

Chapter 3

3.0 Eminent Domain in the Modern Age

3.1 Allodial Title vs. Feudal Title

In allodial title to land the owner generally holds the absolute possession of the land - a freehold tenure by an individual or a group. In English law only the monarchs hold the allodial title through the right of conquest. This makes others as tenants. Though over the years tenants were holding the ownership rights, but king's (or the state at present) sovereign rights have been recognized in every form of the society. Allodial title was not present either in the past or at the present. The state uses its right to eminent domain, subjected to fulfilling the condition of "public use" and paying "just compensation".

3.1.1 Scope of "public use" widened

Irrespective of the political believes the states have broadened the scope of "public use" to include "Public purpose" for "takings" (Berman v. Parker, 348 U.S. 26 (1954), 2017). Interestingly China, whose property rights and judiciary are significantly different from USA, has done the same. (Liu, The Chinese Takings Law from a Comparative Perspective, 2008). England and Wales has also widened the scope to include "for the public benefit" (Circular 02/03: Compulsory Purchase Orders, 2012). Singapore has changed its Land Acquisition Act Article in 1966 (Article 5(1)) to increase the scope. Public purpose definition is also elusive in India. LARR 2013 Sec 2(2)(b) includes "for private companies" Courts have generally concurred with the state's interpretations.

3.1.2 Scope of "just compensation"

Judiciary has been intervening in the determination of compensation and effecting changes (read increase). This is evident in the table (Table 1.1). The improvements over the amount decided by the state were from 266% to 363%. But in deciding the amount, the court has assessed and not computed the amount. The inherent limitation in arriving at any objective value for the "just compensation" without a comprehensive computation mechanism is well summed up by Justice Cheshin in his judgment in the Supreme Court of Israel, when he observed "Section 200 is anomalous and special. The criteria the

legislature has set for us to decide upon in compensation claims are reasonableness and fairness..... These needless to say, are deeper than the ocean and higher than the skies, and one can discover everything within them” (Rachelle, 2007).

3.2 Eminent Domain- Contemporary perspectives

The days of the Kings as paramount authority who owns all land are no more and the elected people’s representatives have taken up the role to themselves. In the modern states, it is the people’s representatives who make laws articulating the ownership of land and the state’s right. Influenced by the political philosophy of Locke, Grotius and others almost all the states of the modern age irrespective of their political beliefs, had taken up on themselves the right to acquire public property whenever the situation demands, but not without just compensation. Chapter 28 of the Magna Carta recognized tenant’s ownership right and required compensation to be paid in case of expropriation by the state. This by default recognizes the sovereign’s right to expropriate.

3.2.1 Eminent Domain in different countries

France

“Comparative law studies have shown, expropriation law in France, as far as compensation is concerned, is midway between the legislation of countries like Germany, which have rather generous compensation policies, and that of countries like Canada, which have more restrictive policies. Within this template, the French situation is quite similar to the mid-range American one, beyond the significant differences in legislation between the different states of the union” (Alterman, Takings International: A Comparative Perspective on Land Use Regulation and Compensation Rights, 2011).

England and Wales

In England and Wales the Compulsory Purchase Act owes its origin to Enclosure (Consolidation) Act 1801. Land Compensation Act, 1961 Section 5 requires that the owner shall receive payment for the "value of the land... if sold on an open market by a willing seller". It ignores any increase in the value of land due to use change - “no

scheme world”.

Greece

“Property is under the protection of the State. Rights deriving from this basic premises, however, may not be exercised contrary to the public interest.....no one shall be deprived of his property except for public benefit which must be fully proven . . . and always following full compensation” (1975 Syntagma [SYN] [Constitution] 17 (Greece) VIIth Revisionary Parliament, 2001).

Germany

“Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected”.

USA

The Fifth Amendment to the US Constitution along with Fourteenth amendment Section 1 imposes limitations on the exercise of eminent domain:, which states "nor shall any State deprive any person of life, liberty, or property, without due process of law". This also says (Searl v. School District No. 2 In Lake County, 1890) that eminent domain “cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.” (Searl v. School District No. 2 In Lake County, 1890)

Sweden

“The government purchases the property at an estimated market value plus 25% compensation. The law also states that the property owner shall not suffer economic harm because of the expropriation” (Wikipedia, 2017).

China

According to Chinese law, the right of eminent domain cannot be exercised unless there is a need based on public interest. However, there are no clear guidelines to qualify for public interest. Compulsory acquisition for construction purposes is covered in s. 43 of PRCLAL (1998) and for building in UBDRAR under urban development schemes. Compensation for farm land is covered in s.47 Para. 1, 2,3,5. UBDRAR allows market value compensation but the amount is as decided by the relevant people's government (Chan, Land Acquisition Compensation in China - Problems and Answers, 2003).

Brazil

The right of property is guaranteed in the Brazilian constitution, except in the case of expropriation for necessity or public utility. The Brazilian expropriation Law considers the following factors in setting a value upon expropriated property which includes (1) Market value of comparable property during the past five years (2) Enhancement or depreciation of the expropriated party's remaining property, (3) Income derived from the property. Brazil has generally permitted recovery for lost profits during the period reasonably required to relocate or acquire a comparable income producing property. It has also permitted recovery of goodwill when a commercial establishment is taken (Rosenn, 1975).

Chile

"No one, in any case, can be deprived of its ownership, the property of such ownership or any of the essential attributes or faculties of the ownership, except by a general or special law that authorizes the expropriation by the cause of public utility or national interest, as qualified by the legislator. The expropriated will always have the right to an indemnification for the patrimonial damage effectively caused." (Wikipedia , 2017).

3.2.2 Eminent Domain-Indian Perspective

India's first land acquisition Act was enacted during the British Raj in 1894, as LAA 1894. Initially the scope of the Act was limited to acquiring land for public purposes like roads, rails, canals etc. The scope was expanded first in 1919 and then in 1933 to include

industrial concerns employing not less than 100 workmen to acquire land for dwelling houses for the workmen employed. Independent India adopted the Act in its totality. With private participations increasing after independence in investments, there was a need felt to acquire land for investment by private industries and the Act was further amended in 1962 to include “acquisition needed for the construction of some building or work for a Company which was engaged or was aiding companies who were engaged in work for public purpose”. Land Acquisition Act was further amended in 1984 to help urbanization. Land acquisition for private companies were further facilitated by adding the words “or for a Company” after the “Public purposes”. The time for hearing of objections were extended and limited to 2 years. In spite of all these amendments the aspirations of the high growth post- liberalization era remained unachieved. Land remained the major hassle for faster economic growth. Government wanted to emulate China’s SEZ model for faster economic growth. In 2005, government passed the SEZ Act, whose rules came into operation in 2006. The objective was to boost growth and exports. But there were misuses. (Chakravorty, The Price of Land- Acquisition Conflict Consequence , P118, 2013). This added fuel to the already brewing fire. Land buyers can be public or private sectors, but formal land acquisition is undertaken by government authorities. This had put the state and the land owners head to head whenever there is need for land for private or public projects. The protest movement in Nandigram (West Bengal) where 14 protesters died in police firing drew national and international attention,. In and around the same time the protest movements over Maha Mumbai SEZ, Vedanta land in Orissa, TATA’s Singur land hogged the news headlines. Conflicts spiraled. Huge number of infrastructure and industrial projects got delayed, some got shelved (Sasi, 2015). Demand to scrap the Land Acquisition Act (LAA 1894) gained momentum.

Under this backdrop new land acquisition bill LARR 2013 was passed in the Parliament and implemented from 1st January 2014. Compensation amount was increased from 2 to 4 times based on the distance from the urban center.

There was more confusion in the process. Land acquisition being a concurrent subject some of the states like Gujarat has amended the states land acquisition Acts incorporating

the clauses of the 2015 Amendment Bill to facilitate the investment process. This however, has not changed the investment scenario of India and the fundamental weakness of the LARR 2013 Act was not addressed.