3rd International Conference

on Public Policy (ICPP3)

June 28-30, 2017 – Singapore

Panel T02P06 Session 2

Constitutionalism: Interface of Law and Public Policy

Title of the paper

Indian Constitutionalism and Public Policy: A Case of Eminent Domain Law in India

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Date of presentation

Thursday, 29th June 2017

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Abstract

Eminent domain in India has been highly controversial since its inception in the Constitution in 1950. It is argued that the Constitution places 'transformative' agenda at its forefront as against the 'liberal' Constitutionalism of the West. Constitution of India determines dual roles of the State, first 'positive acts' as a part of transformative agenda, the State constitutionally obliged to undertake social reforms and second 'preventive/negative acts', the State not to transgress its constitutional boundaries i.e. not to act arbitrarily. These two contradictory 'acts' are embedded under Part IV of the Constitution as 'Directive Principles of State Policy' and Part III as 'Fundamental Rights' respectively. Although Part IV is not enforceable in any court, it is fundamental in the governance of the country as laid down under Article 37 of the Constitution. It is the prospective 'social and economic' policy that the State should follow.

Land reform was one of the social policies that received recognition under Part IV and the State immediately after independence was desperate to implement it. But equally important was the limitation on the State i.e. fundamental right to property under Article 31 and 19(1)(f) of the Constitution. Once the land reform laws were put into execution, Article 31 was used to challenge it. As a result, there was a tussle between judiciary and legislature/executive on the implementation of land reforms and other social reforms vis-à-vis right to property from 1950 to 1978. Finally, to settle this conflict, legislature repealed Article 31. But land reforms remained an unfulfilled task.

During 1990s India adopted economic liberalisation. As a result, government extensively used eminent domain to acquire enormous land to realise liberalise policies. The colonial Land Acquisition Act of 1894 was unabatedly used to acquire enormous land until it was repealed in 2013. Before its repeal, violent protests were witnessed in many parts of India. The protestors consistently demanded introduction of humane law as against the 1894 Act. As a result, the 2013 Act was introduced after extensive debate in the Parliament. However, the existing government has consistently made efforts to overcome the effectiveness of the new law by adopting alternative legislative manoeuvre.

Within this backdrop, this paper interrogates the framing of eminent domain policy of the two phases i.e. the application of eminent domain – to the land reforms in the pre-1978; and post-1990s liberalisation period until the repeal of 1894 Act. This interrogation examines the 'transformative' agenda of the Indian Constitutionalism both from the originalist and subsequent interpretative perspectives of legislature and judiciary. This paper argues that Indian Constitutionalism provides guiding principles for the policy framework, which has broader outreach as 'social policy' than mere 'public policy' for the welfare of the constitutionally identified groups that the eminent domain has failed to follow in true spirit.

Key words – Indian Constitutionalism, Eminent Domain, Right to Property

I

Introduction

Since time immemorial, land has profoundly influenced human civilization, particularly after the advent of agricultural techniques. In the twenty-first century, landed property appears highly controversial. This controversy revolves around the use of eminent domain principle. Eminent domain means the sovereign authority of the State to acquire private property for public purposes. It traces its origin from Hugo Grotius's 1625 legal treatise, *De Jure Belli et Pacis* (On the Law of War and Peace) (Stoebuck 1972: 553-559). Currently, it is one of the most debated issues across the globe, highly contrasted with the property rights (Azuela and Herrera 2009: 337-362). The State is in confrontation with its subjects for implementing liberalized developmental policies that requires extensive land. Strong protests have been witnessed against the taking of land for commercial purposes, whether it may in Africa (Allen 2010), China (Krishnan 2012) or the United States of America (US) (Dugdale 2005; Underkuffler 2006: 377).

India too, witnesses the eminent domain crisis. Traditionally, land is vital to agriculture and livelihood, and determinant of social, religious, economic and political status of an individual in the society (Dumont 1980: 161). More than half of the Indian population engages in agriculture for livelihood.[1] Eminent domain challenges the established traditional authority and social milieu (Frankel 2005: 550). At times, it results in life-threatening violence such as in POSCO, TATA Singur, Yamuna Expressway land acquisition cases (Chattopadhyay 2007; Das 2011; Nayak and Mishra 2011: 12; Dam 2007; Fernandes 2007: 203; Kumar 2011: 20; Parsai 2011). According to the Research and Resources Initiative and the Society for Promotion of Wasteland Development report, since 2011, almost 130 districts in India have witnessed violent protests against the exercise of eminent domain (Gopalakrishnan 2012: 3; Sethi 2014). In its concluding remark, the report estimated that these protests will be intensified in the next fifteen years, as one crore and ten lakh hectares of land was required for various projects (Gopalakrishnan 2012: 23).

Indeed, many protests have compelled the government either to delay or withdraw the land acquisition process. For instance, the land allotted to TATA at Singur was cancelled after the Trinamool Congress Party came into power (Staff Reporter *The Hindu*, 2011). Major land

[1] As per the Agricultural Census 2010-11 available at, http://agcensus.nic.in/document/agcensus2010/agcen 2010rep.htm

acquisitions for infrastructure and industrial development have received setbacks. The government appeared on the threshold, as it had to balance the aspirations of the landowners, particularly peasants, on the one hand, and the need for economic development in terms of setting up infrastructure on the other.

Within this dichotomic situation, the colonial Land Acquisition Act 1894 was replaced by the 2013 Act. This paper analyses the existing eminent domain policy in terms addressing the issues and the solutions provided under the 2013 Act. It also traces the history of eminent domain law in colonial India, to understand the existing policy. Theoretically, this paper analyses the eminent domain from the Indian Constitutionalism perspective.

II

Indian Constitutionalism – The Genesis

The Indian constitutionalism incorporates certain peculiar features as against the Western or Eurocentric constitutionalism (Choudhry et. al 2016; Khosla and Tushnet 2015). National unity, identity, social upliftment, equality and international standing were the conspicuous features of the twentieth-century constitutionalism that India incorporated (Mehta 2010: 17). On the contrary, the western constitutionalism had to contend with the distrust of political power. Therefore, it primarily focused on imposing limitations on the sovereign, but severly disregarded the practices of slavery or racial discrimination (Mehta 2010: 26-27).

Some of the peculiar features of the Indian constitutionalism are the legitimation of State power, the identification of radical evils in the Indian society, the insertion of the innovative participatory rights of the under-classes (SCs, STs and OBCs), the introduction of the international regime of human rights particularly the minority rights, a people-friendly regime of representation and the establishment of a vibrant Supreme Court (Baxi 2002: 62). Due to these peculiar features, Indian constitutionalism has been referred as ‘transformative’ constitutionalism. The western constitutionalism do not undertake a transformative discourse of the subaltern perspectives and involves an ontological robustness (Baxi 2000: 1185-1186; Sathe 2006: 216-217).

Social emancipation is the essence of the Indian constitutionalism. It broke the shackles of the traditional social hierarchies like caste system to ensure justice, freedom, equality and fraternity (Bhargava 2008: 14-15). Three elements marked the significance of the Indian Constitution namely national unity and integrity, democracy and social revolution to uplift

the downtrodden masses (Austin 2002: 319). In sum, the Indian Constitution possesses both unique and universal principles of liberal constitutions based on Indian peculiar situations. Ambedkar justified the incorporation of the universalistic principles on the ground of necessity that matched the Indian situation (Ambedkar 1994: 59).

Despite the theoretical and ideological commitments and legal guarantees the realization of the constitutional objectives has remained a challenging task. Scholars of subaltern studies have consistently highlighted the existence of rampant caste discrimination that clearly violates the constitutional objectives (Guru 2008: 238; Thorat 2012). Guru argues that although the Constitution determines positional good, it lacks cultural good such as recognition and dignity. It is ill-equipped to generate any moral vocabulary (Guru 2008: 244). Hence, caste violence has consistently challenged the vision of social transformation.

Gender discrimination is another subject that has been consistently debated in the constitutional folds. Feminists consider the approach of law and its application to gender issues as discriminatory (Agnes 2011; Baxi 2014). The 'difference' of being female and the sameness approach of formal equality, which considerably fail to take into account the actual conditions of women's subordination (Cossman and Kapur 1999: 261; Menon 1999: 285). Further, Dalit feminists challenges this 'difference' argument on their experiences and argue that not just 'difference' but 'more difference' is needed to challenge both Brahmanical social order and the caste-patriarchal discourse (Chakravarti 2013: 5; Omvedt 1994: 129; Rege 1998: 40; Rege 2006: 33).

Besides the above issues, some institutional crisis witnessed over the constitutionally entrenched countervailing forces viz., the Parliament and Supreme Court. On one hand, the Constitution authorizes the Parliament to amend it and, on the other hand, it places substantive constraints on the latter in the form of judicial review (Mehta 2002: 184). This countervailing force of judiciary took the form of a conflict, which was explicitly visible in the *Golaknath case*[2] and the *Kesavananda Bharati case*[3]. The Parliament equally contributed in the controversy by passing constitutional amendments to counter the judicial review (Sathe 2002: 4). Although the emergence of the 'basic structure doctrine' may have limited the Parliament's authority, it is still an unsettled issue in the absence of an unequivocal exposition of the doctrine (Mehta 2002: 202). The Supreme Court after the pronouncement of

[2]Golaknath vs. State of Punjab 1967 AIR 1643.
[3]Keshavananda Bharati vs. State of Kerala (1973) 4 SCC 225: AIR 1973 SC 1461.

the *Keshavananda Bharati case*[4] may have regained its legitimacy, but it mostly appears as a negotiator rather than a watchdog[5] (Maldonado 2013: 127).

The above-mentioned issues are instances contestation between constitutional values and constitutional mechanisms. Within this binary, the issue at hand is to revisit the fundamental notions of Indian constitutionalism and to trace an originalist perspective towards overcoming the social injustices and institutional crises.

Indian Constitutionalism: Converging the Means and Ends

Indian Constitutionalism is a fusion of two approaches—namely, structural and objective. Structural refers to the means and objective refers to ends. These means and ends incorporate both positive and negative constitutionalism. Negative constitutionalism overcomes the tyranny of the executive and positive constitutionalism stands for the welfare approach. The State interferes in the lives of the people to overcome discrimination and set a welfare agenda. Both negative and positive constitutionalism can be explicitly understood through the means and ends.

Firstly, the ends are constitutional objectives. They can be divided into two broad categories: ultimate ends and specific ends. Specific ends are complementary to the ultimate ends. The Preamble of the Constitution specifies the ultimate ends or objectives. They are justice, liberty, equality and fraternity. These ultimate ends are further explicitly referred to establish sovereign, socialist, secular, republic and a democratic nation. In order to achieve these ultimate objectives, the constitutional text lays down specific ends or socio-economic rights within the Directive Principles of State Policies from Articles 36 to 51 under Part IV of the Constitution. Some the specific ends include the elimination of poverty, gender discrimination, caste discrimination, safeguarding of labour rights, etc. All these ends converge to form an ultimate end. Socio-economic rights under Part IV of the Constitution form positive constitutionalism. Whereas, the inclusion of Fundamental Rights under Part III

[4] Ibid.

[5] This contestation is mainly prevalent between the social rights and individual liberties. For instance, land reforms were part of the Directive Principles of State Policy that were being consistently challenged by individuals invoking the Right to Property enumerated under Fundamental Rights (Austin 2002: 320). Reservations for deprived sections, an affirmative action, is another instance that continue to receive setbacks from the judiciary since its inception (Austin 2002: 321). Although the Constitution incorporated compensatory discrimination for the SCs (Scheduled Castes) and STs (Scheduled Tribes) as goals of social transformation since its inception, there has been consistent debate over the fulfilment of these objectives (Galanter 1989: 195; Jaffrelot 2008: 255).

of the Constitution forms a negative constitutionalism as the State cannot violate these. Nevertheless, the Fundamental Rights are not absolute.

For the attainment of the above-mentioned ends, the Constitution also provides the means. These means include the structures or mechanisms that are constitutionally entrenched viz., the legislature, executive and the judiciary. It specifies the powers and functions of these institutions to achieve the ends. It mainly incorporates checks and balances system. It also provides a detailed description of the form of government and administration within which the executive has to perform (Sathe 2006: 216; Pal 2016: 253).

Now, the significant challenge is how the above institutions will realize the constitutional ends. In this regard, the Constitution proposes a functional aspect. It mainly strives to converge the means and ends. This convergence is mainly embedded within the framework of accountability (Austin 1966: 126). The Constitution entrenches that accountability within its fold. It laid down the accountability of the legislature and the executive. In terms of the executive, which was made part of the legislature by the constitutional framers, it was accountable on a daily basis to the Parliament that includes the Lok Sabha and the Rajya Sabha, through the parties in the opposition (Austin 1966: 162). Article 75(3) states that the Council of Ministers shall be collectively responsible to the House of People (Lok Sabha). Further, the overall legislature including the executive was made part of a periodic accountability through fair and free elections. Moreover, the executive has to prove its majority consistently and a loss of confidence at any time in the Parliament would invite re-elections. Additionally, the Constitution under Article 148 establishes the Comptroller and Auditor General to assess the performance of the executive on public policies.

Apart from the above-mentioned accountability measures, the judiciary plays a significant role (Austin 1966: 80). The Supreme Court is intended to act as the watchdog over the legislative and executive acts. It is entrusted with the judicial review of laws passed by the Union and State legislatures. Both the Supreme Court and High Courts under Article 32 and 226, respectively, are empowered to issue the prerogative writs of *habeas corpus, mandamus, quo warranto, certiorari* and *prohibition* against the governmental or executive acts Moreover, under Article 13, the Constitution has entrusted the Supreme Court to declare any law unconstitutional on the grounds of the violation of Fundamental Rights (Sathe 2004).

This constitutional accountability needs to be trickle down in both substantive and procedural laws and in all aspects of social life to achieve the ultimate constitutional ends of justice,

liberty, equality and fraternity. The State has to undertake this task (Das 1963: 101-102). However, this has been severely challenged by partisan politics and criminalization of politics (Brass 2010: 3; Madhavan 2016: 283). Moreover, the periodic accountability of the legislature through elections is not a bottom–up approach, rather it is top–down approach as the political parties determine the electoral issues (Brass 2010: 3-4). The issues of gender, caste, minority rights, among others, are still unsettled and it is mainly due to the lack of an effective exercise of accountability (Shankar 2010: 171).

Besides the constitutional accountability, another way to converge means and ends includes incorporation of constitutional morality (Choudhry et al, 2016: 2-3). Constitutional morality emanates from the constitutional principles. For social transformation, the machinery should self-regulate itself. It should work without any bias, obey and revere the constitutional principles. (Kannabiran 2012: 468). The fulfilment of constitutional morality is a challenging task. It has to be nurtured by the State and public conscience, which is largely underdeveloped in India (Ambedkar 1994: 61). Until then, the constitutional accountability under checks and balances remains a point of consideration. Failure of the functional aspect of establishing constitutional accountability is evident in land reforms, gender bias, caste discrimination among others (Chakravarti 2013: 5; Jaising 2000: 288; Kohli 1987: 67).

The Indian Constitutionalism stands for the combination of both means and ends with functional accountability. It is putting into effect both positive and negative constitutionalism. Its primary object is to eliminate discrimination, ensure a dignified life and achieve a social revolution (Austin 1966: 27). Its ultimate object is to abjure a revolution through bloodshed (Das 1963: 103). Although the State provides compensatory measures to overcome discrimination, there are legal loopholes that still remain to be fixed such as in the issues pertaining to gender, caste, minorities, homosexuality, civil liberties, etc (Mehta 2015: 247). Such loopholes relate to the substantive rights that are the end-products of the Constitution, and are reflective of procedural ineffectiveness that fails to provide a statutory accountability that in turn refers to the constitutional means. The presence of loopholes within the statutes is in direct contrast with the Constitution and mainly emerges due to the failure of generating the functional aspect of constitutionalism.

Overall, Indian constitutionalism includes the following components—namely, (1) it is the combination of ends and means; (2) ends are the ultimate objectives that the Constitution secures to all its citizens—justice, liberty, equality and fraternity—for establishing a

sovereign, socialist, secular, democratic republic; (3) the means include structures or institutional mechanisms in the form of Separation of Powers viz., legislature, executive and judiciary; however, the Constitution rules out an absolute separation; (4) the State under Article 12 is the prime authority to undertake social welfare policies or social interest; and (5) both the means and ends are converged together or put into practice through constitutional accountability. Moreover, from the value perspective, accountability also includes constitutional morality and public conscience. It is the realization of the rule of law, social justice and transparency. It envisages a constitution in its true spirit. In other words, constitutional accountability channelizes the institution into attaining constitutional ends. Periodic elections, opposition parties, etc., render the legislative/executive accountable. The judiciary exercises wider extensive accountability powers to nullify the unjust laws. It is intended to act freely and without favour. If the laws are unjustly framed by the legislature without addressing its accountability effectively and if the judiciary unjustly recognizes them as a 'negotiator' by deviating from the constitutional values, then it is a clear instance of failure of constitutionalism. Moreover, any unconstitutional collaboration between the executive/legislature and judiciary will also undermine the constitutional ends. Both positive and negative constitutionalism is vital. All these components of means, ends and accountability are together referred to as Indian constitutionalism and they are guiding force of public policy in India. Constitutionalism clearly applies to all the three stages of public policy viz., formulation, implementation, and evaluation (Chakrabarti & Sanyal 2017: 19).

Indian Constitutionalism and Eminent domain

Eminent domain has been one of the most controversial legal subjects. The social contract theorists viewed the sovereign as the absolute authority for seizing any property (Reynolds 2010: 100). However, Locke pleaded for the protection of the right to property (Stoebuck 1972: 567). Grotius, who coined the term eminent domain, viewed it as the sovereign's absolute authority, but subjected its exercise to fulfilment of compensation (Paul 1987: 65). But he did not allow for the justiciability of compensation and public purpose (Lenhoff 1942: 596). Utilitarians viewed eminent domain as consequential and majoritarian welfare principle (Simmonds 2008: 18). The economists considered it as an effective tool to overcome the holdout problem (Posner 1977: 40-42). These different perspectives justify the role of the State as the absolute and sovereign authority in exercising eminent domain. This inherent absolute authority of the State has immensely displaced and impoverished the landowners and tenants (Cernea and Mathur 2008). Although various studies have highlighted the

eminent domain abuse, they have limited their approach to specific issues and distinct constitutional principles (Sarkar 2007: 1435-1442; Fernandes 2007: 203-206).

As a result, two broad trends emerge from these studies viz., an issue-based approach and a structure-based approach. An issue-based approach highlights the individual issues such as public purpose, market value, compensation, etc (Levien 2011: 66-71; Mohanty 2009: 44-50; Roy 2012: 22-25). On the other hand, structural approach focuses on the constitutional perspective of either the rule of law, separation of powers or judicial review (Singh 2006: 1; Sathe 2015: 20; Kashyap 1978: 97). Sometimes, specific issues are fused with specific constitutional principles (Ananth 2015: 302). The Constitution of India provided legitimacy to the eminent domain with certain limitations, previously under Article 31, which was repealed, and then under the existing Article 300A (Singh 2006: 1). The State under Article 12 mainly includes the government, has the foremost responsibility to regulate the eminent domain. Besides this provision, it also provides the means and ends that act as a guiding force in regulating eminent domain. It is this approach of constitutionalism for which the eminent domain demands reconsideration. The legislature under constitutional obligation enacts the statutes that vitally undertake a substantive and procedural aspect of the constitutionalism that also includes constitutional accountability (Sathe 2004).

This constitutionalism had been severely undermined in the eminent domain law of 1894. It involved issues of public purpose, compensation, rehabilitation, resettlement, among others, that were completely left unnoticed until 2013. Even these issues were consistently debated before the Supreme Court since 1950, either for compensation or for determining the public purpose. A non-consideration of the constitutional values and lack of accountability and transparency in the case of eminent domain has also resulted in enormous displacement (Fernandes 2007: 203).

Since 1950, the Indian constitutionalism vis-à-vis eminent domain has been controversial. All the three organs of the State favoured the powerful and left the underprivileged sections suffering. The legislature did not come forward to overcome the undemocratic law of 1894; the executive utilized the law rampantly for various public purposes and by dubiously incorporating all the developmental activities in the name of public purposes they did not follow the transparent and accountable procedures that led to certain acts of gross violation of the Constitution, and these executive acts were justified under a literal interpretation by the judiciary. The judiciary restrained itself in reviewing the substantive nature of the takings

post-deletion of fundamental right to property of land in spite of the presence of a constitutional authority against the 1894 Act. The apex court applied the constitutional principles liberally. It was only in 2011 that the Supreme Court cited the Right to Property vis-à-vis the eminent domain after an enormous protest from the landowners. The Right to Property as a fundamental right proved beneficial to the rich people but could have provided an enormous relief to the underprivileged sections, comparatively. This overall combination led to the violation of accountability in the presence of weak justiciable rights under the existent constitutionalism. The individual interests of the underprivileged sections without the substantive rights of just compensation, rehabilitation and resettlement were in turn compromised for the fulfilment of the public purpose which remained undefined until the replacement of 1894 Act. In the past, due to a non-observance of constitutionalism in the eminent domain, two major setbacks resulted. The first setback resulted in 1978 when the Right to Property was abolished from Part III of the Indian Constitution for one or the other reason. The second major setback was the inability of the legislators to introduce the 'constitutionalised' vision of the eminent domain law and retained the old colonial law. In the absence of a clear-cut implementation of the constitutional values, the eminent domain crisis would exist forever, causing a grave injustice to the citizens and a fraud on the Constitution.

The 2013 Act of the Parliament was meant to undo the hardships caused by the 1894 Act. However, the 2013 Act demands reconsideration within the contours of constitutionalism of accountability and transparency of public purpose, compensation, rehabilitation, resettlement, environmental impact assessment, etc. The eminent domain has to appreciate the relevance of the substantial attainment of constitutionalism. The accountability aspect forms a crucial one that demands a transparent procedure as the means and substantive rights as the ends, which ultimately serves the constitutional goals of the rule of law. It has to undertake the broader aspect of constitutionalism; the cohesion of both the structural and functional aspects—for instance, how the judiciary, legislature and the executivehave interpreted the eminent domain law (public purpose, compensation, rehabilitation and resettlement). A functional view takes up the relevance of constitutional accountability in terms of democratizing the eminent domain.

III

Eminent Domain Law in Colonial India

The colonial legal history was the British white supremacy (Kolsky 2010). Britishers introduced the legal system to secure and safeguard their economic interests. Their ultimate aim was to secure profits (Benton 2002: 127). Therefore, the introduction of legal system was largely guided by economic interests (McLaren 2010: 84; Thompson 1990: 263). For instance, the civil and revenue administration was undertaken by the British themselves, whereas the criminal administration was regulated through the indigenous religious texts (Galanter 1988: 412; Rankin 1946: 21). Although some reforms were introduced through Regulating Act 1773, Settlement Act 1771 and Law Commission Act 1833 but they were mainly introduced to secure economic interests and uniformity in the governance of British India (Keith 1936: 93). The primacy of economic interests was clearly evident in the colonial framework of the eminent domain law. This enhanced as there was consolidation of powers (Kolsky 2010: 106).

During the colonial rule the first law on eminent domain was introduced in 1824 titled as 'Regulation I of 1824' in Bengal (Parliamentary Paper, 1826; Theobald 1844: 320-334). It was followed by the Building Act of 1839 and the Act of 1852 in Madras (Parliamentary Paper, 1852). All three laws were distinctively applied in the regions of Bengal, Bombay and Madras. There was no single uniform law during this time. Except few differences among these laws, there were certain common features in these laws namely, (1) all the three Acts proposed to acquire land for public purpose with compensation; (2) Non-adversarial approach of arbitration was adopted in determining compensation; (3) the decision of the arbitrators was final and conclusive; (6) all expenses of the arbitration were incurred by the Government; (7) the arbitrators were to be impartial and moral; and (8) the notification issued by the Governor-General-in-Council was considered as the conclusive evidence that the purpose was indeed public.

However, some of the major dissimilarities between these three Acts can be summed up as: (1) the 1824 Act ensured a just and full compensation to the interested persons while no such policy was incorporated in the other Acts; (2) Only the 1824 Act differentiated between urgent and non-urgent matters when the land was to be acquired; (3) publication through proclamation was mandatory only for the 1852 Act; (4) the Acts of 1824 and 1852 reversed

the award on the grounds of corruption by arbitrators; the Act of 1839 was silent on this point.

But with the consolidation of power, the Britishers issued the first unified eminent domain law in 1857 (Parliamentary Papers, 1857). Its main object was to introduce uniformity in the land acquisition process within the territory of East India Company. The 1857 Act incorporated many unique principles such as: (1) it introduced the interpretation clause, and defined land and interested persons; (2) proposed land acquisition for temporary purposes; (3) enhanced the rate of compensation; and (4) burden of the costs of proceedings was on the shoulders of the parties if the award was higher than the Collector's award. The Act of 1857 retained the arbitration proceeding. This 1857 Act was replaced by the 1870 Act.[6]

All the earlier Acts had entrusted arbitrators with the sole authority in deciding compensation issues. This was curtailed by the Act of 1870 (Parliamentary Papers, 1871). The Act of 1870 positioned the judge as the authority for determining all issues including compensation. Assessors in the form of arbitrators reduced their position from an active adjudicating authority to a passive body of assistance. It was suggested that the government wished to play a more rigorous role. The main object of the 1870 Act was to curtail wide discretionary powers exercised by the arbitrators, to overcome exorbitant compensation being awarded to the interested persons, and to curb a lamentable waste of the public money.

Further, the 1870 Act was finally repealed by the 1894 Act.[7] The *Statement of Objects and Reasons to the Act of 1894* supplied following reasons for the repeal of 1870 Act as – (1) arbitrators viewed as incompetent, corrupt, and exercised wide discretionary powers; (2) enormous increase in cases and resulted into high costs of proceedings; (3) many claimants made exorbitant and speculative claims. The 1894 Act incorporated changes viz., – (1) Collector entrusted with unlimited powers in determination of public purpose, compensation, reference to the court among others; (2) Assessors were removed and replaced by the adversarial judges; (3) incorporation of short litigation process.[8]

So, with the twin objects of shortening the litigation process and reducing the public expenses, the 1894 Act was passed. Although the Preamble of the Act did not contain any of

[6] Land Acquisition Act 1870 available at http://www.southasiaarchive.com/Content/sarf.141351/203399/011
[7] Land Acquisition Act 1894 available at http://www.southasiaarchive.com/Content/sarf.140920/201626/053
[8] *Balwant Ramchandra Natu and Others v. Secretary of State* (1905) I.L.R.29 Bom.480; *Ezra v. Secretary of State* (1905) I.L.R.32 Cal. 605

the foregoing objects, the provisions certainly intended to achieve the above-mentioned goals. The Act came into force on March 1, 1894.

Under this Act, land acquired for public purpose and company. The provincial government initiated the proceedings. The notification was issued for preliminary investigations to ascertain the suitability of land with the intended public purpose. The notice empowered the concerned officers to investigate the suitability and fitness of the land for the public purpose. Until 1923, no objections were allowed against land acquisition, Section 5A was inserted through the Land Acquisition Amendment Act in 1923. It empowered the interested persons to file objections against the land acquisition before the Collector.

After the preliminary investigation, a declaration was issued. It signified that the land was needed for public purpose or company. The distinction between 'preliminary investigation' under Section 4 and 'declaration' under Section 6 was that the former merely relied on the likelihood or probability of public purpose but in the latter case the public purpose was certain. Further, for a valid declaration, the compensation had to be paid by a company or drawn wholly or partly from public revenues or out of funds controlled and managed by a local authority (Section 6).

After declaration, the Collector initiated the land acquisition process (Section 7). Collector issued public notice inviting compensation claims or any interest in the land. All interested persons had to establish claims and objections in writing to the Collector (Section 9). Any false claims amounted to intentional omission and attracted a penal offence (Section 10(2)). On the fixed date, Collector conducted an enquiry and passed an award. The award was final and conclusive evidence between the Collector and the interested persons. After the award Collector took possession of the land (Section 16). Moreover, if the interested persons dissatisfied with the award filed an application for reference before the Collector. The objections were raised against - (1) the measurement of the land, (2) the amount of the compensation, (3) persons to whom it was payable, and (4) the apportionment of compensation against the interested persons (Section 18).

After Collector made a reference to the court, the Court served notice to the interested persons and the Collector (Section 20). Moreover, the inquiry under the proceedings was limited only to the filed objections (Section 21). At the end of the inquiry, the court passed an award (Section 26). Any interested person dissatisfied with the Court's award was entitled to challenge it before the High Court. After the Amendment XIX of 1921, the appeal from the

High Court was extended to His Majesty-in-Council (Section 54). As soon as the decision was finalized, the Collector would tender the payment of the amount and the interests thereof (Sections 31 and 34).

With respect to land acquisition for a company, a distinct procedure was adopted. Two important qualifications were imposed viz., (1) the company had to seek a previous consent from the local government, and (2) the company had to execute an agreement with the local government (Section 39). On the fulfilment of these two conditions, the local government would authorize any officer of the company to conduct a preliminary survey with the powers equivalent to those under Section 4 (Section 38). With regard to the consent of the local government, an enquiry conducted by it had to explicitly suggest that the land needed for some construction work was likely to prove useful to the public (Section 40). Upon satisfaction, the local government and the company entered into an agreement which was published in the official gazette. An agreement would specify the payment of money by the company to the government, the transfer of land to the company, the terms on which the company acquired the land, the time limit for the construction of work and the conditions for the execution of work and for public use (Section 41). Finally, the local government delivered the land to the company (Section 42).

Moreover, the Act also adopted a distinct land acquisition procedure in urgent or contingent situations and for a temporary occupation of a waste or arable land. On the direction of the provincial government, the Collector issued a fifteen days' notice. After a lapse of the notice period, the Collector acquired the arable or waste land for public purpose or for a company. The possession vested with the Crown. The significant feature of the urgent acquisition was the non-application of Section 5A i.e. a filing of the objections was dispensed with (Section 17). Further, under a temporary occupation of a waste or arable land for public purposes and for a company, the Collector on the directions of the provincial government issued a notice to the interested persons and occupied the land for a period not exceeding three years. On the expiry of the three-year period, the Collector restored the land to the owner. However, if the land had become permanently unfit in terms of using it for previous purposes then the provincial government would occupy the land permanently (Section 36). Any dispute on the condition of land was to be referred to the Court (Section 37). Besides the above-mentioned procedure, the Act distinctly enumerated the relevant and irrelevant factors for the determination of compensation.

In sum, the scheme of the Act of 1894 favoured imperial policies comprehensively.[9] An economic feasibility through adversarial practice was preferred for the obvious reason of reducing the public expenses in the form of compensation and reducing the delay in litigation matters.[10] As a result, the system of assessors that had existed in the 1870 Act was completely eliminated under the 1894 Act. The whole transition of laws from 1824 to 1894 was from an adversarial to a non-adversarial procedure, completely suited to the imperial rule.[11] While maintaining stability, the 1894 Act was amended six times i.e. by Act X of 1914, Act XVII of 1919, Act XXXVIII of 1920, Act XIX of 1921, Act XXXVIII of 1923 and Act XVI of 1933.

IV

Eminent Domain Law in Post-Colonial India

In post-colonial India, the 1894 Act was retained. However, three major amendments were made in the Act. They were – Land Acquisition Amendment Act 1962, Land Acquisition (Amendment and Validation) Act 1967 and Land Acquisition (Amendment) Act 1984. However, many provisions of the amendments of 1962 and 1967; and 1984 were omitted by Parliament through Act 56 of 1974 and Act of XIX of 1988 respectively. The reasons for repeal remained unclear. The Amendment of 1962, an ordinance previously, validated the land acquisition notwithstanding any judgment, order or decree of any court. Before the passage of this amendment, a writ petition *R. L. Arora v. State of U.P.*[12] was pending before the Supreme Court that challenged the land acquisition for the company on the ground that it did not benefit the public directly and therefore violated Section 40(1)(b). Immediately after the passing of 1962 Amendment, Section 7 of the amending Act was also challenged in the writ petition for the violation of Articles 14, 31(2) and 19(1).

The object of the 1967 amendment was to validate certain legal impediments within the course of land acquisition that were possible threats against the implementation of public

[9] *Bhandi Singh v. Ramadhin Roy* (1906) 10 C.W.N. 991; *Shastri Ramchandra v. Ahmadabad Municipality* (1900) I.L.R.24 Bom.600

[10] Moreover the provincial government exercised supreme authority in determining public purpose. For instance in order to declare a private purpose to 'public' contribution of one anna by the government was considered valid. This was validated in *Vedlapatla Suryanarayana v. Province of Madras, represented by the Collector of West Godawari* A.I.R. (32) 1945 Mad.394.

[11] For instance non-issuance of notice did not invalidate the acquisition proceedings this was held in *Sukhdev Saran Dev v. Nipendra Narayan* 76 Cal.L.J. 430; *Rahimbux Haji Karimbux v. Secretary of State* A.I.R. 1938 Sind.6.

[12] 1962 AIR 764

purpose. The amendment extended the time period of the declaration from two years to three years i.e. the declaration should be published within three years from the date of publication of notification.

The 1984 Amendment as compared to 1962 and 1967 introduced some significant changes. It attempted to balance the individual right with community rights particularly in terms of guaranteeing compensation. The Amendment catered some major issues concerning land acquisition, like delay in land acquisition. It enhanced the powers of the Collector in urgent matters. The Collector with the consent of the person interested prevented further proceedings and stipulated time limitation for making of award. Though the amendment appeared to ensure certain reforms in compensatory measures, but simultaneously, it extended the powers of the Collectors in effectuating the eminent domain process, particularly the extension of urgent acquisition in all public purposes. Interestingly, it addressed the plights of land owners as they were deprived of their livelihoods, and remedy ensured was mere increase in solatium that based on the original compensation value determined by the Collector. Any concrete procedural reforms remained unaddressed, though some issues were acknowledged via this amendment. Overall, the scheme of the 1894 retained the same colonial law with the above minor changes.

The only significant challenge to the eminent domain was from the Article 31 and 19(1)(f) which were repealed in 1978 by the Constitution Forty-Fourth Amendment.[13] Right to property under Article 31 extensively favoured the property owners against land reforms. Then the Legislature/Executive with an agenda to implement land reforms repealed Article 31 (Kashyap 1978: 97). Land reforms remained an unfulfilled task.[14] The biggest losers were the small land owners who deprived of the right to property in the process of liberalized policy (Fernandes 2007: 203; Palkhivala 1974: 39).

The 2013 Act and the future Agenda

At the beginning of the twenty-first century, the government undertook massive land acquisition for implementing liberalised policies (Nayak and Mishra 2011: 12). In this process, the 1894 Act was extensively applied to 'grab' the land. It inherited the colonial

[13] Both Article 31 and 19(1)(f) of Part III of the Constitution were fundamental rights and were replaced by Article 300A a mere constitutional right. With the repeal, individual were exempted from writ jurisdiction (Jain 2010: 1865; Seervai 1996: 1398;).

[14] Sumit Chaturvedi. "Land Reforms Fail, 5% of India's farmers control 32% land". Available at http://economictimes.indiatimes.com/news/economy/policy/land-reforms-fail-5-of-indias-farmers-control-32-land/articleshow/52107528.cms

practice that intended to acquire land acquisition without consent in order to secure economic efficiency and overcome delays. However, in the early twenty-first century land acquisition under the 1894 Act was met with enormous protests (Fernandes 2007: 203). Many violent protests were witnessed in Uttar Pradesh, West Bengal, Maharashtra, among others. Many people lost their lives and livelihoods (Gopalakrishnan 2012: 3). As a result, the government in 2007 introduced two separate Bills i.e. Land acquisition bill and Rehabilitation and Resettlement (R&R) Bill (Choudhary 2009: 73-82). Both the bills lapsed after the dissolution of Fourteenth Lok Sabha. Again in 2009, the Bills were redrafted into a single comprehensive bill i.e. Land Acquisition and Rehabilitation & Resettlement Bill. Finally, the Bill was introduced in the Lok Sabha on September 7, 2011. Single integrated law was an outcome the Standing Committee on Rural Development and the National Advisory Council (NAC 2011: 1). Finally in 2013, the Parliament after extensive debate passed the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act'. The Act came into force from January 1, 2014.

Application of the Newly Inserted Principles

The main object of the 2013 Act is to accommodate the least affected persons as the partners in development. In order to achieve this objective, the Act ensures just and fair compensation, adequate provision for rehabilitation, resettlement of owner and the affected families. According to the preamble the Act adopts 'humane, participative, informed and transparent' towards 'industrialization, development of essential infrastructural facilities, and urbanisation'.

Consent Clause

The Act under Section 2 refers to consent clause. The Consent clause is inapplicable to the government land acquisitions such as national security, infrastructural projects, and social welfare schemes (including Public Sector Undertaking and public purpose). Other principles viz., land acquisition, compensation, rehabilitation, and resettlement, however, are relevant. The consent is mandatory in the public private partnership projects and private company that undertakes public purpose. In the case of Public Private Partnership the consent of at least seventy per cent of affected families is required, whereas eighty per cent consent is mandatory in the case of private company involving public purpose.

Rehabilitation and Resettlement

It is applied to three categories namely, (1) public purposes, public sector undertakings, national security, infrastructural projects, and social welfare schemes; (2) public private partnership projects and for private companies involving public purpose; and (3) purchase of land by private company through private negotiations in rural or urban areas if such purchase is above the limit specified by the appropriate government; or if a private company requests the appropriate government for partial acquisition of land for public purpose. Section 2(3)(a) clearly permits private company to acquire land for private purpose. However, any private acquisition below the permissible limit does not attract the rehabilitation and resettlement policy.

Social Impact Assessment (SIA) and Public Purpose

Social Impact Assessment (SIA) is based on the principle of minimum displacement and minimum acquisition (NAC 2011: 9). On public purpose, the 2013 Act, as compared to the 1894 Act, adopted a broader approach. SIA is conducted in two stages. The first stage includes preliminary investigation for determination of social impact and public purpose and the second stage incorporate the appraisal of SIA report by an expert group. Evaluation is based on two outcomes viz., rejection and approval of the project. Outcomes are mere opinions expressed in the form of recommendations to the appropriate government the final 'veto' lies with the government. Moreover, the expert opinion has to be unanimous. At the same time, the SIA is exempted in the case of urgency under section 9.

Protection of Food Security

The Act safeguards food security by overcoming large scale land acquisition of arable and fertile agricultural land which adversely affects the food production (NAC 2011: 2). Under 'exceptional circumstances' and as a 'demonstrable last resort' the irrigated multi-cropped land will be acquired such as in the case of linear projects. But the Act imposed responsibility on the government to develop equivalent waste land as agricultural land to enhance food security. This is not bound by any specific time period. Also it does not mention whether it should be done before acquisition or after.

Special reference to Scheduled Areas and Scheduled Castes

The Act under Section 41(1) imposes limitation on the acquisition of land in the Scheduled Areas. However, the acquisition will take place only as a 'demonstrable last resort' with prior consent of the concerned Gram Sabha. The Consent clause is also applicable to the urgent land acquisitions. If the land acquisition involves involuntary displacement of SC or the ST families then the acquisition authority has to prepare a Development Plan. Government has to pay compensation and provide resettlement with free land for community and social gatherings.

Incorporation of Offences and Penalties

The 2013 Act declares certain acts as offences on the part of claimant and government officials. If any person provides false information or false claims through false documents then such person shall be punished with imprisonment up to six months or fine up to one lakh rupees or both. Further, if a government servant engages in mala fide acts and is proven guilty then disciplinary authority will take disciplinary action on discretion under Section 84(3). However, they will not be punished for the offence, if it is proved that the offence was committed without his knowledge or that powers were exercised with all diligence to prevent the commission of such offence.

Land Acquisition, Rehabilitation and Resettlement Authority

The Act under Section 51(1) establishes the 'Land Acquisition, Rehabilitation and Resettlement Authority'. Its main object is to provide speedy disposal of disputes relating to land acquisition, compensation, rehabilitation and resettlement. The Authority consists of presiding officer appointed by the appropriate government. Under Section 64 it exercises original jurisdiction over matters that are referred by Collector. The proceedings under reference are restricted only with the consideration of the interest of the persons affected by the objection under Section 67. Any decision of the authority can be appealed before the High court within sixty days.

Procedural Framework of Land Acquisition

The procedure of land acquisition begins with the issuance of notification. Meanwhile, the rehabilitation and resettlement award is made. After the SIA report, the appropriate government issues notification and publishes it in the official gazette. The notification

includes – (1) the statement on the nature of public purpose involved; (2) the reasons for the displacement of affected persons; (3) the summary of the SIA report; and (4) particulars of the administrator of rehabilitation and resettlement. After the issuance of notification, a meeting of concerned local self-governing bodies called to inform them of the content of notification.

Objections against the preliminary notification has to be made within sixty days from the date of publication of notification, on the ground – (1) that the notified land area is not suitable for the intended purpose; (2) that the justification offered for the public purpose is not true; (3) objections against the findings of SIA report. All objections are referred to the Collector in writing and only after an opportunity of being heard are given. After the filing of objections, the Collector prepares a report with respect to different parcels of land intended to be acquired and submits its report to the appropriate government. After the receipt of report the appropriate government takes the decision. According to Section 15(3) the decision of the appropriate government is final.

After the publication of preliminary notification, the 'Administrator for Rehabilitation and Resettlement' conducts census and survey of the affected families under section 16. Then after, the administrator drafts the 'Rehabilitation and Resettlement Scheme'. On completion of public hearing, the administrator submits the draft of the scheme for rehabilitation and resettlement at the project level along with specific report on claims and objections raised in the public hearing to the Collector. Further, the Collector reviews the draft and with suggestions forwards it to the 'Commissioner Rehabilitation and Resettlement' for approval. Upon approval of the Commissioner, the report is published. However, the final decision vests with the appropriate government. The 2013 Act, under Section 31(1), deals with 'Rehabilitation and Resettlement Award'. The Collector is empowered to make the 'Rehabilitation and Resettlement Award' for each affected family in the form of entitlements specified in the Second Schedule.

Further, the Collector in determining amount of compensation takes into consideration the market value determined under Section 26 and the award amount in accordance with First and Second Schedules among others. Moreover, the 2013 Act for the first time explicitly guarantees the Collector to seek services of various experts in determining compensation. Finally, the Collector determines the final award.

Additionally, the Collector will pay solatium amount equivalent to one hundred per cent of the compensation amount and award an amount calculated at the rate of twelve per cent per annum on such market value for the period commencing on and from the date of publication of the notification of the SIA study under Section 4(2), in respect of such land till the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

Further, the appropriate government is authorised to temporary occupation of land. The 2013 Act, under Section 81, provides for temporary occupation of waste or arable land for any public purpose on the direction of the appropriate government. Moreover, the Act, under Section 40, provides for the acquisition of land in urgent cases such as for the purpose of defence or national security or any emergencies arising out of natural calamities or any other emergency approved by the Parliament. Under urgent acquisition the government may dispense with Chapter II to VI of the Act, which includes social impact assessment, public purpose, food security, rehabilitation and resettlement award.

V

Analysis and Conclusion

The 2013 Act is mainly introduced to overcome the discrepancies that existed in the 1894 Act. In the absence of any Constitutional limitations, particularly post-1978 i.e. after the repeal of right to property, the apex Court failed to generate substantive limitations against the exercise of eminent domain. Government's satisfaction was the highest law to determine land acquisition, which caused immense hardship to the land owners, which ultimately resulted into violent protests.

The 2013 Act was introduced to overcome those hardships. As observed above, the prime objective of the Act is to cause least disturbance to the owners of land and other affected families, and to engage them as the partners in development. It further maintains that it strives for 'cumulative outcome'. In ensuring these objectives, the Act offered measures that are summed as, (1) just and fair compensation, rehabilitation, and resettlement of affected families; (2) SIA of the proposed land acquisition; (3) food security measures; (4) consent of the local self-government and Gram Sabhas.

These measures are significant and prima facie offers considerable relief to the land owner which was completely missing under the previous 1894 Act. The real beneficiary under the Act is Scheduled Tribal Areas. Even the compensation as against the 1894 Act appears

efficient, but it completely depends on the availability of genuine market value. Nevertheless, the 2013 Act requires acute examination. For instance, the previous principle of 'government's satisfaction' was retained under this Act as well and the same is applied in 'rehabilitation and resettlement' schemes. Similarly, the consent clause is inapplicable to government acquisitions with purposes like national security, infrastructural projects, and social welfare schemes. Moreover, the whole consent process is determined by the appropriate government.

Further, the Rehabilitation and Resettlement scheme is inapplicable to the private companies if the land is below the limit as specified in Section 2(3). Moreover, with regard to the SIA, the expert group setup for appraisal of reports has been assigned only soft powers. The final authority lies with the appropriate government, even if the expert group recommended the rejection of land acquisition, the government is empowered to reject such recommendation and continue with the land acquisition as specified under proviso to Section 7(4). Further, the SIA does not apply to the urgent land acquisition.

The protection of food security clause states that, the 'irrigated multi-cropped land' should not be acquired and if acquired then land for land should be given. In the absence of any specific time period the remedy appears futile. Even the exceptions under Section 10 clearly permits land acquisition. So, on one hand it prohibits the acquisition of 'irrigated multi-cropped land', but on the other hand through exceptions it permits acquisition. Overall the government appears as the final arbiter under the Act and the same is laid down under Section 8(2) of the Act.

The 1894 Act had clearly empowered the government with an upper hand in determining land acquisition. Similar precedent is also followed under the 2013 Act. It has also retained the urgent acquisition and temporary occupation of land. The newly enacted Act has slightly extended the procedure by incorporating SIA, EIA, and Consent clause. However, its final authority is still vested with the Government. Thus, from a plain reading of the 2013 Act it appears that it has retained the core principles of the 1894 Act. The declaration passed by the government is final and conclusive evidence that the land is acquired for public purpose. Now it depends on the how the judiciary interprets it, but the norm of governmental satisfaction will favour the government as in the 1894 Act. However, the major concern of the government is the presence of Consent clause, and to overcome it, the government issued an ordinance in 2015 which did not succeed due to outrage of the public unrest. Overall, the

accountability under the Indian Constitutionalism in relation to eminent domain has been a matter of deep concern after the repeal of fundamental right to property. The 2013 Act slightly improves the situation by ensuring compensation and rehabilitation, but leaves many other areas substantively grey such as consent, social impact, environmental impact assessment that are partially framed or renders scope for exploitation. Lastly, as the public policy suggests that apart from formulation two other things that are vital are implementation and evaluation. Indian Constitutionalism incorporates the public policy principles and thereby recognizes the policy formulation, but the functionality of the true values depends on implementation and evaluation to which the eminent domain must address.

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