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History of eminent domain in India

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Abstract
This paper explores the history of land acquisition in India by focusing on colonial traces, the emergence, development and various legal justifications of the principle of eminent domain under East India Company rule. It also throws the light upon the workings of the reality that law construct and enacted in devising the principle of eminent domain.

Keywords: land acquisition, colonial rule, legal, land revenue, rehabilitation and resettlement etc

Introduction: History of Eminent Domain in India

This article explores the prehistory of the LAA of 1894 to trace the emergence, development and various legal justifications of the principle of eminent domain under the East India Company (EIC) rule. By focusing on the case of colonial Calcutta, it argues that, if ideas of wasteland were instrumental in laying claims to agricultural land but the EIC in certain parts of India, then alluvial land accretions in the volatile river basin of Ganges Delta laid the basis for articulating the eminent domain principle when it came to urban land.

Thus, LAA (Land Acquisition Act) is now RTFCTLARA (Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act), and this has a tentacle which weaves in multiple acronyms, a major one being PAP or project affected person. This is all part of the process of legislating for justice in a "land-deficit people-surplus nation [1].

After independence, the LAA remained statutory in nature till the government undertook large-scale land distribution from the 1950.' The recent revisions to the LAA of 1894, Land Acquisition, Rehabilitation and Resettlement (LAAR) Bill in 2011 passed by the Ministry of Rural Development (MORD) and its most recent manifestation as the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (RTFCTLARR) Bill of 2012 have hugely expanded the scope of "public." More importantly, these revisions have incrementally whittled down the "consent" clause for land acquisition as a capital-hungry nation staggers violently to "remake" India, through the project "Make in India," consisting of building 100 smart cities, and the 1,483-kilometre stretch of the. Delhi—Mumbai Industrial Corridor (DMIC).

This paper, instead of tracing the afterlife of the LAA, which has already been undertaken traces prehistory of the LAA; how regulations and codes enacted by a corporate sovereignty impinged upon the realm of law under the crown. It also focuses on the disparate moments, legal, bureaucratic and often extralegal methods employed to enact land acquisition and justifies the existence of eminent domain principles in pre-colonial in order to document the processes and narrative fictions that coalesced into our present understandings of state's relation to land and law's relation to ethics. Through this brief study, this paper throws light upon the workings or the "reality" that law constructs and enacts, often in counter-intuitive manner [2].

These recent revisions and articulations of land acquisition laws, which are not only reshaping the landscape of a shining India, but also unleashing dispossessions at an unprecedented scale and restructuring relations between state and citizens necessitate a return to understanding the gaps between law and justice on the one hand, and state relations to land on the other [3]. They also necessitate us to inquire more closely into the premise from which we have been asking whether there can be just land acquisition. In order to briefly address the question of justice or ethics from within the space of law, it is necessary to first turn to the opening paragraph of the Tenth Report of the Law Commission of India, Law of Acquisition and Requisitioning of Land (1958) dealing with land acquisition. A significant legerdemain occurs in this opening statement through which the questions of both justice and ethics were rendered inconsequential within the domain of land and rights to property in the Constitution [4].

The power of the sovereign to rake private property for public use (called in America Eminent Domain—an expression believed to have been first used by Grotius and the consequent rights of the owner to compensation are well-established. in justification of the power, two maxims are often cited: salus populi est suprema lex (regard for public welfare is the highest law) and nccessitas republica major est quam private (public necessity is greater than private necessity). A critical examination of the various stages of evolution of this power and its ethical basis will serve no useful purpose as the power has been established in all civilized countries (Tenth Report on Low Commission of India 1958).

This paper does not hope to provide definitive answers to these questions, but lays the groundwork to think critically

[1] Ramesh, Jairam and Muhammad Ali Khan (2015): Legislating for Justice: The Making of the 2013 Land Acquisition Law, New Delhi: Oxford University Press.

[2] Bose, Prasenjit (2013): A Land Acquisition Bill with Many Faultlines." Economic and Political weekly, XLVIII, Nos 26-27.

[3] Chakravorty, Sanjay (2013): The Price of Land Acquisition, Conflict, Consequence, New Delhi: Oxford University Press.

[4] The Tenth Report of the Law Commission of India 1958.

about the state's relation to land (and landlessness). Is the state—land relationship one of ownership, of trusteeship, one capital extraction, or all of them? There was perhaps never one defining relation between the state and land. Scholars have argued that only with the 1984 amendment of the LAA did an open neo-liberal agenda with vastly expanded scope of eminent domain begin to gain ground [5].

The evocation of "public" purposes as one of the primary bases for eminent domain emerged only gradually. Moreover, the analysis also reveals that eminent domain principles go back at least 80 years prior to the LAA of 1894, and extensive legal debates about the existence of the provisions for sovereign claims to land were raging around the turn of the i9th century. In order to unravel the question about how the state visualize its relation to land in law and practice, I will first address two particular omissions from the Constitution which will frame the article: omissions related to the fundamental right to property and the statutory authority to grab land.

The 25th amendment of the Constitution in 1971 omitted Article 31(1), following the Supreme Court judgment popularly known as the Bank Nationalization Case. Article 31(1) guaranteed that 'No person shall be deprived of his property save by the authority of law, where the authority of law emanated only when the Parliament or state legislature passed an act, and not by executive order or fiat. It also solidified a legal process of eroding the obligation to define and pay compensation for acquisition that had begun a decade earlier. The multiple and gradual instances of citizens being stripped of their rights to their property or the right to demand just compensation were well underway for over a decade [6].

Defining just and correct compensation began as early as in 1954 in the State of West Bengal v. Mrs. Bela Banerjee and Others (1953). The litigation defined compensation as the duty of the legislature to "ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of." However, within a year, the Parliament passed a bill to amend Articles 31, 31A and the Ninth Schedule to the Constitution under the Fourth Amendment Act of 1955. The reasons behind these amendments were stated as follows:

Recent decisions of the Supreme Court have given a very wide meaning to clauses (i) and (2) of Article 31. Despite the difference in the wording of the two clauses, they are regarded as dealing with the same subject. The deprivation of property referred to in clause (i) is to be construed in the widest sense as including any curtailment of a right to property. Even where it is caused by a purely regulatory provision of law and is not accompanied by an acquisition or taking possession of that or any other property right by the State, the law, in order to be valid according to these decisions, has to provide for compensation under clause (2) of the article. It is considered necessary, therefore, to re-state more precisely the State's power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in deprivation of property.' This is sought to be done in clause 2 of the Bill.

Thus, the Parliament redefined compensation as a fixed amount and "specified that the principles on which, and the manner in which the compensation was to be determined or given could not be called in question in any court on the ground that compensation provided by the law was not adequate. The debate about compensation did not end with that and continues to remain relevant contentious and unsettled even to this day [7].

Prehistory of the LAA of 1894

From 1793, contemporaneous with the Permanent Settlement of Bengal to 1834, a year after the Governor General of India was vested with extensive legislative powers, the merchants of the EIC passed 675 regulations. Of these, 78 continued to be in force, either wholly or partly, even following the British Raj's assumption of power in 1857. Although the 23rd section of the 21St Geo.III, Cap.70 passed in 1781, vested powers in the Governor General and the Council to frame regulations from time to time, it was not until 1793 that Governor General Marquis Charles Cornwallis attempted to give a formal shape to the legislative functions in the eastern colony. As scholars have noted, these new powers introduced statutory laws relating to land and property in Britain's overseas empire [8].

Land Legislation in India

One of the earliest pieces of legislation with respect to the acquisition of property was passed under the Bengal Regulation 1 of 1824:

A Regulation for enabling the officers of Government to obtain at a fair valuation land or other immovable property required for roads, canals or other public purposes, and for declaring in what manner the claims of the zamindars and of the officers in the Salt Department are to be adjusted in certain districts, where lands are required for the purposes of salt manufacture.

As stated within the regulation, it applied 'throughout the whole of the provinces immediately subject to the Presidency of Port William." Almost a quarter century later with the expansion of railways, the British passed act I of 185o to extend the provisions of the land acquisition law to the town of Calcutta "with the object of confirming the title to lands in Calcutta taken for public purpose" In Bombay, on the other hand, it was the 1839 Building Act XXVIII which for the first time enacted land acquisition legislation "for the purposes of widening or altering any existing public roads, streets, or other thoroughfare or drain or for making any new public roads, street or thoroughfare within the island of Bombay and Colaba" (LCI 2). A similar Railway Act XVII of 1850 followed the previous act in order to facilitate the transfer of land to railway authorities in the presidency town. In Madras, the trajectory was again slightly different and land acquisition laws were not enacted till the 1852 Act was passed.

Finally, following the crown takeover in 1857, one of the first acts was passed that sought to legally encode the territory of British India, which repealed all the earlier laws pertaining to acquisition. The premise of the 1857 Act was that sought to make "better provision of the acquisition of land needed for public purposes within the territories in the possession and under governance of the East India Company and for the determination of the amount of

[5] Ramanathan, Usha (2011): Land Acquisition, Eminent Domain and the 2011 Bill, Economic and Political weekly, XLVI, No.44-45.

[6] Rustom Cavasjee Cooper vs. Union of India AIR 1970 SC 564 : (1970) 3 SCR 530 : (1970) 1 SCC 248

[7] State of West Bengal v. Mrs. Bela Banerjee and Others 1954 AIR 170 1954 SCR 558

[8] Guha Bernard S (1996): colonialism and Its Forms of Knowledge: The British in India, Princeton University Press.

compensation to be paid for the same.

The 1824 Regulation I of the Bengal Code had two purposes, one was to acquire land at a “fair price" for the construction of "roads, canals, or other public purposes, and the second one dealt with the contentious issue of land- required for salt manufacture. The first purpose gave the EIC rights to acquire “private property” at a time when it only- had rights to tax, draw revenue and trade. This consolidated the various forms of legal machinations that enacted everyday forms of conquest by wresting land (and not just extracting revenue) from the indigenous populations. With the coming of the Indian Railways during the first half of 1850s, and the subsequent changes to the laws pertaining to acquiring private property expanded the scope of the public. The 1850s regulation mentioned above in the Bengal, Bombay and Madras presidencies enabled the Company, for the first time, to acquire private property in the name of public purposes on behalf of private companies. Is this a colonial version of what we today call a PPP? Finally, Act IV, the LAA of 1870: An Act for the Acquisition of Land for Public Purposes and for Companies equated public and private interest in the expansion of the colonial state’s eminent domain. These rulings leading up to the 1894 LAA entirely remapped state authority, the subject’s rights and legal scope of the question arises upon what rights-whether natural on liberal-through which colonial officials sought to justify their right to eminent domain? What forms of eminent domain principles existed, if at all, prior to the coiming of the British? How were new legal fictions enacted to produce eminent domain in Britain’s Eastern colony under the guise of just and fair rule? Before turning to bureaucratic reasoning and extralegal architecture employed to get land for the construction of the Strand Bank in Calcutta, let us briefly turn to how both British and Indian legal scholars read and understood the existing laws pertaining to state or eminent domain [9].

Phillips discerningly points out that, in the absence of written material, an investigation into the practiced law revealed that cultivated land was the property of him who cut away the wood, or who cleared and tilled it [10].

Although he argues that, based on the extant textual sources, while it was not clear whether the owner had rights to the soil, or only to its produce, it was nonetheless emphatically stated that the sovereign’s right did not go beyond “one-eighth, one-sixth or one- t These numbers changed according to prosperity, war and urgent necessities that a king might encounter. Given that, the king’s rights over land are restricted only to the produce of the land, or the minerals under the earth, Phillips concludes that this would seem to indicate something less than an absolute or exclusive right to the soil in either (king, or the tiller). The share of the king is what we shall meet with in all our future enquiries as the land revenue.

Phillips was not the first British official to point out the misrecognition of propriety rights upon which the EIC built up its revenue system. A similar claim can be found in a contemporary work by a Bengal civil servant and legal scholar C D Field, who is perhaps most well-known for his book, The Law of Evidence in British India. After mentioning the impossibility of ascertaining property rights and noting the “asperity” with which the debate about land tenure in India was conducted, Field then demonstrates that the entire debate rests upon a fallacious premise. In his chapter on “The Tenure of Land in the Bengal Presidency,” attached to the Regulations of the-Bengal Code Book (1875), he says.

And so it happened that to the English Gentleman—possessed of marvelous energy, great ability, the highest honesty of purpose, and spotless integrity, but destitute of that light which alone could have guided them to the truth—fell the task of solving this problem (of understanding existing land tenure). And the solution appeared to them to depend UOH the answer to this question—’who owns the land [11]?

There is reason to believe that the first administrators of the Company’s territory in India had similar vague notions of the law of real property in their own country. A very strong indication of this is the use of the word ‘estate,’ which in legal phraseology means the quantity of interest in realty owned by an individual, the aggregate of the rights over land vested in particular person. The dimension of this interest may vary very considerably, e g, an estate for life, an estate-tail, an estate in fee-simple, none of which phrases carried the idea of owning the land itself. (...) In popular phraseology the word ‘estate’ is applied to the land itself, and this is the way in which it was applied in India by the first administrators, and has continued to be applied down to the present hour (see the Bengal Regulations passim, more generally. Had they started with the right use of the word, they would not have searched for an ownership which they never found, because no such things ever existed: but would have sought to discover what were the ‘estates’ in land in India; and it would soon have been clear to them that no estates existed similar to those in England; that the carving was in fact done on a different principle, the thing cut up being the same in both countries, but the English system of cutting being different, more exact and intricate.

The Sovereign’s Right in Land

In this section I turn to an unpublished report from the judicial proceedings of the Bengal Presidency which, in spite of not being part of the published laws discussed in the earlier sections, had a thick afterlife in the everyday practices of power enacted by the Company.

Around 1804—05, the River Hooghly started changing in its course as it flowed to the Bay of Bengal, resulting in the sedimentation of “shoals and mudflat” along Calcutta’s western bank. Calcutta, located at the edge of this active delta, was exposed to the vagaries of the shifting river course. The deposit created a large strip of land and rendered obsolete the first survey of urban property conducted by the revenue officials in 1797.” The decades following the emergence of the strip of land, especially from 1820 to 1860, marked a crucial period in establishing and amending land acquisition laws in Bengal and the creation of the idea of eminent domain, By the 1820s, the Hooghly had meandered so far West that it had deposited alluvial land approximately four miles long and roughly half a mile

[9] Singha, Radhika (1998): A Depositism of Law: Crime and Justice in early Colonial India, Delhi Oxford University Press. Waherbook, David (1981)” Law Agrarian Society in Colonial India” Modern Asian Studies 15(3):648-721.

[10] Philips Arthur (1874-75): The Law Relating to Land Tenure of Lower Bengal, Tagore Law Lecture Series.

[11] Field, C D (1875): The Regulation of Bengal Code in Calcutta: Thaker and Spink.

wide along the western banks of Calcutta [12].

The British attempted to transfigure these heterogeneous communal spaces of the riverbank or ghats along this stretch into clearly demarcated public space and simultaneously codified Customs into a legal system [13].

The codification was coterminous with the production of a market in land, and the market masqueraded as the colonial idea of the "public." one that ran B.C. regulated, measured and disciplined [14].

We are of the opinion that it is indisputably the property of the State and it would be advisable to adopt measures for raising it With a view to the appropriation of it to public purposes. We are not aware that any claim is likely to be seriously maintained to this spot though it has been occasionally used for the deposit of old guns and anchor, and thus a dubious sort of occupancy has been exercised over a part of it by Messer's Clarke and Co on behalf of Mr Johnson. It may nevertheless be proper to state the grounds on which we consider the title of Government to it to rest [15].

The eminent domain principle and justification for land grabs was perhaps never articulated more clearly and bluntly. Through these bureaucratic manoeuvres, merchants of a joint stock company turned themselves into landlords and laid the "legal" groundwork for land acquisition in the colony.

Two decisive aspects of colonial law and economy converge here: on the one hand, there was the attempt by the Company agents to initiate a process whereby a heterogeneous body of ownership practices was condensed into contractual paper- based exchange and establishment of rights. On the other hand, the slippage between the terms interchangeably used in the report points to the operation 'of colonial power as corporate sovereignty—as the Company. In the course of the report becomes the zamindar, then the government, and finally, the State. This deliberate slippage throws light upon the unique political power of the Company—Stare and how it calibrated its status "between positions of deference and defiance, between claims to be a "mete merchant" and an independent "sovereign" [16]

Conclusion

To conclude, let us return to the omissions with which I began the article. The fundamental right to property undone by an expanding scope of eminent domain doctrine, first enacted feebly in the name of distributive justice in the 1950s, and later more emphatically in the name of administrative efficiency from the 1970s, and finally, violently under neo-liberal development and growth in the last decade. Even if scholars have turned to the exceptional status of eminent domain laws the LAA to RTFCTLARRA, perhaps a far grimmer proposition can be found in the recent argument "that under the Constitution eminent domain is not exceptional power that the right to property is not a fundamental right" (Sampat 2013: 47, emphasis mine). If there were ever any radical potential to rethink eminent domain Principle for land redistribution, that was decisively foreclosed in the 1958 Tenth Law Commission Report, which declared an examination of the "ethical basis" of eminent domain laws as, at best, superfluous. Given this foreclosure, perhaps it is more important to document the moments, where the ethical question or questions of justice were repeatedly undermined, or declared given evant in the face of a pragmatic solution based on custom, whether real or invented.

[12] Territories Department Report 1820: Section 15

[13] Cohen, Bernard S (1996): Colonialism and its Forms of Knowledge: The British in India, Princeton University Press.

[14] Birla, Ritu (2009): Stage of Capital: Law, Culture, and Market Governance in Late Colonial India, Dhrum Duke Un Press.

[15] Territories Department Report 1820: Sections 27—28

[16] Stern, Philip J (2011). The Company – State: corporate Svereignty and Early Modern Foundation of The British Empire in India, New York: Oxford University Press.

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6. Rustom Cavasjee Cooper vs. Union of India AIR 1970 SC 564: (1970) 3 SCR 530: 1 SCC 248, 1970.
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