise from the doctrine of eminent domain has allowed for an engorgement of state power over land.

In relatively recent times, the policies of the State, ruggedly supported by legislation, have re-introduced the power of the ‘sovereign’ to use its discretion in facilitating the concentration of land in corporations. This is not a replication of the *zamindari* system of wealth transfer by the use of state power, but a neo-liberal version of it.

Mining and Special Economic Zones (SEZs) have been added to the arenas of contest, wherein the contestants are made even more unequal by law and state force, which are deployed in effecting the transfer. There are nuances that have begun to enter state practice, wherein, for instance, corporations are being advised to buy land in the 'open market'. In such cases, the need for the State to intervene to secure the interests of the land holders is being recognised, even as the potential of a fair transaction of sale is not discounted. Other arrangements, including shareholding and leasing as opposed to outright sale require the State to step in to conceive and implement alternative arrangements that will allow for varied, but responsible, uses of land, without dispossession being a necessary consequence.

While these changes are occurring with remarkable swiftness, the status of the recognised property interests of women, the landless and the marginal farming and artisan communities does not even feature in the discourse. It is the zone of neglect that these communities inhabit. Dislodging the current appreciation of the doctrine of eminent domain is a necessary first step in the route to a return to equity, distributive justice and the limiting of the extraordinary and absolute power that the doctrine has been allowed to vest in the State.

NOTES

1. *Dejure Belli et Pads*, quoted in *State of Bihar vs. Kameshwar Singh* 1952.
2. *Ibid.*, at 929.
3. Section 23, Land Acquisition Act 1894.
4. Section 24, Land Acquisition Act 1894.
5. Section 23 Explanation (2), Land Acquisition Act 1894.
6. Section 3(f) (v), Land Acquisition Act 1894.
7. Jain 2003.
8. *Tekaba AO vs. Sakumeren AO* 2004.
9. *Samatha vs. State of Andhra Pradesh* 1997.
10. Koskenniemi 2000. 'From Apology to Utopia: The Structure of International Legal Argument' 1989, Chapter 4, cited in Henry J. Steiner and Philip Alston (eds), *International Human Rights in Context* 2000.
11. Ian Brownlie (1990), Chapter XIII, p. 287, quoted in Steiner and Alston 2000: 574.
12. *Supra* note 5. The interchangeable use of 'independent' and 'sovereign' as a prefix before 'State' in international law is significant. See also, Starke 1989: 100.
13. *Sharda Devi vs. State of Bihar* 2003.
14. Published in the *Gazette of India* 2004.
15. *Ravindra Kumar vs. District Magistrate* 2005.
16. *Narmada Bachao Andolan vs. Union of India* 2000.

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