

NATURE, MEANING, SCOPE AND DEVELOPMENT OF EMINENT DOMAIN

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INTRODUCTION

In the modern world the concept of Eminent Domain has acquired more importance than ever before. It is the age of globalization. Development activities are fast going. Land is an essential requirement for every developmental activity. The government requires land for the construction of government offices, libraries, slum clearance projects, public schools, colleges and universities, public highways, public parts, railways, telegraph and telephone lines, dams etc. For satisfying all these requirements government uses the power of Eminent Domain for the acquisition of private property. In such a situation it is necessary to find out the origin and development of the doctrine of Eminent Domain.

ORIGIN AND MEANING OF THE CONCEPT OF EMINENT DOMAIN

The power of Eminent Domain can be traced back to the Roman Law and it was a well established concept long before the American Revolution¹. The right of Eminent Domain is an ancient one. The concept was in existence in English Common Law. Numerous early colonial statutes along with English Common law carried the philosophy of Eminent Domain power into U. S. Jurisprudence. So the American colonies readily utilized the concept. The Doctrine was introduced more than 100 years ago to further colonial interests². Before the American Revolution the British Parliament exercised this power. The American Colonies has used this power for the construction of roads and bridges. The concept is known in different names in different countries³.

The term was first used by Hugo Grotius in his book 'De jure belli ac pacis' as dominium eminence⁴. The writings of Locke, grotius and Pufendorf suggest that the State can and must take private property on occasions, but has an absolute duty to compensate the owner justly⁵. Before british colonization land in India was held through a variety of tenure systems in different places. The british colonizers brought

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1. Stacy L. Leeds, 'Eminent domain or some other name: A tribal perspective on taking land,' (2005), Vol. 41, *Tulsa Law Review*, 51
 2. Glanville Austin, *Working A Democratic Constitution: The Indian Experience*, 1st edition, (2000), P.69
 3. 'Compulsory purchase' in UK, Newzealand and Ireland exportation' in Canada and Compulsory Acquisition' in Australia
 4. He was a natural law jurist born in Holland in 1583. He has been regarded as father of International Law due to the contributions made by him in the field of International law
 5. see *Supra* n.1

these lands under their control. For this purpose they enacted a number of regulations and Acts⁶. These regulations and Acts enabled the acquisition of land at fair value for roads, canals and other purposes. This established the concept of eminent domain, facilitating the acquisition of private property by the government. The land administration system of British gave birth to a new class of people called zamindars. They didn't have any direct control over the land. But with the passage of time the British land policies made them the owners of the land⁷.

Grotius defined the term as '.... The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may are and even alienate and destroy such property, not only in the case of extreme necessity in which even private persons have right over the property of others, but for ends of public utility, to which ends those who founded 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 property⁸.

Eminent Domain has long been regarded as an inherent power of both the federal and State Governments. State Governments have delegated this power to their sub divisions. Sometimes this power has been delegated to private corporations that perform quasi-public functions such as construction of rail roads. Eminent Domain is the right of a government entity to seize private property for the purpose of constructing a public facility. Union, State and Local governments can seize private property under eminent domain after the owner being compensated at fair market value. Some public projects for which the land is required include high ways, hospitals, schools, parks or government office buildings⁹. Eminent Domain is the right of a government to appropriate private property for public use, usually with compensation to the owner¹⁰.

The State has the power to acquire the private property from the citizens for public use. The term 'eminent domain' generally refers to a governmental entity's legal authority to force a private land owner to sell his or her real property for public use¹¹. In other words, it means the power of the sovereign to take property for public use without the owner's consent.¹² The doctrine is based on two Latin maxims '*Salus Populi est Suprema Lex*' means welfare of the people of the public is the paramount law and '*Necessita Public Major est Quam*' means public necessity is greater than private necessity. In *City of Austin v.*

⁶. Regulation I of 1824, Act I of 1850, Act VI of 1857, Act X of 1870, Act of 1894

⁷. The zamindari system was a feudal type system of land holding. Under the Mughals and the British, zamindars and other large land holders did not own the land. They were responsible for collecting revenue from the people and were allowed to keep a portion of it. After independence, they generally hold on to the land as their own. Many of the zamindars received their land either by colonial favore for simply by occupying it when the British left.

⁸. See *Supra* n.4

⁹. Barron's finance and investment dictionary.

¹⁰. American Heritage Dictionary

¹¹. Dr. Durga Das Basu, '*Indian Constitutional Law*', 3rd edition (2011), p.1134

¹². *Ibid*

*Nalle*¹³, the court held that government exercises its eminent domain authority and takes a land owner's private property, the governmental entity must pay the land owner just compensation.

The Britannica Concise Encyclopedia defines eminent domain as the government power to take private property for public use without the owner's consent. Constitutional provisions in most countries require the payment of just compensation to the owner¹⁴. It is as a power peculiar to sovereign authority and coupled with a duty to pay compensation¹⁵. Eminent Domain compels the owners to sell their land to government for public purposes, but under the Constitution the owner will receive the fair market value of the property¹⁶. The Oxford Dictionary of Politics defines the term Eminent Domain as the right of the State on behalf of the public to take private property without the owner's consent. The Columbia Encyclopedia defines the term as the right of a government to force the owner of private property sells it if it needed for a public use. The Webster's English Dictionary defines the term as the right of the government to take or to authorise the taking of, private property for public use, just compensation being given to the owner¹⁷.

In *Indira English Medium School v. Sub Collector*¹⁸ the Supreme Court held that Eminent Domain is the right or power of a sovereign State to appropriate the private property within the territorial sovereignty to public uses or purposes. It is an attribute of sovereignty and essential to sovereign government. The power of Eminent domain being inherent in the government, is exercisable in the public interest, general welfare and for public purpose. In *Bhola Ram v. GNCTD*¹⁹ the court held that acquisition of private property by the State in the public interest or for public purpose is nothing but an enforcement of the right of Eminent Domain.

In *Jilubhai Nanbhai Khachar v. State of Gujarat*²⁰ the court explained Eminent Domain as the right of Sovereign State to reassert either temporarily or permanently its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent Domain is the highest and most exact idea of property remaining in the government or in the aggregate body of people in their sovereign capacity. Eminent Domain is the power which connotes the legal capacity of the State to take the private property of individuals for public purpose. Since the power of Eminent Domain is an inseparable incidence of sovereignty, there is no need to confer this authority expressly by the Constitution²¹.

¹³. 120 S.W. 996 (Tex.1909)

¹⁴. U.S.A in the 5th amendment to the constitution

¹⁵. Britanica.com

¹⁶. See *Supra* n.14

¹⁷. Webster's New World College Dictionary 4th edn (2006) 465

¹⁸. AIR 2013 SC 867

¹⁹. AIR 2013 SC 219

²⁰. AIR 1995 SC 142

²¹. *United States v. Jones* (1883) 27 L. (edn) 1015

DIFFERENCE BETWEEN POLICE POWER AND EMINENT DOMAIN

The concepts of Eminent domain and police powers are borrowed from the American Law. The Constitutional guarantee of the due process clause in the United States Constitution requires that no private property shall be taken for public use without just compensation²². In the exercise of its police power, the State may pass regulations designed to ensure public health, public morals and public safety are also public convenience or general prosperity²³. Eminent Domain should be distinguished from the exercise of the power of taxation and police power. The power of Eminent Domain, police power and taxation power are all forms of social control but each differs from the other. It is possible to distinguish each from the other, yet each has characteristic which resemble the characteristic of others²⁴. Police power is the legal capacity of sovereignty or one of the governmental agents to delimit the personal liberty of persons for the protection of those social interests which reasonably need protection.

The police power regulates the use and enjoyment of property so as to conserve or promote the health, morals, safety and the general welfare of the community²⁵. In the exercise of the Eminent Domain power the State may take any property from the owner and may appropriate it for public purposes. The police and Eminent Domain powers are essentially distinct. Under the police power restrictions may be imposed and the property may even be destroyed without compensation being given, whereas under the power of Eminent Domain the property may be appropriated to public on payment of compensation only²⁶.

Taxation is the legal capacity of the sovereignty as one of the governmental agents to exact or impose a charge upon persons of their property for the support of government and for the payment for any other public purposes which it may constitutionally carry out. The power of taxation differs from the power of Eminent Domain, for under taxation the government is required to make and enforce contribution of money or property by the citizen as it is his share of the burden of support of the government. But Eminent Domain takes not a share of the public burden, but more than a share²⁷. Eminent Domain is the power that the State may exercise over all land within the territory.

CONDEMNATION

The process of acquiring private property by Eminent Domain is known as condemnation. Eminent Domain traditionally has been used by governments to condemn land for buildings, roads, schools, government buildings and the like. Through the process of condemnation public or government authorized private entities exercise the power to take private property through Eminent Domain²⁸. To 'condemn'

²². 5th and 14th Amendment to the U.S. Constitution

²³. *Chicago Burlington and Quincy Rly v. People of the State of Illinois* (1906)200 U.S. 561

²⁴. 'Shukla's Constitution of India', Mahendra.P.Singh.(ed), 10th ed, (2001), P.240

²⁵. *Ibid*

²⁶. Judicial dictionary 14th edn, (2008), 386

²⁷. See *Supra* n.24

²⁸. www.collumbiaencyclopedia.bartleby.com

means to take property under the power of Eminent Domain. A 'condemnee' is one who owns property, that might be condemned and a 'condemner' is the person or entity seeking condemnation of that property. The condemner's right to take property will be denied if the condemnor has failed to follow the procedures set forth in the statutes that authorise exercise of the power of Eminent Domain²⁹.

The term condemnation is used to describe the formal act of the exercise of the power Eminent Domain to transfer title to the property from the private owner to the government. In some cases the property owner challenges the right to take, because the proposed taking is not for public use or the condemnee is not legislatively authorized to take the subject property, or has not followed the proper substantive or procedural steps as required by law³⁰.

SCOPE AND DEVELOPMENT

In the changing scenario the concept of Eminent Domain has acquired great importance. Government has to perform many functions in order to ensure social and economic justice to the people³¹. It is the duty of the government under the Directive Principles of State Policy to secure the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.³² It is also the duty of the State to secure a social order for the promotion of welfare of the people.³³ In order to conduct the welfare activities the concept of Eminent Domain has been inserted in various statutes.³⁴

The power of Eminent Domain may be exercised directly by the legislature by the adoption of a statute identifying the particular property to be acquired for a public use or it may be delegated to agents who may exercise the power in the manner prescribed in the enabling statute.³⁵ The Union as well as the State governments is empowered to enact laws for the acquisition or requisition of property. The source of the State's Eminent Domain power rests in Seventh Schedule.³⁶ U.S. Constitution states 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws.'³⁷ Eminent Domain is the process by which the government may take private property for a public purpose, provided the government provides just compensation. The

²⁹. Alcoa Development and housing Authority v. Monday, Docket No.196, 1991 WC 12291

³⁰. 14th amendment of the U.S. Constitution

³¹. Preamble to the Indian Constitution – justice, social, economic and political: liberty of thought, expression, belief, faith and worship; equality of status and opportunity and to promote them among all :fraternity assuring the dignity of the individual and the unity and integrity of nation.

³². Article 39 (a) and (b) of the Indian Constitution

³³. Article 38, 44th Amendment Act 1978

³⁴. Statutes relating to land reforms and land acquisition

³⁵. The Land Acquisition Act, 1894

³⁶. Entry 42 List III

³⁷. 5th amendment to the U.S. Constitution

U.S Constitution grants this power to both federal and State governments. The Constitution allows for the taking of private property for public use as long as just compensation is given and it also prohibits the taking of property without due process of law.³⁸ Article 300 A of the Indian Constitution states that no person shall be deprived of his property save by authority of law.³⁹ The Supreme Court has very clearly stated that the executive cannot deprive a person of his property without the authority of law and law in this context means ‘ an Act of Parliament or of a State legislature, a Rule or a Statutory order, having the force of law, that is positive or State made law.’⁴⁰

The concept of Eminent Domain has gained more strength than ever before due to the 44th Amendment. It facilitates the government to take private property for public purpose in a smooth manner. The doctrine of Eminent Domain is for the general good of the public. The reason for the development of the concept is that the government has to undertake to reconstruct the agrarian economy through which to confer right 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.⁴¹ In *Tekaba A.D. v. Sakumerin A.O.*,⁴² the court held that 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. 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. Eminent Domain only deals with taking of land from a person who has legally recognised rights over the land. It only addresses the taking of a land held in private hands. 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.⁴³

In *Kelo v. City of New London*⁴⁴ the court permitted the taking on the ground that the development plan would increase taxes and create new jobs. This decision was criticized by many members of the public. Certain States enacted legislations that would prohibit the use of Eminent Domain for certain uses such as private economic development projects. When government takes someone’s property for public use the law calls it ‘taking’⁴⁵. In the initial stages of the development of the doctrine of Eminent Domain the common aim of the government in the enactment of the statutes relating to Land Reforms, Land

38. 5th and 14th Amendment to the U.S. Constitution

39. 44th Constitution Amendment Act,1978

40. *Bishaber Dayal Chandra Mohan v. State of U.P.*, AIR 1982 SC 32

41. Land Reforms Act and Land Ceiling Acts

42. (2004) 5 SCC 672

43. Usha Ramnathan, *A word on Eminent Domain*, in Lyla Mehta (editor), ‘Displayed by development confronting Marginilization and gender justice’ (2009), p.133

44. 125Ct 2655 (2005)

45. System.USLEGASL.com, Interpretation and scope of the Eminent Domain clause

Acquisition, Land Ceiling etc was to abolish zamindars so as to eliminate the intermediaries by means of compulsory acquisition of their rights and interests and to bring the tillers in direct contact with the government.⁴⁶ In *Jagtar Singh Etc v. State of Punjab Etc.*⁴⁷ the court held that the requirements of the community do not remain static, they indeed, go on varying with the evolving process of social life. Accordingly there must be curative response from the public authority and the public scheme must be varied to meet the changing needs of the public. So in exercise of the power of Eminent Domain the State can compulsorily acquire land of the private persons for public purpose.

Eminent Domain is a vital economic development tool. It is an essential requirement for the government to take over private property for public use. If Eminent Domain were not available as an economic development tool, individual property owners could effectively keep the State away from realizing the vast benefits associated with economic development by refusing to sell their property⁴⁸. Thus the power of Eminent Domain helps the government to take over the private property for public purpose. Local authorities, societies and Co-operative societies can also acquire land for developmental activities through the government's power of Eminent Domain.⁴⁹ In the early years of constitutionalism the power of eminent domain was used by the government to invest the rights to land in the tiller and the tenant and as a move against landlordism. It was an attempt to prevent the concentration of land in a few hands by dispossessing zamindars and to redistribute land to the landless and to enforce a ceiling on how much land may be held by anyone.⁵⁰ But now the power is used by the government to take over the land from the farmers and to hand it over to the corporations. So it has resulted in the mass displacement of farmers.

The State cast itself in the role of a facilitator through the exercise of the power of Eminent Domain. So in the changing situations the power of Eminent Domain is misused for various other purposes that poses a great threat to shelter and livelihood of the displaced people. Acquisition of land is necessary but it should be exercised for genuine purposes. The status of right to property changed from fundamental right to legal right facilitates the acquisition of land in a smooth and easier manner.⁵¹ This was effected, because of the serious obstacles faced by the government in the process of acquisition of land for social and economic development. After the amendment it is not possible to file a writ to challenge the acquisition. It is not possible for the government to effect socio-economic development where challenges raised by the individuals against the acquisition of land. So through the 44th amendment the concept of Eminent Domain has acquired vital importance in the developmental projects.

⁴⁶. *The State of Bihar v. Maharajathi Raja Sir Kameshwar*, 1952 SCR 889

⁴⁷. AIR 2012 SC 997

⁴⁸. See *Supra n.43*

⁴⁹. *Societies Registered under the Societies Registration Act, 1860 and Co-operative societies established under the Co-operative societies Act*

⁵⁰. See *Supra n.43*

⁵¹. Articles 19(1)(f) and 31 were deleted by 44th Constitution Amendment Act, 1978