



ECHO'S ON NARRATIVES OF 'EMINENT DOMAIN' IN LAND ACQUISITION LAW : A THEORETICAL DISCOURSE

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ABSTRACT

What is earned through labour whether can be taken away by sovereign state under the notion of eminent domain or not is well read notion in land law or basically in property law around several democratic legal traditions. The sovereign space for taking private property for the governmental use basically under the legal tradition of eminent domain are also creatively expressed as part of statutory imagination and many country have recognized as formal attitude in law. The land law has long association with human civilization and is developed under different episodes and echoes. The state basically (the federal government) is legislatively empowered to take immovable property of private under the notion of eminent domain concept and this is been used in various occasions by state authorities. The state is traditionally given such authorities to use private land for the public purpose and basically justifying their takings. The taking by state authorities need to be fair, transparent, useful, procedural fairness, due process of law and need to be obviously well compensated. The issues of just term compensation is always contested in the land acquisition process and many leads to violent conflict and dispositions of the project. The notion of eminent domain the land acquisition law is also well empowered for the betterment of larger public with sacrifice of individual interest. This paper is analysis of theoretical construct like concept, theories, element, justification, limitation and few case law on practice of eminent domain in Nepal.

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Key Words: Public Purpose, Intent, Wisdom, Narrating, Immovable

INTRODUCTION

Human civilization is always confrontational in nature.¹ The nature of contestation are also with issues of property and basically the rights over immovable property and land. The land disputes is as old as human civilization and traces back to primitive society of livings.² The relation between land and humans are inseparable in character and land is always symbolically represented as power, status, culture, norms, values and many more attributes are attached³ to it hence the land are precious and also valuable in every forms of society.⁴ The significance of land rights are well explained and justified in religious and non-religious authorities of the state so that the people can understood the issues and its importance more in need.⁵ State is ultimate guardian of all immovable property and also protector of movable property.⁶ The issues of land has traditionally represented the principal form of wealth, the principal symbol of social status and the principal source of economic and political power.⁷ The political power are always manifested through the proper engagement with the state authorities. The land are considered as source of authority of command and values for the larger people. The state has inherent authority to take away the private acquired land for the benefit of larger public on the notion of eminent domain. A "necessary exception in the title to all property,"⁸ a noticeable ideas for taking the ownership of individual on the status agencies. The way state have evolved from very beginning and the way engagement and relations are built is more reflection on the subject for the better protection of state power not as authoritarian

¹ Daniel Fidel Ferrer, *Confrontations: Philosophical reflections and aphorisms*, Daniel Fidel Ferrer (2011).

² John Lubbock, *The origin of civilisation and the primitive condition of man: mental and social condition of savages* (Longmans, Green, 1912).

³ Pierre Bourdieu, Structures, habitus, power: Basis for a theory of symbolic power, 155 *Culture/power/history: A reader in contemporary social theory* 199 (1994).

⁴ Marion Shoard, *This land is our land* (London: Paladin Grafton Books, 1987).

⁵ Ralph H. Kilmann, Mary J. Saxton and Roy Serpa, Issues in understanding and changing culture, 28(2) *California Management Review* (1986).

⁶ Cathryn A. Berryman, Toward more universal protection of intangible cultural property, 1 *J. Intell. Prop. L.* 293 (1993).

⁷ Mahesh Chandra Regmi, *Land Ownership in Nepal* 1 (Adroit publication Delhi, 1977).

⁸ *Donnahey v. State*, 9 Miss. 242 (8 S. & M.) (1847). S.

regime rather a welfares regime. The right of eminent domain is a remnant of the ancient law of feudal tenure⁹ and is manifested through various purpose of such takings.

Traditionally, Nepal is heavily dominated with agrarian economy but shifts are seen to remittance hence the entire priority on these aspects need to be well evaluated and development are crucial in nature and today we are known as remittance village.¹⁰ When the economic shift are seen as phenomenon, the taking of private land for any purpose of the government will be a general engagement of state agencies with individuals and it is seen as very growing specifically in new set up of the government.¹¹ It was said that the agro-based economy of Nepal has contributed two-fifth of the total value added to the national economy.¹² The contribution of the agrarian economy in modern time need to be well examined based on rapid changes and mobility of people across multiple avenues for their livelihood.¹³ The migration are seen as new defining feature of Nepalese economy and have impacted on multiple factors linking to national economy to state political, development and other key considerable issues.¹⁴

The law relating to property is considered as reflection of bundle of rights and significantly corroborates many more benefit attached to such entitlement. The rights and interests over the land and property are created and transferred through lawful means and this expression are more than merely entitlement in law.¹⁵ The inclusive expression of land right or right over property justify right to acquire, hold and enjoy property against society rests.¹⁶ The land rights exclude inherently others and gives

⁹ *New York City Housing Auth. v. Muller*, 155 Misc. 681, 279 N.Y.S. 299, 300 (1935).

¹⁰ Ramesh Sunam, *Transnational Labour Migration, Livelihoods and Agrarian Change in Nepal: The Remittance Village*, Routledge (2020).

¹¹ Patricia Munch, An economic analysis of eminent domain, 84 (3) *Journal of Political Economy* 473-497 (1976).

¹² Understanding Reforms in Nepal: Political Economy and Institutional Perspective Institute for Policy Research and Development (IPRAD) IPRAD 1 (Maitighar, Kathmandu, 2005).

¹³ Leo De Haan, and Annelies Zoomers, Exploring the frontier of livelihoods research, 36 (1) *Development and change* 27-47 (2005).

¹⁴ Sanjay Sharma, Shibani Pandey, Dinesh Pathak and Bimbika Sijapati-Basnett, *State of migration in Nepal* (Kathmandu: Centre for the Study of Labour and Mobility, 2014).

¹⁵ Martin Dixon, *Land Law 1* (Cavendish Publishing Limited 1994).

¹⁶ A. Alias & Daud, A payment of adequate compensation for land acquisition in Malaysia, 12(3) *Pacific Rim Property Research Journal* 326-329 (2006).

special consideration to holder/owner as against every individuals.¹⁷ This right has long been practiced and enjoyed on unlimited way but the notion of eminent domain are not supporting these evolved hypothesis in the land jurisprudence.¹⁸ The significance of property can be better understood by those who are not holding any as such and is considered more than merely holding and using. The property and basically immovable in character has many meanings and is somehow in law is considered as sum of rights and in case of tangible property would include the rights of possession and right to enjoy, the right to destroy, the right to retain, the right to alienate and so on.¹⁹ The issues of alienation is very unique and precious in the property jurisprudence. The exclusionary rights are only entertained in the domain of land law and it is seen for protecting the rights of land owner and possessor. This rights can be used against any other as peculiar manifestation of state power. The individual are empowered to enjoy their rights overall land in unlimited sense excluding all other possible.²⁰ The land and any form of tangible property is more than economic assets and encompassing all emotional and sentimental value too.²¹ This leads to perception and understanding of significance of land rights in democratic state.

Whether these issues relating to land rights are under certain limitation imposed by state authorities are somewhere the notion of eminent domain comes into picture.²² There are many judgment where these non-absolute character of lands rights are explained and narrated. The concept of eminent domain is one of justification for limitation imposed on unlimited, unrestrictive uses of immovable or tangible property.²³ It is subject to eminent domain; an inherent right of the State to compulsorily

¹⁷ Sheldon Leader, Janet Dine and Andrew Fagan, Inflating consent, inflating function, and inserting human rights, *Human Rights and Capitalism (Cheltenham: Edward Elgar, Cheltenham)* 28-47 (2006).

¹⁸ William Baude, Rethinking the federal eminent domain power, 122 *Yale LJ* 1738(2012).

¹⁹ *Guru Datta Sharma vs. State of Bihar AIR 1961SC 1684.*

²⁰ Thomas W Merrill, Property and the Right to Exclude, 77 *Neb. L. Rev.* 730 (1998).

²¹ M.P. Jain & G. Xavier, Compulsory Acquisition in Malaysia, 2(xxix) *MLJ* 6 (1996), (Sep. 5, 2024, 07:30 AM), <http://ssrn.com/abstract=2420039>.

²² Larissa Katz, Exclusion and exclusivity in property law, 58 (3) *University of Toronto Law Journal* 275-315 (2008).

²³ Gerald Korngold, For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents, 66 *Tex. L. Rev.* 533 (1987).

acquire private property for common good.²⁴ Again the issues of common good is largely left on legislative and governmental discretion based on standards criteria for acquiring such property. Such as in case *State of West Bengal V. Subodh Gopals*, the property was described as, property to be understood as the corporeal sense as having reference to all those specific things that are susceptible to private appropriation and enjoyment as well as in its judicial or legal sense of the bundle of rights which the owner can enjoy under the municipal law with respect to user and enjoyment of those things to the exclusion of all others.²⁵ Similarly, in case of *Nebbia v New York* (1934)²⁶ the court held neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the harm of his fellows, or exercise his freedom of contract to work them harm.²⁷

The judicial pronouncement is very clear on inherent state authorities to take over private land for the public utilities. The element of public utilities/interest are also based on the nature of acquiring and taking or any other specific indicators developed based on engagement process as well as in the issues of concerns of the authorities.²⁸ The state can obtain the private land with proper observing the just term compensation clause as non-deniable part of the process and the purpose need to be very carefully observed.

The term public purpose is also defined in one of historical judgment by the Supreme Court of Nepal. In the judgment the SC said that, the purpose of acquiring land for the private company to cultivate the sugarcane can't be justified under the *Land Acquisition Act, 1977*. The purpose of acquisition as per this law has to be directly beneficial to larger public and the nature of acquiring purpose is not within the scope of the law. The direct relation need to be established for acquiring the

²⁴ Compulsory Acquisition without Compensation and The land use act page no. 1 (Sep. 5, 2024, 07:30 AM), https://www.academia.edu/6586538/COMPULSORY_ACQUISITION_WITHOUT_COMPENSATION_AND_THE_LAND_U_SE_ACT.

²⁵ *State of west Bengal vs. Subodh Gopal* (1954 SLR 587).

²⁶ Sonu Bedi, *Rejecting Rights 127* (Cambridge University Press, 2009).

²⁷ *Purnabhadhur vs. Land reform office and others*, NKP 2050, D.N. 4696, p.88.

²⁸ Ryan Patrick Alford, *Is an Inviolable Constitution a Suicide Pact; Historical Perspective on Executive Power to Protect the Salus Populi*, 58 *Louis ULJ* 355(2013).

land by the governmental authorities.²⁹ The term public purpose have objective criteria for testing the scope of law so that the government cannot acquire based on their level of convenience and comfortable. Similarly, the SC has also interpreted about the nature and purpose of land acquisition of private individual. In one of historic case about the establishment of public university taking private land was decided as matter of public purpose within the domain of land acquisition law. The nature of engagement of those institution are not for benefiting the individual rather than larger public so SC said the taking of land for this purpose is public in nature.³⁰

CONCEPT OF EMINENT DOMAIN

The state power to of acquiring the private property is principally based on two maxims are often like: *salus populi est suprema lex* (regard for the public welfare is the highest law) and *necessitas publica major est quam privata* (public necessity is greater than private necessity.)³¹ These principles are developed under Romanic legal system, inherited around world and well-practiced by the common legal traditions. The word public welfare is highest moral responsibility of the state and require well reflection of consideration while dealing with the private property. The state are under obligation to consider the public interest as justification of takings and using it for larger benefit. By the principle of eminent domain, the state has inherent rights to take and appropriate the private property belonging to individual citizens for public purpose.³² A principled takings doctrine has three components, *dealing with efficiency, equity, and political legitimacy*.³³ These three principles are substantially required to prove in every takings by the state authorities for said public purpose in the cause of action. The material observation of these principles are more needed for taking the property of individuals. *Hugo Grotius*, regarding Eminent Domain says, "...The property of subjects is under the eminent domain of the state, so that the state or he who acts for it

²⁹ *Netraraj Uppadhya Pandey vs. HMG*, NKP 2025, D.N. 448.

³⁰ *Kedar Bahadur Poudel vs. HMG*, NKP 2055, Vol.7. D.N. 6563.

³¹ Law of Acquisition and Requisitioning of Land, 10th Report of Law Commission of India, p.1.

³² *Charanjit Lal vs. Union of India* AIR 1951 SC 41.

³³ Susan Rose-Ackerman and Jim Rossi, *Takings Law and Infrastructure Investment: Certainty, Flexibility and Compensation* (August, 1999).

may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a 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 property . . . Nor will the state, though unable to repair the losses for the present, be finally released from the debt, but whenever it possesses the means of repairing the damages, the dormant claim and obligation will be revived.³⁴

The expression 'eminent domain' seems to have been first used in 1625 by the international jurist *Hugo Grotius* in his work *De Jure Belli ac Pacis*,³⁵ now it is accepted principle of constitutional law in almost all important countries.³⁵ The principle is not only limited to constitutional law rather has expanded on every occasions of the state authorities. These principles are also observed in case of Nepal like in *Netra Raj Pandey V. Prime Minister and Cabinet Office*, Kathmandu.³⁶ The SC said, the right relating to article 9(2) is fundamental rights of citizen and rights of Eminent Domain of state. Both the right need to be properly read together so that the benefit can be given to larger community. The SC further said, rights of Eminent Domain mean 'state have the sole and exclusory rights over all kinds of property of individual. The notion of Eminent domain of every sovereign state are exercised under two conditions.³⁷ Among the conditions first is private property shall be only acquired for public work that benefits public and second condition when taking the private property the owners shall be provided just, prompt, adequate and effective compensations.³⁸

ELEMENTS OF EMINENT DOMAIN

Amendola F.C defines Eminent Domain under following way...it is the right of the nation or state, or of those to whom the power has been

³⁴ Grotius, *De Jure Belli ac Pacis*, Book. Vol. III, chapter 20.

³⁵ *Chiranjit Lal Choudhary v. Union of India*, AIR 1951 SC 41, 54.

³⁶ *Netra Raj Pandey vs. Prime Minister and Cabinet Office*, NKP 2066, D.N. 8170, p. 978.

³⁷ Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 *Yale LJ* 221 (1931).

³⁸ Richard A. Epstein, *Takings: Private property and the power of eminent domain* (Harvard University Press, 1985).

lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property without the owner's consent on paying the owner a due compensation to be ascertained according to law.³⁹ The source of private property need to be justified and this expression have many variations. If state has this power of taking, the taking must not be unlawful, should be based on due process of law along with other procedural requirement needed in the entire process of acquiring. The need has to be established for the purpose of infringing on the rights of individuals and there is need to make proper balance between the individual interests versus public interest. The law must not create friction or tussle rather need to work as instrument of minimizing such contest and conflict. There is no doubt that state has no power to take private property but whether the taking could be arbitrary, discretionary or any other beyond rule of law matrix need to be tested in the perspectives of eminent domain. The principle is not only limited to taking or not taking rather is much more than such authority. The every action in the process need to be carefully examined and tested for the purpose of exercising such authority by state or any delegated authorities of state. There are two conditions seen practically in process of acquiring land for the public utilities for justification of state inherent power under the principle of eminent domain.

Eminent domain as inherent right of state

The notion of right requires sources and the way labour is considered as source for private property of individual. The source of eminent domain as right to the state need to be well justified and explained. The state is traditionally empowered as major stakeholder and hence this development was also considered as logical and need based. The traditional functions of state for the protection and restoration of the natural environment as well as more than said role are seen as well-developed parts in the law.⁴⁰ In English practice, the Privy Council held that it is only the government which would be the sole judge as to the question of

³⁹ F. C. Amendola & et al. (eds.), *Eminent Domain Corpus Juris Secundum*, 29A C.J.S., 2006.

⁴⁰ FAO 2008, *Compulsory Acquisition of Land and Compensation*, FAO Land Tenure Studies, 10 Rome: Food and Agriculture Organization of the United Nations, p1.

public purpose.⁴¹ Whether the content of public purpose would be filled with judicial pronouncement or not was a long debate in land acquisition law and also old question in common legal traditions? ⁴²It is yet need to be decided but largely agreed this is prerogative authority of the state to consider the constituent element of public purpose while acquiring the land for the public purpose. But the court has said the right to state as eminent domain is well developed and materialized.⁴³ The SC of Nepal has also further said in one of historic judgment about the right to acquire land for the public purpose. The authority as per the land acquisition law is vested with the government not with the local level bodies. The nature and purpose may be for the public but since unauthorized taking over the property will constituent beyond the limitation imposed by the law. The local level bodies are not empowered to acquire land for the purpose of building hospital at local level.⁴⁴

Public Purpose

The expression of term public purpose is seen common to all taking process and is mandatory construed as part of law but failing to define the element of it so taking property and building ministers quarter was also justified as part of public purpose. The evolutionary character of this aspects need to be well analyzed and then only the justification will be realistic and convincing for the looser of land. The sentences like anything that would promote the welfare of the people would constitute a public purpose.⁴⁵ The term welfare is very subjective and even the public purpose itself is more vague and ambiguous in nature. This require qualifying criteria for the purpose of enduring any action on this cause. The expression public purpose ‘would include a purpose in which the general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned.⁴⁶ It was held that public purpose would include a purpose in which the general welfare of the

⁴¹ *Ezra vs. Secretary of State for India-in-Council (1905)23 IA 93(PC).*

⁴² Francis S. Philbrick, Changing conceptions of property in law, 86 *U. Pa. L. Rev.* 691 (1937).

⁴³ James Geoffrey Durham, Efficient just compensation as a limit on eminent domain, 69 *Minn. L. Rev.* 1277 (1984).

⁴⁴ *Laxmi Narayan Singh vs. PradhanPanch (Local Bodies Chief), NKP 2046*, Vol. 1. D.N. 3709.

⁴⁵ *State of Bihar vs. Maharajadhiraj Sir Kameshwar Singh, [1952] SCR 889.*

⁴⁶ *Somavathi vs. State of Punjab AIR1963 SC 151; 1963 SCR (3) 774.*

community as opposed to the particular interest of the individuals is directly and vitally involved.⁴⁷ This explanation is not well seen in many cases. But it is said that the eminent domain principle is only applicable for the greater good of humankind than individual interest. The conflict are also on the subject matters of public purpose versus private consideration so that the eminent domain rights need to be carefully exercised based on real necessity than considering it as tool of politics. The government must not use this right as in populist way rather has to have meaningful impact on public.

THEORIES OF EMINENT DOMAIN

Matthew Harrington,⁴⁸ has identified the following theories conceiving the issues of eminent domain as in land law—reserved right of the sovereign; eminent domain as—inherent right of the state; and the eminent domain power emanates from—consent of the governed.

Reserved Rights Theory

This theory assumes that an individual's ownership of property is merely possessory right and ownership is government or state. The state has right to take private property for the public benefit hence this reserve nature of property are with state. State can use their power in lawful manner for the effective benefit of larger public so that the balance of interest can work.⁴⁹ The consequence of such a reserved-rights theory is that it has the potential to deny compensation to the landowner and to eliminate the necessity of going through all the judicial procedures. The clearest objection to this theory had come from latter American courts, for whom reservation of rights in the sovereign sounds too much like feudalism.⁵⁰ According to this theory, a citizen's possession of property is subject to an implied reservation that the state might retake the property at any time for a public purpose.⁵¹

⁴⁷ *Ram Kumar vs. State of West Bengal AIR 1963 Cal. 534.*

⁴⁸ M. P. Harrington, "Public Use" and the Original Understanding of the So-Called "Taking" Clause (2001) (Jan 5, 2016, 08:45 AM), http://ssrn.com/abstract_id=316595.

⁴⁹ W. Ambaye Daniel, *Land Rights and Expropriation in Ethiopia*, Springer Theses (2015).

⁵⁰ *Beekman vs. Saratoga R.R. Co.*, 3 Paige Ch. 45, 73 (N.Y. 1831).

⁵¹ P. Nichols, Sackman J. & *et. al.* (eds), *Nichols on Eminent Domain* Matthew Bender & Company 100 (2007).

Inherent Powers Theory

The notion of this theory starts with notion of force and concept of police power with the state agencies. The state has inherent authorities to take the private property for the public purpose. The notion of eminent domain is also reflection in same way.⁵² The power of eminent domain is an inherent attribute of sovereignty and the notion of sovereignty is not based on any other qualifying criteria rather by fact with the state and it is beyond any constitutional and legal recognition by any such agencies.⁵³ The state has unlimited power by virtue of its existence and has contributed for the development of public purpose at large. The state authorities are more empowered for the social welfare and also for the consideration of general public at matter of facts rather than the issues of law. The inherent powers theory is also reflection of such practices. The SC of Nepal had made historic contribution through establishing the element of just term compensation as part of judicial intervention. The GoN have right to acquire the land or private individual for the public purpose as per land acquisition law. The process must follow the step given in the law and also must reflect the objective criteria and must go hand in hand with project issues. The issues of compensation is not an isolative phenomenon so it must reflect the overall purpose of the law and must relate with the essence of this subject.⁵⁴

LIMITATION OF THE POWER OF EMINENT DOMAIN

The limitation over the authority of state is largely based on procedural aspects as well as major purpose of such takings. There are no doubts that state is ultimate authority on every natural resources and have unlimited exercise of authority over them so the necessity and process need to be more fair for the effective implementation of this rights. The law enacted by state can impose few restrictions while exercising such authority to confiscate private property for the public purpose such as the taking must be for a public use, and just compensation must be paid to

⁵² *Ibid.*

⁵³ The Public Use Limitation on Eminent Domain: An Advance Requirement, 58 Yale L. J., pp. 599–614.

⁵⁴ *Yagya Prasad et al. vs. Ministry of Urban Development, NKP 2075, Vol.9, D.N. 10102.*

the owner.⁵⁵ The state has autonomy to decide the matter such as public purpose not based on their discretion rather on global mobility on the subject matters. The state has to really satisfy all those criteria for the effective reflection of such authority. The state may come in confrontation with issues in case not observing these conditions⁵⁶. In practice the Courts have generally placed limitations on the grounds of review as follows.⁵⁷

- a. A public purpose that is only apparently public purpose but it is in reality private purpose or other collateral purpose.
- b. An acquisition without following the procedure established under the Act
- c. When the acquisition is unreasonable or irrational.
- d. When acquisition is not a public purpose at all and the fraud on the state is apparent.
- e. Malafide intention on the part of the government is an important test on which the purpose of acquisition has to be tested for its validity.⁵⁸

CONCLUSION

The eminent domain is state authority to take private land for the public purpose. The taking needs well and careful observation of need and also follow procedural fairness as part of the process. The inherent rights of taking is also seen as regular part of the state authorities for the public purpose. The development of eminent domain concept is as long as state formation have begun so that many theoretical perspectives are on the discourse of eminent domain. The reflection of such issues are broadly well justified in the legal requirement as part of the domestic law. The legal criteria need to be well understood in the process of acquiring land for the public purpose. The issues of just term compensation is also important for the effective enforcement of eminent domain notion. The taking lawful authorities need to be provide adequate and just compensation to aggrieved party for the effective execution of this issues.

Hence, the eminent domain concept is significant in land acquisition law.



⁵⁵ *Ibid.*

⁵⁶ *Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chennai*, AIR 2005 SC 3520.

⁵⁷ *Sooram Pratap Reddy and others vs. District Collector, Ranga Reddy Dist and others* (2008) 9 SCC 552.

⁵⁸ *Somavanti vs. State of Punjab*, (1963)2 SCR 774, 804-5.