


# The Peculiar Circumstances of Eminent Domain in India

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# The Peculiar Circumstances of Eminent Domain in India

## **Abstract**

The question of a constitutional property regime governing eminent domain gave rise to nuanced and principled debates in the Constituent Assembly of India, which drafted the Indian Constitution between 1947 and 1950, and in subsequent Parliamentary meetings regarding constitutional amendments. However, these extensive deliberations resulted in a clause that only addressed the most superficial aspects of property rights in India. Similarly, the statutory frameworks that govern state acquisition of land, in particular The Land Acquisition Act, 1894, provide only another part of the puzzle. This paper starts earlier in history-at the inception of eminent domain in India-in order to put this institution into its colonial context. I argue that this concept of compulsory land acquisition by the government, as inherited from the British and encapsulated in the Constitution, statutory law, and in practice, is inappropriate for the reality of how property rights are held and exercised in India and incapable of being reformed toward the socially inclusive purposes for which property rights were originally included in the Constitution. Because of this discord, efforts to re-formulate the law of eminent domain continue to fall short of real transformation of the property rights regimes in India.

## **Keywords**

Eminent domain; Right of property; India

## The Peculiar Circumstances of Eminent Domain in India

PRIYA S. GUPTA \*

The question of a constitutional property regime governing eminent domain gave rise to nuanced and principled debates in the Constituent Assembly of India, which drafted the Indian Constitution between 1947 and 1950, and in subsequent Parliamentary meetings regarding constitutional amendments. However, these extensive deliberations resulted in a clause that only addressed the most superficial aspects of property rights in India. Similarly, the statutory frameworks that govern state acquisition of land, in particular *The Land Acquisition Act, 1894*, provide only another part of the puzzle. This paper starts earlier in history—at the inception of eminent domain in India—in order to put this institution into its colonial context. I argue that this concept of compulsory land acquisition by the government, as inherited from the British and encapsulated in the Constitution, statutory law, and in practice, is inappropriate for the reality of how property rights are held and exercised in India and incapable of being reformed toward the socially inclusive purposes for which property rights were originally included in the Constitution. Because of this discord, efforts to re-formulate the law of eminent domain continue to fall short of real transformation of the property rights regimes in India.

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La question d'un régime de propriété constitutionnelle régissant le droit d'expropriation a suscité des débats nuancés et empreints de principes à l'Assemblée constituante de l'Inde (organisme qui a libellé la constitution de l'Inde entre 1947 et 1950), ainsi que lors des séances ultérieures du Parlement traitant des révisions constitutionnelles. Cependant, ces longues délibérations ont débouché sur une clause qui n'abordait que les aspects les plus superficiels du droit de propriété en Inde. De même, le cadre juridique qui régit l'acquisition de terres par l'État, en particulier la Land Acquisition Act, 1894, ne représente que l'une des nombreuses parties du puzzle. Cet article remonte plus loin dans l'histoire – soit à l'entrée en vigueur du droit d'expropriation en Inde – afin de tenir compte du contexte colonial de cette institution juridique. Je fais valoir que ce concept de l'acquisition obligatoire de terres par le gouvernement, tel qu'il a été hérité des Britanniques et tel qu'il est enchâssé dans la Constitution, le droit législatif, ainsi qu'en pratique, est inapproprié face à la réalité et à la façon dont les droits de propriété sont détenus et exercés en Inde, et à l'impossibilité de pouvoir les réformer à des fins socialement inclusives pour lesquelles le droit de propriété avait été inclus dans la Constitution. En raison de cette discordance, les efforts visant à reformuler le droit d'expropriation continuent à ne pas conduire à la transformation véritable des régimes des droits de propriété en Inde.

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**THIRTY KILOMETERS FROM DELHI, INDIA**, in the midst of wheat fields in Badhkhalsa, Haryana, a green and white sign is posted: "This land belongs to the government. No Entry."<sup>1</sup> Except for the recent addition of the sign, the fields and the view to the east have been an unchanged landscape for centuries. On

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1. Author's translation. The information regarding Badhkhalsa village presented in this article is from various interviews and clinical work completed during 2010–2011, the court papers from that village's suit against the government, and several local news articles as cited within.

a small hill to the west of the sign are the burnt remnants of a shack and tractor—reminders of a clash with government officials seven years ago. To the south of the sign are gleaming white high-rise buildings and a dusty construction site that wouldn't look out of place in Tokyo or New York. To the east, down a partly paved road, is the village of Badhkhalsa itself, and further on (at the time of writing) a group of men at the side of the highway to Delhi sit in protest to the appropriation of their land.

These pictures—of the fields, the tractor remains, the buildings, the protest, and the sign—are worth far more than a thousand words in depicting property rights in India. They have led me to a simple assertion: It is unclear what kind of public purpose is being furthered by land acquisition for 'development.' One would only have to survey a few conflicts on the ground to reach this conclusion. Aside from the burnt tractor in Haryana mentioned above, one might point to the killing of two police officers attempting to exercise government acquisition of land for a highway in Noida, Uttar Pradesh,<sup>2</sup> or the protracted battles for recognition of tribal rights to land in the eastern state of Jharkhand. I discuss the latter example in Part IV.

The question of a constitutional property regime governing eminent domain<sup>3</sup> gave rise to nuanced and principled debates in the Constituent Assembly (the body that framed the Indian *Constitution*<sup>4</sup> between 1947 and 1950) and in subsequent Parliamentary meetings regarding constitutional amendments. However, these extensive deliberations resulted in a clause that addressed only the most superficial aspects of property rights in India. Similarly, the statutory frameworks governing state acquisition of land, in particular *The Land Acquisition Act, 1894 (LAA)*,<sup>5</sup> are important but provide only another piece of the puzzle.

This paper traces India's current property regime back to an earlier point in history—the inception of eminent domain in colonial India—in order to establish the colonial context for my argument. I argue that this concept of compulsory land acquisition by the government, as inherited from the British and encapsulated

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2. "2 cops killed in clashes with farmers in Gr Noida, 1 farmer also dead," *Indian Express* (7 May 2011), online: The Indian Express <<http://www.indianexpress.com/news/noida-land-battle-2-policemen-killed-in-clashes-with-farmers/787234/>> [Greater Noida].
  3. I use the term "eminent domain" in this article as a generic term for the power of a public authority to take private property for public use, usually upon payment of compensation. The specific terms used to describe this power vary across legal systems, including appropriation, compulsory acquisition, compulsory purchase, expropriation, and eminent domain.
  4. *India Const*, 1950 [*India Const*].
  5. *The Land Acquisition Act, 1894*, No 1 of 1894 [*Land Acquisition Act, 1894*].

in the *Constitution*, in statutory law, and in practice, is inappropriate given the reality of how property rights are held and exercised in India. These rights appear incapable of being reformed to foster realization of the socially inclusive purposes for which they were included in the *Constitution*. As a result, efforts to reformulate the law focusing on current forms of eminent domain continue to fall short of genuine transformation of the property rights regime in India.

Dipesh Chakrabarty has discussed how European thought is “both indispensable and inadequate in helping us to think through the various life practices that constitute the political and the historical in India.”<sup>6</sup> In his book *Provincializing Europe*, he sets out to “[e]xplor[e]—on both theoretical and factual registers—this simultaneous indispensability and inadequacy of social science thought” as well as “how this thought—which is now everybody’s heritage and which affect us all—may be renewed from and for the margins.”<sup>7</sup>

This article attempts to “provincialize” eminent domain by arguing that its origins, its use, its disparities from the reality of property in India, and various examples of resistance to it demonstrate that eminent domain is and has always been an ill-fitted institution for the purposes of structuring the property regime in India. In short, the theory behind eminent domain understands the relationships between land, state, citizen, corporation, and community<sup>8</sup> as they might have existed in colonial India and is out of place in a democracy purporting to be committed to social justice.<sup>9</sup> The doctrine was introduced more than a hundred years ago to further colonial interests. Its operation rests on a number of assumptions that have not proven true in the Indian context. My argument is not that the system needs tweaking or that eminent domain fails in just a few instances. Rather, I critique the institution historically, constitutionally, statutorily, and in practice. This is not to say that India should move away from a liberal system of property rights or attempt to go back in time with regard to how property is held. I am, however, advocating for a hard look at eminent domain that calls it into question at the institutional level, as opposed to attempting to fix it by tweaks or adjustments.

Part I of this paper draws from Dipesh Chakrabarty’s characterization of Indian history to establish the terms of my argument. It then presents a brief history of the particular form of eminent domain operating in India. This history

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6. *Provincializing Europe: Postcolonial Thought And Historical Difference* (Princeton: Princeton University Press, 2000) at 6.

7. *Ibid* at 6, 16.

8. I recognize that even the terms “citizen,” “state,” and other concepts referred to in this paper draw from European theoretical and material sources. See Chakrabarty, *supra* note 6 at 4.

9. For more information, see Granville Austin, *Working a Democratic Constitution: The Indian Experience*, 1st ed (New York: Oxford University Press, 2000) at 69.

is often left out of analyses of this institution that choose the “constitutional moment” as their historical starting point. It also highlights how the theory underlying the form and purpose of eminent domain are ill-fitted for a postcolonial and democratic India. Part I closes with an analysis of how the constitutional elements of the regime and its overall operation in practice further demonstrate the inequities resulting from the use of the colonial-era institution today.

Part II frames India’s ambivalence regarding a constitutional right to property by briefly laying out the debates surrounding this right at the time that the *Constitution* was drafted. As in many postcolonial states, land reform and development have been and remain key priorities of the Indian government. In the Indian Constituent Assembly, this debate came to represent the crux of the choice faced by the new state—between a liberal, modern version of individual rights and a more socialist vision of development. A strong property rights provision was eventually added to the *Constitution* but was later removed to facilitate land reform. Part II then argues that this ambivalence is not due to a failure to properly implement eminent domain but rather is indicative of the need for transformative thinking, which would require leaving behind the colonial institutional structure and its purposes.

In the absence of constitutional protection for property rights, the federal *LAA 1894* currently governs eminent domain. Part III provides a deeper look at how this statute actually functions, including how “public purposes” are construed and how much compensation is given in practice. This paper discusses how eminent domain in India was initially crafted to distribute land amongst the masses but ultimately became a tool for accomplishing the opposite, and highlights the inability of the institution to function in any other way.

Building from this examination of the failure of the *LAA* of 1894 to operate substantially differently than it did during colonial times, Part IV explores what ideas might inform a reformulation of the property regime in contemporary India. It explores different popular conceptions of property using examples of resistance against the government’s use of eminent domain to further the stated goal of development. In the case of Badhkhalsa, I show that the waist-deep crops are not merely the work of illegal encroachers operating under the government’s radar, but that the Badhkhalsa villagers held and cultivated their land for over seven hundred years before the government acquisition. This Part then argues that governmental and societal responses have a cyclical relationship with peoples’ changing views, norms, identities, and resistance. These identities constitute and are constituted by resistance and by conceptions of property that are not adequately accounted for in current law.

Part V concludes the paper by tying together the arguments presented in this article and by presenting two interrelated ideas: the close relationship between property and identity; and the under-recognition of this relationship in law and theory.<sup>10</sup>

In articulating social norms concerning land throughout this paper, I do not make claims regarding a universal relationship to land or a universal reason for resistance to eminent domain found in India; rather, I draw from examples in India to explore the disparities between the law of eminent domain and the realities of how real property is held and valued in India. I also attempt to understand the myriad of resistances to government expropriation taking place throughout the country. While my primary assertion is that this resistance demonstrates the poor fit of eminent domain with India's aspirations for socially just development, I recognize that this is only one way to characterize resistance in relation to eminent domain.

## I. PROVINCIALIZING EMINENT DOMAIN

With regard to the production of history through academic discourse, Dipesh Chakrabarty has articulated how "Europe' remains the sovereign, theoretical subject of all histories" including those that "we call 'Indian.'"<sup>11</sup> He observes that "there is a peculiar way in which all these ... histories tend to become variations on a master narrative that could be called 'the history of Europe.'"<sup>12</sup> His aim, therefore, is to "open up the possibility of a politics and project of alliance between the dominant metropolitan histories and the subaltern peripheral pasts," and his project "grounds itself in a radical critique and transcendence of liberalism," including the bureaucratic institutions of the modern state.<sup>13</sup> This project recognizes that 'Europe' has been constructed as the "original home of the 'modern'" by the "collaborative venture and violence" of "modern imperialism" as well as "(third world) nationalism."<sup>14</sup>

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10. In the context of international law, Balakrishnan Rajagopal writes that "resistance is not merely always a reaction to hegemony, but is in fact a complex multitude of alternative visions of social relationships ... ." See *International Law From Below: Development, Social Movements, and Third World Resistance* (New York: Cambridge University Press, 2003) at 10. Similarly, in this project, I seek to explore how alternative visions of the social relationships and identification with land itself inform resistance movements.

11. *Supra* note 6 at 27.

12. *Ibid.*

13. *Ibid.* at 42.

14. *Ibid.*



In this paper, I attempt to “provincialize” eminent domain by questioning the British master narrative in which government acquisition of privately held land is legitimized by academic and policy discourses that reproduce certain colonial conceptions of the relationship between land, citizen, and state. Property rights in India have been a highly contested and dynamic area of the law for centuries. The current form of eminent domain reflects its colonial roots, its relationship to ideas of absolute state sovereignty over land, and decades of engagement and implementation of this concept. This Part shines some light on the colonial origins and design of the concept in order to inform the subsequent analysis of India’s engagement with eminent domain. I argue that the purposes for which eminent domain was enacted call into question its appropriateness as an institution in a democratic society. Can an institution crafted specifically to take resources and land from subjects for the benefit of the Crown and its corporate associates ever be modified to serve a public purpose? I argue that, given the historical development of eminent domain in India, the answer is “no.”

I do not pretend that this project can both question existing conceptions of property rights and outline an alternative vision simultaneously. My aim is only take the first step—to question the institution of eminent domain through a legal analysis—in the hope of opening up theoretical space for conceptions of property that do not define themselves purely in relation to, as modifications of, or even as stemming from the particular British institution currently at work in India. As such, I highlight the ambivalences and contradictions of eminent domain historically, constitutionally, and statutorily, while offering a critique of the practical workings of this institution in India.

Like Chakrabarty, I do not call for a “simplistic, out-of-hand rejection of modernity, liberal values ... and so on”<sup>15</sup> or for a culturally relative analysis of the law. Nor do I reject liberal property rights, claim that the government can never infringe such rights, or deny that identities, forms of resistance, and communities have shaped themselves in response to eminent domain. I do, however, like Chakrabarty, attempt to “write into the history [and, in my case, law] of modernity the ambivalences, contradictions, the use of force, and the tragedies and ironies that attend it.”<sup>16</sup>

#### A. THE INCEPTION OF EMINENT DOMAIN IN INDIA

The history of the government’s consolidation of the power to acquire land in India is both convoluted and poorly covered by existing legal literature. I will

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15. *Ibid* at 43.

16. *Ibid* at 43.

neither try to present it as a linear narrative (because it is not) nor attempt to lay out an entire historical account. The purpose of this paper is the argument it offers, not the exposition of intricate histories.

Before British colonization, land in India was held through a variety of tenure systems in different places, which were brought into the fold of colonial control piecemeal according to the needs of the colonizers. That said, a few major developments in the transformation from pre- to postcolonial property regimes guide this narrative and argument.

In 1824, the colonial authorities passed *Regulation I* of the *Bengal Code*.<sup>17</sup> This regulation had two purposes. First, it enabled the acquisition of land at “fair value” for “roads, canals, or other public purposes,”<sup>18</sup> and second, it dealt with the procedure for the claims of *zamindars*<sup>19</sup> and others regarding “the peculiar circumstances of the lands required for the purpose of salt manufacture.”<sup>20</sup>

With regard to the first object, this regulation established the concept of acquisition of private property by the government, which was expanded upon geographically and conceptually in the decades to come. In doing so, it also set the stage for further consolidation of property in the hands of the colonial government and the expansion of the British Empire through this new legal mechanism.

The second object—salt manufacturing—proved significant as well, though colonial authors could never have anticipated how much so. In short, this statute consolidated the decades of encroachment of colonial authorities into the salt industry.<sup>21</sup> This takeover brought massive profits to the British, made salt inaccessible to common people, and eventually led to Gandhi’s Salt March of 1930. This 240-mile march to the coastal village of Dandi ended with Gandhi and others producing their own salt in violation of colonial laws regarding the British monopoly over salt production. This act of civil disobedience inspired millions to join the freedom movement.<sup>22</sup>

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17. No 1 of 1824, Bengal Code [*Regulation I*].

18. *Ibid.*

19. The *zamindari* system was a feudal-type system of land holding. Under the Mughals and even under the British, *zamindars* and other large landholders often did not own the land outright. They were responsible for collecting revenue from the people on it and were allowed to keep a portion of it. After Independence, they generally held onto the land as their own. Many of the *zamindaris* received their land either by colonial favour or simply by occupying it when the British left. This concept is further explained below.

20. *Regulation I*, *supra* note 17, s 1. See also Law Commission, *Report on the Law of Acquisition and Requisitioning of Land* (New Delhi: Law Commission of India, 1958) [Law Commission].

21. AM Serajuddin, “The Salt Monopoly of the East India Company’s Government in Bengal” (1978) 21 *J Econ & Soc Hist* 304.

22. Dennis Dalton, ed, *Mahatma Gandhi: Selected Political Writings* (Indianapolis: Hackett,

During the decades after the passing of *Regulation I*, the railroad craze that erupted in England found its way to India.<sup>23</sup> However, the existing regulations could not provide the perfunctory sanction of land acquisition necessary for railroad expansion as it did not encompass the transfer of seized land to private entities.<sup>24</sup> The railroads, while appearing public in purpose, were built and owned by private companies. These companies were waiting in the wings for the ability to expand their operations into a new country and for the consequent rise in profits this would entail. To achieve this legal maneuver, the colonial authorities formulated a new law to fill the gap.<sup>25</sup> This regulation “widened the scope of the term *public work* to include railway construction.”<sup>26</sup> In the interest of expediency (and of the colonial government’s corporate associates), “the problems of legal entitlement, valuation of the land acquired and the mode of payment of compensation were to be settled later.”<sup>27</sup>

Seven years later, “various laws on the subject of land acquisition were consolidated as Act IV applicable to the whole of British India.”<sup>28</sup> The next legal iteration and expansion of land acquisition, *The Land Acquisition Act of 1870: An Act for the acquisition of land for public purposes and for Companies*,<sup>29</sup> made explicit the link between government acquisition and private entities meant to benefit from the expansion of the colonial mandate.<sup>30</sup> Eventually in 1894, as discussed below in Part III, the *LAA* was enacted to replace all laws of this sort.

## B. THE FORM AND PURPOSES OF EMINENT DOMAIN

The establishment of the power of eminent domain meant more than the acquisition of individual tracts of private property for public or other purposes. It also changed, in law and in rhetoric, the relationship between state, citizen,

1996) at 20, 72; Antony Copley, *Gandhi: Against the Tide* (Oxford: Basil Blackwell, 1987); and Geoffrey Ashe, *Gandhi: A Study in Revolution* (London: William Heinemann, 1968).

23. Smritikumar Sarkar, “Land Acquisition for the Railways in Bengal, 1850-62: Probing a Contemporary Problem” (2010) 26 *Stud in Hist* 103 at 107.
24. *Ibid* at 114.
25. *An Act for giving additional Facilities for Public Works in Bengal*, No 42 of 1950, India Code.
26. Sarkar, *supra* note 23 at 115 [emphasis in original]; Law Commission, *supra* note 20 at 1.
27. Sarkar, *supra* note 23 at 115.
28. Sanjukta Ray & Shreemoyee Patra, “Evolution of Political Economy of Land Acquisition” in *India Infrastructure Report 2009: Land – A Critical Resource for Infrastructure* (New Delhi: Oxford University Press, 2009) 41 at 41.
29. *The Land Acquisition Act, 1870*, No 10 of 1870 [*The Land Acquisition Act, 1870*].
30. For an interesting glimpse into the British view of land acquisition at the time, see H Beverly, *The Land Acquisition Acts (Act X OF 1870 and Act XVIII of 1885)*, 2d ed (Calcutta: Tracker, Spink and Co, 1888).

and land.<sup>31</sup> Indian jurisprudence regarding eminent domain inevitably traces the concept back to its roots in Grotius,<sup>32</sup> and justifies its use based on the proposition that all land vests in the “sovereign,” which can reassert its right over the land of its “subjects” at any time.<sup>33</sup> This concept served the colonial authorities and the Crown well.

Surprisingly, this language was not altered after Independence and continues to have rhetorical and material influence on the law, with the Indian state now filling the role of sovereign. After Independence, as Usha Ramanathan explains, the Supreme Court had to address the issue of eminent domain, which was now contested by the landholders in India. “In explicating the power, the court held that eminent domain was ‘the power of the sovereign to take property for public use without the owner’s consent.’”<sup>34</sup> Almost sixty years later, in a 2004 dispute over who had ownership of and right to use a water source in Nagaland, the Supreme Court first acknowledged that customary law governed the determination of land rights for particular tribal groups in this region, holding that “[s]o 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.”<sup>35</sup> As Ramanathan explains, “The disregard of customary law, the relationship of local communities to natural resources and the presumption about the sovereign power of the State over such resources all indicate the power that eminent domain has handed over to the State.”<sup>36</sup>

The question of what “sovereign” means domestically in a democratic state is intimately tied to the legitimacy of the use of eminent domain for ‘public’ purposes. Ramanathan raises questions that remain unanswered:

Does [the Preamble to the *Constitution*, which resolves to constitute India into a sovereign republic] indicate a change from the understanding deriving from sovereignty as linked with a ruler or king or queen? Can the constitutional version of sovereignty presume absolute power in the State over the people? ... To ask it

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31. Saratkumar Mitra, ed, *The Land Law of Bengal*, 2d ed (Calcutta: R Cambray & Co, 1921), online: <<http://www.archive.org/stream/landlawofbengalw00mitriala#page/30/mode/2up>>. Mitra states that “[t]he English in India started with the assumption that ‘all the soil belonged in absolute property to the sovereign, and that all private property in land existed by his sufferance’” and that the “existence of private property in land which is the fundamental doctrine of Hindu jurisprudence ... was entirely ignored” (*ibid* at 30).
32. See Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Oxford: Clarendon Press, 1925).
33. Usha Ramanathan, “A Word on Eminent Domain” in Lyla Mehta, ed, *Displaced By Development: Confronting Marginalisation and Gender Injustice* (New Delhi: SAGE, 2009) 133 at 134.
34. *Ibid*.
35. *Ibid* at 137.
36. *Ibid* at 138.

differently, where does sovereignty reside—in the people, or in the State? Or is an attempt to re-conceptualise sovereignty as belonging with the people merely at the level of rhetoric, but impractical and therefore to be discarded in constitutional interpretation and state practice? What if sovereignty is demonstrably a route to absolute power?<sup>37</sup>

If “sovereign” refers to the state, then in actuality the state has just stepped in as the colonial power, claiming ultimate control over all land and resources. The way ‘development’ often operates today—that is, government use of eminent domain to transfer land from people to private corporations—underscores the conclusion that regardless of whether the state meant to replicate the colonizers’ form, it has done just that. If “sovereign” refers to the people, it is unclear which people. As explored in this paper, these are certainly not the people whose land is taken or the masses who do not hold land.

In addition to this replication of colonial conceptions of sovereignty, the precise formulation of eminent domain has also remained static from colonial times to the present day. Ostensibly, the government of India today has different interests than the colonial authorities did in the 1800s;<sup>38</sup> however, the fact that “public purpose” remains undefined and is used expansively continues to allow abuses of sovereign power over land through eminent domain, as explained in Part III below. The idea lying at the heart of eminent domain—that private property can be taken without consent—has proven to be a double-edged sword for many people in India. It would be used to first move land toward and later away from the masses.

The law of land acquisition is one of many areas that did not change with the *Constitution* after Independence. In fact, according to Article 372 of the *Constitution*, all colonial laws remained in force unless explicitly repealed.<sup>39</sup> Nandini Sundar argues that “[i]n a country like India where all the fundamental laws have been inherited from the colonial period, viewing the rule of law simply in terms of adherence to existing law, regardless of whether it complies with substantive democratic norms, is problematic.”<sup>40</sup> If development was meant to be for the masses, who had been exploited by the colonial authorities, it is rather shocking

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37. *Ibid.*

38. As stated by Ray and Patra, “The key concerns of the colonial legislators were quite evident. The state had to be enabled to acquire land swiftly while minimizing compensation payment, seen as a drain on the state exchequer. Further, there was a need for mobilizing larger amounts of land for expanding railways in the country.” *Supra* note 28.

39. *Ibid.*

40. “Laws, Policies, and Practices in Jharkhand” in Nandini Sundar, ed, *Legal Grounds: Natural Resources, Identity, and the Law in Jharkhand* (New Delhi: Oxford University Press, 2009) 1 at 7.

that the same laws that vested all of their property in the Crown under colonial rule were so smoothly transferred after Independence to a “sovereign” in the form of the new governmental power.<sup>41</sup> The people who had just led the fight for freedom, in effect, replaced the authorities they overthrew and allowed eminent domain to persist without any checks or balances. The maintenance of this form of eminent domain led directly to the type of development that prevails in India today.

A.J. van der Walt seeks to completely rethink the institution of property while recognizing the effect its design has on social welfare and the structure of society, including the “protection of marginalised and weak land users and occupiers.”<sup>42</sup> Had the leaders of the newly independent India similarly wished to realize the transformative potential of law, they might have started by asking what kind of relationship between citizen, state, and land they wanted to encourage, and they might have designed a system of property based on that vision.<sup>43</sup> What transformations in the Indian property rights regime might have ensued? Perhaps this would have meant getting rid of eminent domain entirely. Or perhaps it would have meant creating some other kind of government power to acquire land, with different conditions and assumptions in place. At the very least, it would have meant looking critically, as the decades progressed, at those who were losing out and those who were benefiting from the exercise of land acquisition.

As explained below in Part II, the debate around property rights covered a range of issues and considerations, but it never seriously questioned the institution of eminent domain. Nor did it result in a law that recognized the myriad of ways in which people held and related to land. All of these different interests were squeezed into a single conception of ownership, which remained subordinate to government claims flowing from the colonial version of eminent domain.

## II. CONSTITUTIONAL PROPERTY RIGHTS IN THE POSTCOLONIAL INDIAN STATE

### A. THE POSTCOLONIAL DILEMMA REGARDING DEVELOPMENT AND CONSTITUTIONAL PROPERTY RIGHTS AS IT UNFOLDED IN INDIA

At the time of India’s Independence in 1947, elite landowners controlled 43 per cent of the land in India.<sup>44</sup> These landowners were referred to by a variety of terms

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41. But see HCL Merillat, *Land and the Constitution in India* (New York: Columbia University Press, 1970) at 39 (applauding the post-Independence continuation of British institutions).

42. *Property in the Margins* (Portland: Hart, 2009) at viii.

43. Austin, *supra* note 9 at 69 (indicating that many Indian leaders at the time of Independence shared a vision of social equality and justice).

44. Gregory S Alexander, *The Global Debate over Constitutional Property: Lessons for American*

depending on the location and structure of control. In the interest of simplicity, I use the word *zamindar*, which was initially used to describe a specific kind of landholding but has now become a more a generalized term often used to cover a variety of landholders.<sup>45</sup> During the *Mughal* period of Indian history, certain persons were responsible for the collection of tax revenue from particular areas of farmland. H.C.J. Merillat reports that “[t]hese tax farmers were, in many cases, former local lordlings and rajas who thereby retained a measure of local importance and power . . . .”<sup>46</sup> As the central authority of the *Mughals* faded over time, those “tax farmers became more and more independent and more prone to abuse their powers” by claiming ownership and hereditary succession of the land.<sup>47</sup> The British, “accustomed under their own legal system to having an ‘owner’ of a particular piece of land, no matter what other interests might exist,”<sup>48</sup> treated these people as proprietors. Others were added to their ranks in exchange for various services or through their connection to the government.<sup>49</sup> While the particular unfolding of this consolidation of power, land, and various interests varied across states and localities, the general result was that vast lands were eventually subjected to ownership interests through the administration of tax revenue and through colonial favour.

The high concentration of land in the hands of these *zamindars* complicated the question of property rights for the newly independent India. Vallabhbhai Patel, the new home minister, believed that many of the principles of laissez-faire economics should be adhered to in newly independent India and therefore advocated for the inclusion of strong property rights in the *Constitution*, including a right to full compensation for takings.<sup>50</sup> On the other hand, Jawaharlal Nehru, the new prime minister, believed in using large-scale property redistribution and nationalization to correct past social injustices and to lay the groundwork for a

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*Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) at 52.

45. Merillat, *supra* note 40 at 21. The British created another form of ownership as well—*ryotwaris*—who were “independent, usually small freedholders” who had “variable assessments of land revenue” and who were directly and personally administered (*ibid* at 17). Whereas I focus on the homogenous form of property encapsulated in the *LAA*, it is worth noting that many other systems of holdings existed, if only to further underline the point that the act was not crafted to fit the reality of land holdings in India at that time.
46. *Supra* note 40 at 13.
47. *Ibid* at 13.
48. *Ibid*.
49. *Ibid* at 14.
50. Nick Robinson, “Expanding Judiciaries: India And The Rise Of The Good Governance Court” (2009) 8 Wash U Global Stud L Rev 1 at 28-29.

prosperous economy.<sup>51</sup> In his opinion, the government should not have been required to pay full compensation for the property that it had seized.<sup>52</sup> He strongly believed that socialist policies were the most appropriate measures for India, and this thread wove through many of his decisions.

The desirability of a constitutional clause regarding property rights in the postcolonial state should be discussed in conjunction with development discourse for two reasons: first, the prominence of development as an explicit policy goal in postcolonial states; and second, the promotion of strong property rights clauses in development policies put forward by international financial institutions<sup>53</sup> as well as mainstream theory and policy.<sup>54</sup> It is no coincidence that the former colony is now the ‘developing’ country and that property rights are often a site of significant ideological battles in both development and postcolonial discourses. Scholars have noted the “centrality of the ideology of development for the very self-definition of the postcolonial state” and how it results from the economically exploitative (and hence illegitimate) nature of colonial rule.<sup>55</sup> “In this view,” according to Rajagopal, “the legitimacy of the state does not come merely from ... its democratic character; rather it comes from its rational character to direct a program of economic development for the nation.”<sup>56</sup>

With this commitment to development as a backdrop, the question of whether a property rights clause should be included in India’s *Constitution* was of significant importance. If property rights were indeed conducive to economic development, then perhaps the new Indian state, committed to achieving this end, should have included them in a newly written *Constitution*.<sup>57</sup> On the other hand, the inclusion of a constitutional property-rights clause near the time of

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51. *Ibid* at 40. Nehru was not alone in this view. According to Granville Austin, “Socialism was thought the antithesis of imperialism, at once its enemy and remedy.” *Supra* note 9 at 72.

52. Robinson, *supra* note 50; Austin, *ibid* at 76.

53. Hernando de Soto, *The Mystery Of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). See also Frank K Upham, “From Demsetz To Deng: Speculations On The Implications of Chinese Growth For Law And Development Theory” (2009) 41 NYU J Int’l L & Pol 551 at 558; and Michael Trebilcock & Paul-Erik Veel, “Property Rights And Development: The Contingent Case For Formalization” (2008) 30 U Pa J Int’l L 397 at 397.

54. Unfortunately, the development and constitutional questions are rarely discussed at the same time. See Alexander, *supra* note 44 at 2. This article makes a preliminary attempt to do so and acknowledges that much more work needs to be done at this intersection.

55. Rajagopal, *supra* note 10 at 21, commenting on the work of Partha Chatterjee.

56. *Ibid* at 22.

57. See e.g. Cass R Sunstein, “On Property and Constitutionalism” (1992) 14 Cardozo L Rev 907 at 909.



Independence ran the risk of entrenching property in the hands of the few who enjoyed a privileged position—the *zamindars*. And, if the new government legitimized the elite's hold on resources in this way, then certainly it would have been very difficult to “realize development” for anyone but the already endowed. Indeed, a decision to allow the elites to keep their property holdings would have left the new state in a position that risked recreating the exploitation (and therefore the illegitimacy) of the colonial relationship.

For critics of the constitutionalization of strong property rights, the resulting entrenchment of existing wealth becomes even more problematic when it is acknowledged that those holding the rights may have acquired these rights as a result of inequitable processes. As Jennifer Nedelsky explains in the case of South Africa, the inequity and the legitimacy of acquisition were and are bound together, as “the unjust distribution is the direct result of years of unjust dispossession, together with laws that made it virtually impossible for the dispossessed to acquire property.”<sup>58</sup> In South Africa, as in India, vast tracts of land were held in the hands of the few, and establishing secure property rights with secure compensation would have meant providing what was seen as excessive compensation to individuals who had acquired the land through (unjust) dispossession of others. In particular, control of land by white farmers in South Africa was enabled through forced removals, laws prohibiting blacks from ownership, and heavy state subsidies for white farmers.<sup>59</sup> In the case of the *zamindars*, similar arguments were made in the Constituent Assembly. The methods by which *zamindars* had acquired their landholdings, while heterogeneous, often proved less than legitimate,<sup>60</sup> and some argued that the new Indian government had no business bankrupting itself to pay them for their land.<sup>61</sup> Additionally, because the newly independent India, not unlike the new South Africa, was meant to be inclusive, the framers struggled with how to avoid sanctioning the already uneven concentration of landholdings while remaining committed to ‘modernity’ and its prescription of strong property rights.

As I show later in this Part, the Constituent Assembly demonstrated its commitment to economic development when it created a constitutional environment conducive to the liberal, modern state. The primacy of development

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58. “Should Property be Constitutionalized? A Relational and Comparative Approach” in GE van Maanen & AJ van der Walt, eds, *Property Law on the Threshold of the 21<sup>st</sup> Century* (Antwerp: MAKLU, 1996) at 417.

59. *Ibid* at 423.

60. See Austin, *supra* note 9 at 72-73.

61. The Project Committee, *The Framing of India's Constitution: A Study* (New Delhi: The Indian Institute of Public Administration, 1968) at 286 (Chair: B Shiva Rao).

(as well as modernity) and the concurrent commitment to social equality<sup>62</sup> led to heated Assembly debates regarding constitutionalization of property rights and distribution of property. The crux of the debate was whether there should be a strong property rights clause in the *Constitution* in accord with liberal individual rights, or whether concentrated landholdings should be divided and redistributed without full compensation.

While the Constituent Assembly eventually decided to include a constitutional clause pertaining to property, which looked very much like those found across other common law jurisdictions, the framers compromised on clauses pertaining to compensation for takings. They then chipped away at the constitutional clause (in order to enable land reform) until it was rendered basically meaningless. While the debate described later in this Part appears to have followed a fairly standard postcolonial tenor, it is worth taking a close look at the primary policymakers in order to understand how events proceeded the way they did.

## B. THE INDIAN CONSTITUTIONAL BATTLE OVER PROPERTY RIGHTS

The debate in the Constituent Assembly about property rights was passionate, long-lasting, and emblematic of many postcolonial debates regarding the strong protection of property rights and development as well as of the Patel-Nehru divide. The issues debated included whether movable (*i.e.*, personal) property should be covered, whether “just” should modify the term “compensation,” whether the legislature should determine the amount of compensation,<sup>63</sup> and whether there should be a separate provision for government appropriation of land aimed at dismantling the *zamindari* system.<sup>64</sup>

In the case of state legislation enabling the abolition of the *zamindari* system, there was a concern that if “due process” and just compensation were guaranteed, these statutes would be “challenged in courts on the ground of inadequacy of compensation.”<sup>65</sup> Not only could this result in a favourable outcome for the

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62. Austin, *supra* note 9 at 71.

63. The role of the legislature as opposed to the *Constitution* as the site of decision making with regard to compensation or more general protection of private property is a common sticking point in postcolonial debates regarding constitutional property clauses. See Jennifer Nedelsky, “Should Property be Constitutionalized? A Relational and Comparative Approach” in GE van Maanen & AJ van der Walt, eds, *Property Law on the Threshold of the 21<sup>st</sup> Century* (Antwerp: MAKLU, 1996) 417; Alexander, *supra* note 44 at 3. It is worth noting that neither side in this debate appears to have questioned the importance of having some mechanism to protect property rights and also some mechanism for eminent domain.

64. Rao, *supra* note 61 at 284.

65. *Ibid.*

*zamindars*, but more importantly such litigation would likely take years, during which time “all social progress would be brought to a standstill.”<sup>66</sup> There was also a concern that a uniform obligation to pay compensation would make abolition of this system “almost impossible.”<sup>67</sup> These concerns led some delegates to advocate for a “distinction between acquisition of property for government use,” where the government might pay at least full value of the property, and “acquisition for social ends involving the interests of large masses of people,”<sup>68</sup> where the state would pay nominal or no compensation. This distinction did not make its way into the final formulation of the clauses.

On the other side, advocates for a single property clause that provided for just compensation argued that it would be “unfair not to give *zamindars* just compensation, merely on the basis of assumptions as to how individual *zamindars* had originally acquired their estates.”<sup>69</sup> Vallabhbhai Patel, arguing for strong property rights, eventually persuaded the Assembly that such a clause was intended to authorize the state to acquire land for various public purposes, not merely for the acquisition of *zamindari* land.<sup>70</sup> His simplification of the reality of how long it would take to dismantle the *zamindari* system evidently won him sufficient support, and the one-tier property protection clause was eventually adopted after significant battles over compensation.<sup>71</sup>

At least one delegate argued that keeping property rights out of the *Constitution* may help dismantle the *zamindars*' hold on land in the short term but would harm the “poor tiller” in the longer term.<sup>72</sup> Many other delegates argued against a constitutional clause because paying *zamindars* the full value of the land was neither fair nor possible for the newly formed state governments.<sup>73</sup> In the end, there was a compromise: strong property rights in that the clause was included amongst the fundamental rights enumerated in the *Constitution*,<sup>74</sup> and a vague

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66. *Ibid.*

67. *Ibid* at 285.

68. *Ibid* at 285-86.

69. *Ibid* at 286.

70. *Ibid.*

71. *Ibid* at 286-91.

72. See Shri Nagappa's comments on during the Constituent Assembly Debates. *Debates of the Constituent Assembly of India*, vol III (2 May 1947) at 515 [Constituent Assembly Debates].

73. Rao, *supra* note 61 at 285-86.

74. Placing the property rights clause in the fundamental rights section of the Constitution allowed claimants to bypass lower courts and take their claim directly to the Constitutional Courts at the Supreme Court level. As explained in Part II, the watered-down property rights clause found in the Indian *Constitution* today is no longer located in this section.

entitlement to compensation, which Nehru and others evidently thought would enable land reform.

Article 19(1)(f) of the *Constitution*, as originally enacted, provided that all citizens have the right to acquire, hold and dispose of property.<sup>75</sup> Article 31 in turn stated that:

(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable ... , shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.<sup>76</sup>

Both Articles were included in the fundamental rights section, and both were eventually deleted, as discussed below.

Even with this vague provision on compensation, however, it was found that the state could not afford to pay the *zamindars* for these vast land tracts, and land reform stalled for a few years until Patel's death near the end of 1950. After Patel died, Nehru was able to push through several constitutional amendments immunizing state acts that abolished *zamindari* holdings from judicial review.<sup>77</sup> Introducing the first of these amendments, Nehru stated:

Another article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has ... formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up. The main objects of this Bill are ... to insert provisions fully securing the constitutional validity of zamindari abolition laws ... .<sup>78</sup>

These amendments set off a thirty-year battle between the Supreme Court and Parliament, which played out through a series of cases regarding expropriation and compensation. The results watered down the right to compensation until

75. *India Const*, art 19(1)(f).

76. *India Const*, art 31.

77. The First Amendment called for the insertion of Article 31B, which put a specified Schedule of State Acts abolishing *zamindari* holdings outside the purview of judicial review. *The Constitution (First Amendment) Act, 1951*, India Code [First Amendment]. Subsequent amendments enabling state land reforms, including notably the Fourth Amendment of 1955, were passed in response to Supreme Court rulings attempting to extend judicial review to these state reforms. See *The Constitution (Fourth Amendment) Act, 1955*, India Code.

78. First Amendment, *ibid*, Statement of Objects and Reasons.

1978, when Parliament put an official end to the strong formulation of constitutional property rights.

In 1977, the year after The Emergency (Indira Gandhi's twenty-one month autocratic takeover), the people elected the Janata Party, which ran on a platform that included "returning power to the people, and the demolition of the constitutional right to property" in an effort to redistribute land in favour of the general population.<sup>79</sup> Once in office in 1978, the Janata Party promptly repealed Articles 19(1)(f) and 31.<sup>80</sup> In their place it added one article, 300A, outside the fundamental rights section. Article 300A reads, ambiguously, "[N]o person shall be deprived of his property save by the authority of the law."<sup>81</sup>

This paltry formulation of constitutional property rights left the door wide open for statutory law enabling state seizure of land, and in walked the decrepit colonial-era octogenarian—the *LAA*—infused with new purpose.

### C. ANALYZING THE CONSTITUTION THROUGH THE OPERATION OF ITS CLAUSES

Before taking stock of the *LAA*, this Part will take a quick look at how the fixation on the issue of whether or not to constitutionalize property rights and compensation failed to take into account the reality of how such a regime would actually operate. This failure prevented the institution from ever operating as envisioned or for the benefit of the masses, as both Nehru and Patel had intended (albeit through different methods).

First, the 1950 constitutional property rights clause did not adequately address the complexity surrounding the legitimacy of the *zamindars'* claim to the land they occupied. As explained by Nivedita Menon, "[N]o one in Parliament explicitly opposed the abolition of zamindaris"; rather, the Assembly "debate was over whether compensation should be 'just' and 'adequate.'"<sup>82</sup> There are several unfortunate implications of framing the issue as one of compensation alone. If the Constituent Assembly had directly challenged the legitimacy of the *zamindars'* holdings (that is, seriously questioning *whether* to pay them and not simply how much), this might have justified carving out a separate legal mechanism for them. Instead, while the *zamindars* were compensated through fragmented

79. Alexander, *supra* note 44 at 56.

80. *The Constitution (Forty-Fourth Amendment) Act, 1978*, India Code [*Forty-Fourth Amendment*].

81. *India Const*, art 300A.

82. "Citizenship and the Passive Revolution: Interpreting the First Amendment" in Rajeev Bhargava, ed, *Politics and Ethics of the Indian Constitution* (New Delhi: Oxford, 2009) 189 at 201.

land-reform acts enacted in various states (which were challenged in the courts and led to some of the battles between the courts and Parliament referred to earlier in this Part), the vagueness of the compensation clause served to further disenfranchise poor people in the future. However, it is possible that a direct challenge to the liberal, modern framework of property rights (which might have been politically unwise in the international realm as well as with wealthy domestic constituents) might have antagonized the Supreme Court, causing it to reassert its commitment to the liberal order even more aggressively. As it happened, though, the slow erosion of this right has resulted in the situations in Haryana, Jharkhand, and numerous other places discussed below in Part IV.

Moreover, much of the debate seems to have focused primarily on the effect of constitutionalized property rights on the *zamindari* system while excluding land that was not claimed by this group. The lack of distinction between compensation for *zamindar* abolition and for other kinds of expropriation has enabled the government to avoid compensating a variety of occupiers of land in the present day. A prescient delegate from Madras, Shri S. Nagappa, identified this prospect clearly during the Constituent Assembly debates:

It seems, to me, Sir, that when we are acquiring landed property from a zamindar, we need not pay as much as he wants. We need pay only what is reasonably required to enable him to maintain himself and his family for one or two generations. That is the only thing necessary to do to fulfil the kind of assurance which the Congress has given to these zamindars and jagirdars in their election manifesto . . . .

For instance, if a poor man's property is acquired for a particular purpose, then, in giving him compensation, care must be taken to see that it is reasonable in the particular case. In such a case the Government must pay him the cost of the land and something more even. But when the Government acquire lands from a zamindar, they need not pay the actual market rate or the local rate to make the compensation paid reasonable. You have to fix the compensation keeping in view the manner in which the zamindar acquired that property.

Then, Sir, I submit that when once you acquire land, you must see that the tiller of the soil is made the owner of the soil. Then alone we will be able to give a kind of encouragement to the toilers and make them increase the produce and the national wealth for the maintenance of the country.<sup>83</sup>

Shri S. Nagappa's argument does not appear to have had a tangible impact on the surrounding debate or the resulting constitutional clause, though history has proved his concerns correct on multiple occasions.

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83. Constituent Assembly Debates, *supra* note 72 at 515.

Even if Nagappa's Cassandra-esque foresight is frustrating to those unsatisfied with the current distribution of land and resources, the fact that there was *almost* legal space to recognize and protect informal property interests during the constitutional moment is significant. The delegates do not seem to have been overly concerned with the formal mechanisms by which people would prove their entitlements (though this would end up having a significant impact on the operationalization of all land law in India). Even the "poor tiller" was recognized in these debates, however the flexibility expressed in these discussions was apparently left behind when drafting the actual law.

I am not arguing against compensating the *zamindars* at full market value. My point is in favour of conducting a deeper analysis of the inequities of eminent domain and rethinking the use of the institution at all. Including and then subsequently removing the property rights clause did not create a clean slate on which lawmakers could draw their designs of distribution. Quite obviously, people already had access to land and were already using it, depending on it, and identifying with it in different ways. This reassessment of eminent domain applies to a range of actors, from the *zamindar*, to the tenant, to the labourer. While it may be argued that the *zamindars* benefitted by excluding others from the land for centuries, it may also be acknowledged that they too had attachments to the land and had organized their lives around quasi-ownership. Either way, these reforms failed to account for realities on the ground and repeatedly led to battles inside and outside legal arenas.

Nivedita Menon explains how these realities complicated the subsequent formulation of the law, in that the disjuncture between the Court and Parliament in the decades between the enactment of the *Constitution* (1950) and the *Forty-Fourth Amendment*<sup>84</sup> (1978) is a manifestation of the "tension between the liberal theory of the individual," found in the Supreme Court's approach, "and the post-colonial experience of 'incomplete' individuation and lived community identity," found in Parliament's "insistence on other bearers of rights—the community, the larger society, the nation-state."<sup>85</sup>

Second, there seems to have been an assumption that the entitlements that came with ownership were indivisible and immutable. Perhaps the varied rights generally theorized to comprise ownership in common law (possession,

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84. *Supra* note 80.

85. Nivedita Menon, "Citizenship and the Passive Revolution: Interpreting the First Amendment" in Rajeev Bhargava, ed, *Politics and Ethics of the Indian Constitution* (New Delhi: Oxford, 2009) 189 at 206.

use, exclusion, and alienation)<sup>86</sup> could have been disaggregated in order to allow multiple classes of individuals to receive compensation. Alternatively, the rights themselves might have been reconfigured in according with how people related to the land—for instance, its control, personal use for farming, use for farming for a *zamindar*, or dependence on it as a source of daily wages.<sup>87</sup> As much of the land was used for agricultural purposes, splitting up the compensation could have directed funds towards those not receiving the benefits of land reform.

Third, there also seems to have been an underlying assumption that title and accurate records existed, were functional, and that land could therefore be controlled and accounted for in a predictable way by the *Constitution* and subsequent legislation. It was thus ironic, if not perverse, for the new government to voice a commitment to socialism, and later for the Janata Party to win on its redistributive platform while furthering a property rights and compensation system that was based on title and other formal indices, most of which are cloudy for the vast majority of real property.<sup>88</sup>

There also appear to have been different conceptions of what it meant to have legitimate title records, as explained by Carol Upadhyā's work in Jharkand. Upadhyā writes that during her fieldwork it was common for her to ask for evidence of title and to get "crumbling" and revered, out-of-date papers in response.<sup>89</sup> The fact that these documents were outdated is hardly surprising given the red tape associated with updating records for sales or transfers, as well as the complexity of joint tenancy within extended families. Even if title exists in the name of someone living, in actuality land is often split amongst family members, as is the case in Badhkhalsa. This fact is not reflected in the records.

The vastly inadequate state of records adds to the uncertainty surrounding compensation for land acquired by the government. Whether or not this uncertainty is intentional, it serves as a further reflection of how the configuration

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86. See JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L Rev 711.

87. I recognize that unbundling could present more challenges than documented here. See generally Thomas C Grey, "The Disintegration of Property" in J Roland Pennock & John W Chapman, eds, *Property: NOMOS XXII: Yearbook of the American Society for Political and Legal Philosophy* (New York: NYU Press, 1980) at 70; and Jeanne L Schroeder, "Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property" (1994-1995) 93 Mich L Rev 239. Moreover, as Trebilcock and Veel highlight, the formalization of rights in a spatial model may erode customary property rights that allocate entitlements on a functional basis (to grow crops, raise cattle, et cetera). Trebilcock & Veel, *supra* note 53 at 448.

88. Bill Lewis et al, "India: The Growth Imperative" *McKinsey Global Institute* (October 2001) at 52.

89. "Law, Custom, and Adivasi Identity: Politics of Land Rights in Chotanagpur" in Nandini Sundar, ed, *Legal Grounds: Natural Resources, Identity, and the Law in Jharkhand* (New Delhi: Oxford University Press, 2009) 30 at 51.



of property rights is not really a *system* of land rights at all, much less one that functions “for all.” It only includes a small percentage of the actual land claimed by people, was set up partially in accordance with Anglo-American common law, and did not take into account local norms regarding how land was actually held and used.

Finally, there was an assumption that government would redistribute fairly (or at least favourably towards the people who elected it) after the constitutional right was removed. Removing the strong formulation of the right in 1978 might have moved the property regime in a populist direction and away from formality, which was also implicitly expressed in the constitutional debate. If there was really a commitment to the masses, then there must have been a recognition that those masses were going to need a route to property rights that did not involve the traditional common law purchase of title. However, this alternative notion seems to have been ignored or forgotten, as evidenced by the current predatory operation of the *LAA*, with its focus on title and on paper evidence. Instead of allowing fair redistribution, this act has enabled the government to drive ‘development’ and to redistribute from the poor to the rich via the gap created by the removal of constitutional property rights. Moreover, there is no easy judicial check on these actions: Claimants no longer have direct access to the Supreme Court due to the removal of the right from the fundamental rights part of the *Constitution*.

### III. THE UNCHECKED POWER OF THE *LAA*

In the absence of the constitutional right, the *LAA* governs the exercise of eminent domain by the Indian government. As explained in Part I, this legislation has been revised only in a cosmetic way since its enactment in 1894.<sup>90</sup> While the act’s language regarding government acquisition of land is similar to constitutional provisions found in many other countries, it operates in a perverse way for reasons discussed below. This legislation empowers government officials to carry out acquisitions. Officials may first conduct preliminary investigations after publishing a notification of their intent.<sup>91</sup> After the notification, there is an objection period.<sup>92</sup> After the notification and objection period, if officials decide “that any particular land is needed for a public purpose or for a company,” then an official

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90. Ramanathan, *supra* note 33 at 133.

91. *Land Acquisition Act, 1894*, *supra* note 4, ss 4(1)-(2).

92. *Ibid*, s (5).

declaration must be made within one year of the original notification.<sup>93</sup> The declaration itself carries significant power and is “conclusive evidence that the land is needed for a public purpose or for a company as the case may be; and, after making such declaration, the [government] may acquire the land in manner hereinafter appearing.”<sup>94</sup> Subsequent sections of the LAA allow officials to demarcate the land, issue notice to persons interested, determine compensation, take possession of the land, and exercise certain procedural powers.<sup>95</sup>

The government has used both the “public purpose” and “compensation” prongs of acquisition in a nearly unrestricted way. “Public purpose” has been interpreted to include employment, allowing almost any public or private project to meet this requirement and making these determinations virtually unchallengeable in court. Moreover, compensation under the LAA is uncertain and open to abuse.

The analysis of these two prongs of the LAA will begin with the countryside before moving on to the city. This inquiry will bring us back to the development dilemma posed in Part I. Since the legislation assumes that title is clear for the land in question, this assumption will be carried forward in the examples below.

#### A. “PUBLIC PURPOSE”

The roots of the “public purpose” requirement under the LAA can be traced to the takeover of salt manufacturing and other commercial interests, as explained in Part I. While the phrase is not defined, section 3(f) offers a list of examples of what constitutes a “public purpose.”<sup>96</sup> Despite this enumerated list, the requirement

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93. The one-year time limit was introduced in the 1984 amendment. See *ibid* as amended by the *Land Acquisition (Amendment) Act, 1984*, No 68 of 1984, India Code [*Land Acquisition Act, 1984*].

94. *Land Acquisition Act 1894*, *supra* note 4, s 6(3).

95. *Ibid*, ss 8-16.

96. According to this section, the term “public purpose” includes:

- (i) the provision of village-sites, or the extension, planned development or improvement of existing village-sites;
- (ii) the provision of land for town or rural planning;
- (iii) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;
- (iv) the provision of land for a corporation owned or controlled by the State;
- (v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;
- (vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying

continues to be interpreted very liberally—any kind of employment meets it.<sup>97</sup> In 2008, the Supreme Court stated that a “public purpose” includes “any purpose wherein even a fraction of the community may be interested or by which it may be benefited.”<sup>98</sup> As such, Special Economic Zones (SEZs), mines, shopping malls, factories, dams, and other large-scale projects have been facilitated by expropriation under the *LAA*. The proponents of these projects may promise employment for the local dispossessed, but such promises are often not enforced. Even if they are implemented, they usually only allocate one job for each family, which often goes to the male in the household. This displaces the previous division of labour and income in which both males and females worked in the fields. Additionally, it is difficult for people to take advantage of such offers if they have nowhere to live near to the new workplace.

Under the purview of the public purpose requirement, federal, state, and local governments have thrived in taking land from rural holders and giving it to private corporations at throwaway prices.<sup>99</sup> These projects have been well covered by media and academic accounts of India’s economic boom, but the extent to which this newfound wealth is actually redistributed from disenfranchised rural populations to the pockets of government officials and industrialists is rarely given adequate recognition in policy formulation.

Claimants have tried unsuccessfully to bring suits protesting the use of the public purpose requirement in this way—indeed, one wonders how this term can be applied when it is entirely rejected by the affected population and operates without proper democratic or judicial debate on the matter. These issues bring us back to the very questions posed at the inception of the postcolonial state regarding how to ensure development for all, not just for the already endowed.

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out any such scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a state; or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;

(vii) the provision of land for any other scheme of development sponsored by Government or with the prior approval of the appropriate Government, by a local authority;

(viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for companies.

*Ibid*, ss 3(f)(i)-(viii).

97. Ramanathan, *supra* note 33 at 133. *Nand Kishore Gupta & Ors v State of UP & Ors*, 10 SCC 282 (2010) (India).

98. *Sooram Pratap Reddy & Ors v District Collector, Ranga Reddy Dist & Ors*, [2008] 12 SCALE 367 (India SC).

99. See Part II above.

Even when the public purpose ostensibly meets common law definitions—roads, airports, or railways, for instance—the acquisition is not always well conceived or well implemented in the rush towards development. For example, Nagpur is an expanding city that officials had hoped would become a commercial hub in the mid-2000s. Plans were made for two new airport runways, the second of which required takings of nearby land.<sup>100</sup> After the expropriations were executed, air traffic decreased significantly because of changes in development patterns. Currently, the capacity of the existing runway is expected to be sufficient for another thirty years, meaning that the land taken for the second new runway will not be needed for a significant period of time. Unfortunately for the inhabitants of the land taken for the second runway, their land *title* remains in the hands of the government, despite extensive protests, court claims, and some media coverage. That said, while the title has been transferred, at least some of the claimants have been asserting their rights to their land by continuing to occupy it.<sup>101</sup>

## B. COMPENSATION

While the *LAA* calls for consideration of the “market value” of the land in determining compensation,<sup>102</sup> this term is a fraught with uncertainty. Under the act, the exact means of calculating market value are left undefined. In 1893, the committee reviewing the proposed legislation decided to leave the term undefined. They found that:

No material difficulty has arisen in the interpretation of it; the decisions of several High Courts are at one in giving it the reasonable meaning of the price a willing buyer would give to willing seller; but the introduction of a specific definition would sow the field for a fresh harvest of decisions; and no definition could lay down for universal guidance in the widely divergent conditions of India any further rule by which that price should be ascertained.<sup>103</sup>

When this provision came up for review at the Law Commission of 1958, they agreed with the view expressed sixty years before under colonial rule, and it

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100. Prabhu Ghate, “Dubai on ground or pie in sky? Nagpur hub airport: how coercive land acquisition and hype lead to an illusory project, needless displacement,” *Mint* (27 March 2008), online: <<http://www.livemint.com/2008/03/27004208/Dubai-on-ground-or-pie-in-sky.html>>; Praful Bidwai, “A Nandigram near Nagpur?,” *The Daily Star* (27 March 2008), online: <<http://www.thedailystar.net/newDesign/news-details.php?nid=22814>>.

101. Interview of Prabhu Ghate (on file with author).

102. *Land Acquisition Act 1894*, *supra* note 4, s 23(1).

103. Law Commission, *supra* note 20 at 21.

was decided that the courts would determine the appropriate amount.<sup>104</sup> In the 1958 Law Commission report, the first Attorney General of India, M.C. Setalvad, observed that while “[s]ome Judges have attempted a definition,” they felt that “no useful purpose . . . [would] be served by a critical examination of these views expressed by them.”<sup>105</sup> Unfortunately, this lack of engagement with the term has further exacerbated the inequities dealt out by the operation of the *LAA*.

The problems that arose in Nagpur regarding the market price of land are emblematic of the issues arising in many government acquisitions. First, the market price is determined by nearby sales of land. Unfortunately, in the case of Nagpur, nearby prices had plummeted because politicians had been talking about the project for a few years. Second, because of the extensive black market for real estate in India, the parties to a transaction often declare a sale price that is half or less than half of the actual price paid, in an effort to avoid taxes.<sup>106</sup> Because the government determines market value based on the listed prices of nearby properties, this leads to massive undervaluation. Third, there is often a lag between when the market price is determined and when the cheque is issued, during which time property values might have fluctuated. Finally, in the case of Nagpur, the government did not pay for houses, crops, or improvements on the land—just for the land itself.

The compensation problem is exacerbated in at least three additional ways: First, only the government decides on “use” (akin to zoning); second, all land vests in the government; and third, the state is explicitly empowered to use industrial policy to encourage acquisitions at low prices and transfer acquired land to industry.<sup>107</sup>

The government has sole decision-making authority regarding how land is categorized according to different uses, and places various restrictions on the sale of land designated as “agricultural.” This has created incentives to exercise expropriations in rural areas on land that cannot be purchased by corporations. Therefore, even when people have title, the government acquires the land and makes a spread in the sale to the corporation. The corporation ends up better off as well, as it can buy previously inaccessible land for amounts that are well below market price. For example, in the case of an SEZ project in Gujarat, a recent study reveals an “enormous premium (of possibly upwards of 10,000 per cent)

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104. *Ibid.*

105. *Ibid.*

106. Priya S Gupta, “Ending Finders, Keepers: The Use of Title Insurance to Alleviate Uncertainty in Land Holdings in India” (2010) 17 UC Davis J of Int’l L & Pol’y 63 at 85-86.

107. Sundar, *supra* note 40 at 22.

that is being earned (given the throwaway price at which land has been obtained) on land leases by the business group involved.<sup>108</sup>

The government also controls land by regulating land records. The murky state of the land title system therefore allows even more land to ‘legally’ vest with the government than inhabitants might believe. Fragmented state and executive branch efforts to clear some of the red tape surrounding title and records have been made, but conclusive results remain to be seen. As discussed in Part I, the rhetoric surrounding government land acquisition is a powerful driver of increased state control and appropriation of privately held land.

Finally, government control is even clearer when one looks at the logic of industrial policy in India. Industrial policy has worked to channel land and resources away from rural peoples and towards industry in many parts of the country. For example, in Jharkand industrial policy was implemented in order to make the state more attractive to investors, and it explicitly allows for the transfer of expropriated land to industry at the government’s acquisition cost.<sup>109</sup> These industrial policies not only benefit the corporations by keeping prices low but also by allowing them to get clear title by buying from the government, thereby insulating them from subsequent claimants to land tracts. In fact, some corporations only develop on government land because of this phenomenon.<sup>110</sup>

### C. COMMUNITIES NOT ACKNOWLEDGED BY THE LAA

Even if some compensation is paid to the titleholders, the provisions of the *LAA* do not provide relief or recognition of the rights of communities displaced by development—communities much larger than just rural land titleholders. The labourer, the seller of crops, and the distributors all end up out of work if farming ceases. One might hope that social welfare mechanisms would kick in to provide for them, but what is needed is recognition of their *place* and their relationship to the land in a more structural way. For example, an expectation argument might posit that if a family of labourers has been using, working, and making money off

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108. Aseem Shrivastava, “SEZs: The Problem,” *Seminar* (19 February 2008), online: <<http://www.countercurrents.org/shrivastava190208.htm>>.

109. Sundar, *supra* note 40 at 22. Resorting to the courts for assistance regarding valuation has not alleviated the issues with market value detailed above. In the *Subh Ram* case in 2010, the Supreme Court held that the *LAA* “prohibits the court from taking into consideration any increase to the value of the land acquired, likely to accrue from the use to which it will be put when acquired.” *Subh Ram & Ors v Haryana State & Anr* [2009] 15 SCR 287 (India). In practice, this judgment limits the ability of landholders to share in the profits of development when their land has been taken without consent for those purposes.

110. Gupta, *supra* note 105 at 101.

such land for generations—and if they have a legitimate expectation that this will be their future livelihood, have organized their lives accordingly, and taught their children as much—then in the event that the land is expropriated, they should be entitled to compensation for their use and expectations. The affordability of such an entitlement is hardly a controversial point—governments and corporations appear to be making significant profits through land arbitrage from the poor. The issue is more how to divide the existing resources, rather than whether there are any.

In some cases, the currently displaced had possession for decades before expropriation. In Orissa, for example, many communities have been living on communal land for centuries, long before the *LAA*.<sup>111</sup> However, due to the formality of the language of individual rights, not everyone gets compensated when the land is expropriated. A constitutional right that is not reconceived to recognize the nuances of their situation, therefore, probably would not help them.

The lack of recognition of these communities is inconsistent with land revenue systems in place for centuries before the British arrived. As stated by Merillat:

[A] certain proportion of the [harvest] went to each one in the village who by station or service had a customary claim to that share—to the raja or other ruler, to the village officials, to the cultivators themselves, to the cobbler, carpenter, herdsman, watchman, potter, blacksmith, barber, and other artisans and village servants.<sup>112</sup>

I do not present this fact in order to argue in favour of a return to some pre-colonial salary arrangement, but rather to highlight the disparity between centuries of treating the land and its harvests as a foundation of a system of sustenance and entitlement, and an individual exclusionary right that only recognizes nominal owners.

Moreover, rural displacement puts many people in a cycle of disenfranchisement and landlessness. After being displaced rurally, these individuals often move to the urban centers, where they commonly end up on the edges of city and society, owning nothing and squatting on land.<sup>113</sup> Their situation must be included in an analysis of property rights, even though their lack of title leaves them out of the formal system. First, the formal system was set up, either intentionally or negligently, to exclude them. In order to rethink the system, property rights as they exist must be examined by asking who is using the land and in what way. Second, their lack of ownership is often a direct result of expropriation for

111. Sundar, *supra* note 40 at 18.

112. See Merillat, *supra* note 41 at 11.

113. Amita Baviskar, "Breaking Homes, Making Cities: Class and Gender in the Politics of Urban Displacement" in Lyla Mehta, ed, *Displaced by Development: Confronting Marginalisation and Gender Injustice* (New Delhi: Sage, 2009) 59.

development. At least some minimal access to property is necessary for participation in society, and the disenfranchisement of these people only deepens after being displaced. This chronology has been well documented in the case of slum residents in Delhi.<sup>114</sup> In this way, the operation of the *LAA* has ejected the poor from the system, leaving even more for those inside it.

Therefore, the *LAA* operates to expropriate at the government's will. If the hope was that constitutional property rights might result in a democratic process governing how land could be taken, this has not been realized. Instead, the law has relied on this act—written by the British—and operated without recognition of the norms on the ground.

Even if fair distribution is not one's normative goal, an analysis of property rights would still benefit by taking the context of eminent domain into account. Land acquisition does not just affect agriculture, urban planning, city spaces, public welfare, and public resources. It directly affects the lives of the people attached to land. As such, strengthening methods of acquisition, compensation, or even rehabilitation cannot begin to adequately address the issues raised through each instance of acquisition. When the law operates without acknowledging social norms, the resistance of those previously ignored will often prevent it from functioning. If not for this phenomenon, industry might not have withdrawn from Nandigram, and the World Bank project in Narmada Valley might not have been revoked.<sup>115</sup> Social norms regarding property need to be acknowledged as legitimate, not simply as obstructions.

#### IV. THE CYCLES OF IDENTITY, RESISTANCE AND RESPONSE TO EMINENT DOMAIN IN PRACTICE

In this Part, I focus on resistance to eminent domain in order to highlight the disconnect between the law and the social norms regarding land. I first focus on the links between land and identity, and between land and the divine—two areas that are under-recognized in the law of eminent domain and its treatment of land

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114. *Ibid* at 64; Sundar, *supra* note 40 at 11; Baviskar, *supra* note 113 at 64 (highlighting that almost one-fifth of the population of Delhi has been forced out of their homes at some point).

115. Medha Patkar, "Getting the World Bank to stop funds was a big victory," *Tehelka Magazine* 7:44 (6 November 2010), online: <[http://www.tehelka.com/story\\_main47.asp?filename=Cr061110Getting\\_the.asp](http://www.tehelka.com/story_main47.asp?filename=Cr061110Getting_the.asp)>; Sanjana Chappalli, "The Woman Who Walks on Water" *Tehelka Magazine* 7:44 (6 November 2010), online: <[http://www.tehelka.com/story\\_main47.asp?filename=Cr061110The\\_Woman.asp](http://www.tehelka.com/story_main47.asp?filename=Cr061110The_Woman.asp)>; and Arundhati Roy, "The Greater Common Good" in *The Algebra of Infinite Justice* (Penguin Books, 2002) 43.



as fungible. Then, after revisiting the village of Badhkhalsa's engagement with eminent domain as an example of an act of resistance, I will look at the state's more general adaptation to responses of this kind. This relationship between confrontation and government adaptation is cyclical. Governments recognize and adapt to resistance, and resistance movements adapt to government recognition.

This dynamic raises questions regarding the relationship between sovereignty and development. When the colonial authorities expropriated land, they destroyed connections to economic and identity-constituting resources. The postcolonial state has continued to operate in much the same way and has even "tighten[ed] its control over natural resources."<sup>116</sup> "Thus," writes K.B. Saxena, "the most vital resources which define tribal identity and are crucial for their dignified survival such as land, water and forests are increasingly taken away by the State with devastating consequences."<sup>117</sup> The word "dignified" is significant, as the Court has recognized the role of dignity in finding a right to housing, which is discussed in the next Part.

Saxena ties this idea of control over resources and identity to the agitation that is often incited among users of the land when land is acquired by the government. Such agitation "demand[s] that the local resources within the territory by which the community is identified should be controlled by the community rather than the State."<sup>118</sup> This again raises the questions raised by Ramanathan earlier: If the land vests in the sovereign, where does the sovereign reside? Put another way, under what justification can land be taken from entire communities for the benefit of the sovereign if the sovereign is supposed to represent the interests of those communities?

#### A. IDENTITY, LEGITIMACY, AND DIGNITY IN LAND OWNERSHIP

The idea that property, particularly land, can be so much more than a commodity—and that it can be intertwined with identity—has been recognized by many who have done fieldwork in rural and urban India. Some scholars focus on family identity and history, others on culture, others on livelihood and security, and others on legitimacy. One simple theme that emerges from these inquiries is that land is often not fungible. This may seem obvious, but an examination of the law around eminent domain or at human rights mechanisms regarding rehabilitation of displaced persons shows that the notion of identity-driven attachment

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116. KB Saxena, "Development, displacement, and resistance: The law and the policy of land acquisition" (2008) 38 Soc Change 351 at 357.

117. *Ibid.*

118. *Ibid.*

to land has not influenced policy in a significant way. The compensation mechanisms described above in Part III do little to address the attachment that people and communities may have to particular pieces of land and fail to recognize the inadequacy of money as an alternative to access to and life on that land.

The complexity of people's relationships to land is near impossible to address in a single article. As such, I will highlight several aspects of social norms regarding land that are incompatible with the operation of eminent domain. This discussion is meant to further demonstrate the ill-fitting nature of eminent domain in India by highlighting some of the complex dimensions of property not covered by the *LAA*. These aspects include the close relation of land to personal/communal identity, legitimacy, livelihood, resources, and future security.<sup>119</sup> As one scholar put it (regarding Africa), "[A]s economic, symbolic and emotional aspects are at stake, land is often at the source of violence and is also an essential element in peace building, political stabilisation and (socio-economic) reconstruction in post-conflict situations."<sup>120</sup>

Mayur Suresh argues that "we [should] take the link between identity and property seriously, not merely in Lockean or Hegelian terms—that property is an extension of the self—but also in the sense that property is a marker of identity and carries identity down generations."<sup>121</sup> He goes on to show that identity is "contingent and constructed" by exploring the cases of two *hijras*.<sup>122</sup> In the first case, Kamla, a *hijra*, was engaged in a battle over property succession.<sup>123</sup> She lost the case because the ties to her birth family were found to negate her ability to claim property through *hijra* succession. In the second case, which Suresh likens to *Plessy v. Ferguson*,<sup>124</sup> another individual named Kamla (unrelated to the first) was denied a mayorship on the basis of her purported identity as a *hijra*, which was established by the fact that she had received property in the *hijra* way from a

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119. See e.g. Ward Anseeuw & Chris Alden, eds, *The Struggle over Land in Africa: Conflicts, Politics, & Change* (Cape Town: HSRC Press, 2010) (quoting Nikolova Bistra V, *Land and identity: Non-recognition of indigenous land rights – reasons, effects and potential developments* (Master's Thesis, Lund University Environmental studies and Sustainability Science, 2007)); Mayur Suresh, "Possession is 9/10ths of the Body: Law, Land and Hijra Identity" in Arvind Narrain & Alok Gupta, eds, *Law Like Love: Queer Perspectives on Law* (New Delhi: Yoda Press, 2011) 378 [Suresh]; Sundar, *supra* note 40.

120. Anseeuw & Alden, *supra* note 119 at 2.

121. Suresh, *supra* note 119 at 381.

122. *Ibid.* A *hijra* is a transgendered person who is biologically male and who takes on a female gender role. See Laxmi Murthy, "Women, Men and the Emerging Other" in Kalpana Sharma, ed, *Missing: Half the Story* (New Delhi: Zubaan, 2010) 44.

123. *Ibid.*

124. 163 US 537 (1896) (USSC).

*hijra*.<sup>125</sup> In Suresh's analysis, these examples serve to highlight the complexity of identity in the application of customary law regarding *hijras* and the contradictions involved with their 'right' to use customary property law in accordance with Indian family law. These examples illustrate the mutually reinforcing relationship between property, identity, and legitimacy. In the first case, when one is denied property (by ignoring *hijra* succession, for instance), one is denied one's identity and even legitimate existence. In the second, how one gains property is seen to be indicative of one's 'true' identity.

A. Revathi's writings on her struggle for recognition in her family similarly articulate how property can be a legitimating force with regard to identity. After having a sex-change operation and subsequently working as a sex worker, she was removed from her family's division of property (and eventually, after supporting her parents financially, allowed back in). She writes, in a poem which opens an essay revealingly titled "Property as Selfhood: A Hijra Experience,"

Mother didn't accept  
 Father didn't accept  
 Society didn't accept  
 We have no property. No happiness.  
 No home. No work.  
 ...  
 Our mothers should accept.  
 Our fathers should accept.  
 The society should accept us.  
 We should get property.  
 We should get happiness.  
 We should get a home.  
 We should get a job.<sup>126</sup>

Her disinheritance and the perceived illegitimacy of her identity were closely intertwined. A. Revathi goes on to explain that her parents cut her out of the succession of property "by virtue of [her] being a woman," because women do not have "individual property rights."<sup>127</sup> She then goes on to describe the experience of supporting her parents financially in a way that her brothers did not, rebuilding

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125. As Suresh observes, "[p]ossessing the said property is like possessing *hijra* blood—the property in question is therefore a marker and signifies identity and binds ... [the individual] to being a *hijra*." *Supra* note 119 at 386. Complicating the case further was a local statute requiring the mayor to be female and recognizing *hijras* only as castrated males (*ibid*).

126. In Arvind Narrain & Alok Gupta, *Law Like Love: Queer Perspectives on Law* (New Delhi: Yoda Press, 2011) 530 at 530-31 [emphasis in original].

127. *Ibid* at 532.

their house, and being allowed to have some claim to it<sup>128</sup> after signing a document avowing that her “parents would not be thrown out of the house.”<sup>129</sup>

Land as identity and dignity seems outside the scope of much of the operation of law, though it may govern peoples’ lived experience of the law. That is, peoples’ lived experiences will inform what they see as the source of rights to land (for some, centuries of occupation) and which rights one has (for some, rights or expectations regarding farming, tenancy, or ownership itself). Numerous sources attempt to elucidate the complex attachments that people share with land through livelihood, family, history, and culture, and how these attachments may constitute one’s own or communal identity.<sup>130</sup> According to Nandini Sundar,

Property must not be viewed merely as the deeds to an existing plot of individually owned land – as debates in Jharkand show, land is both a means of livelihood and an object of aspiration, a site for the collective expression of identity, and a symbol for what shape adivasi identity should take in an increasingly commodified world.<sup>131</sup>

As another researcher and activist observes, “Land is also the basis of community identity, providing a material and symbolic substratum for social and cultural life.”<sup>132</sup> For tribal peoples who gain food, shelter, and livelihoods from communal forests, the relationship with their communal land has been described as “symbiotic” by the Ministry of Environment and Forests.<sup>133</sup>

The discussion above is not meant to ignore the urban consciousness or to argue implicitly that centuries of possession are required for people to see land (or place) as constituting their identity. Amita Baviskar writes,

Instances of urban displacement also compel us to rethink the ways in which dominant understandings of *dis-place-ment* imagines place. Displacement presumes an attachment to a given landscape that is severed, often violently. That landscape becomes the anchor for bonds of kinship and religion, for livelihood and provisioning, for memory, identity and being—it becomes a socially-inhabited place. But for migrants in cities, what is *their* place, their home? When their *basti* (settlement) is demolished and they are dumped on a wasteland on the edge of the city, what do people cherish and what do they mourn? ... [D]isplaced urban women struggle

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128. She leaves her precise legal claim to the house vague in this piece.

129. A. Revathi, *supra* note 126 at 534.

130. See for example, Margaret Jane Radin, “Property and Personhood” (1982) 34 *Stan L Rev* 957.

131. *Supra* note 40 at 12. *Adivasi* is a term that includes heterogeneous tribal and indigenous people throughout India. Upadhyaya, *supra* note 88 at 55.

132. *Ibid* at 30.

133. Pradip Prabhu, “The right to live with dignity,” *Seminar* 552 (August 2005), online: <<http://www.india-seminar.com/2005/552/552%20pradip%20prabhu.htm>>.

to craft a sense of place, to make a home, and a liveable habitat... [and force us to rethink our] understanding of cultural resources and the politics of place-making. They demand that both activists and academics re-examine the politics of recognition in campaigns against displacement.<sup>134</sup>

In the context of railroad construction, Sarkar notes that the issue of land acquisition was associated with the highly sensitive notion of the homestead, which “attributed cultural values to one’s home and the land inherited from one’s ancestors.”<sup>135</sup> Even after such ancestral land has stopped providing direct livelihoods or homes, people continue to travel long distances to return and visit the family temples located on it.<sup>136</sup> This discussion also highlights the presence of the divine, which is not adequately accounted for by legal mechanisms that seek to replace land with money or a particular piece of land with some other land. This concept is also lost in European conceptions of labour, as Chakrabarty observes:

[T]he modern word ‘labor’ ... translates into a general category a whole host of words and practices with divergent and different associations. What complicates the story further is the fact that in a society such as the Indian, human activity (including what one would, sociologically speaking, regard as labor) is often associated with the presence and agency of gods or spirits in the very process of labor. *Hathiyar puja* or the ‘worship of tools,’ for example, is a common and familiar festival in many north Indian factories. How do we—and I mean narrators of the pasts of the subaltern classes in India—handle this problem of the presence of the divine or the supernatural in the history of labor as we render this enchanted world into our disenchanted prose—a rendering required, let us say, in the interest of social justice? And how do we, in doing this, retain the subaltern (in whose activity gods or spirits present themselves) as the subjects of their histories?<sup>137</sup>

Two ideas can be extrapolated and applied to shortcomings in eminent domain law: the narrow interests in land that are recognized by the law as opposed to the plurality of ways in which people are actually connected to the land; and the presence of the divine or supernatural in this connection. Sarkar also observes that “[t]here was the tribal notion that clearing of forests for the railways would infuriate the ancestors buried under the forest land. As a result, the tribal people feared that instead of rains, fire balls would drop from heaven.”<sup>138</sup> The

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134. *Supra* note 113 at 61.

135. Sarkar, *supra* note 23 at 113.

136. This is a common theme in my conversations with people about their ancestral land. See also Bina Agarwal, *A field of one’s own: Gender and Land Rights in South Asia* (New York: Cambridge University Press, 1994) at 18.

137. Chakrabarty, *supra* note 6 at 76-77.

138. Sarkar, *supra* note 23 at 113.

idea of the divine is also present in the common procedure of asking permission of the land in religious ceremonies at the start of almost all construction projects. The divine, however, does not appear to be present in the law regarding eminent domain.

Attachment to one's home is hardly unique, yet it remains under-recognized by law elsewhere as well.<sup>139</sup> If social norms around identity, legitimacy, livelihood, and entitlement to resources are reinforced by centuries of possession, pre-law possession, decades of reliance, or entitlement to some resources after being displaced from their own, then it is hardly surprising that when land is taken, resistance ensues.

## B. RESISTANCE AND THE CONSTITUTION OF IDENTITY

The state structures of eminent domain, as well as their response to opposition, contribute to and often constitute the identity of those resisting appropriation. In the context of the assertion of sexual identity through resistance, Arvind Narrain says the following:

Perhaps most importantly, the voice of resistance breaks the silence. The voice of pain or anger lets us know that all is not well with the definition of politics as we know it. The point of politics begins when you discover that what you feel are not your feelings alone, that your cry of rage is shared by a wider group of people and that what you have to say resonates with the experience of other people as well. Its speech builds new solidarities and reaches out across great distances to awaken the impulse of politics in others similarly situated. Perhaps central to the political impulse is the desire to build solidarity on the basis of one's identity.<sup>140</sup>

How do acts of resistance relate to law? How do they relate to a property regime? Resistance not only influences these understandings, but manifests them. One might well resist *because* one's identity, one's relationship with the land, and therefore one's understanding of how the government should relate to its citizens and the land is in tension with the law's understanding of the same.

In Badhkhalsa, the village described at the opening of this paper, residents have been featured in the local newspaper, in the national newspapers, and on national television. Their work has brought increased scrutiny to the entire state of Haryana, though they have yet to succeed in their claim over their land. Women are playing an increasing role in the fight to keep their land.<sup>141</sup> Some

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139. Radin, *supra* note 130.

140. "Queering Democracy" in Arvind Narrain & Alok Gupta, eds, *Law Like Love: Queer Perspectives on Law* (New Delhi: Yoda Press, 2011) 1 at 5.

141. K Rajalakshmi, "Standing up to the state," *Frontline Magazine* 28:11 (17 June 2004), online:

have said, in person and in the newspapers, how their lives and identities are tied to the land that was expropriated. Others have commented that, with the increasing land values in the area, many of those who resist expropriation might have been willing to sell if the price were higher.<sup>142</sup> Despite the divergent views on what should be done with the land, a common thread seems apparent—that the decision should lie with residents of the village, not with the government. Moreover, this solidarity is also revealed by the fact that almost all the male members of the village spent time, often days, at the sit-in at the highway.

Of course resistance often proceeds within the framework provided by that which is being resisted.<sup>143</sup> So, when people in Jharkand opposed re-surveying by the government, they did so because they knew the results of the reconstituted records would be used against them in future expropriation, and so they attempted to preserve their own title records as evidence of their ownership.<sup>144</sup> The more resources and land that are taken, though, the more difficult it becomes to sustain continued agitation. As Saxena notes, “Community control over natural resources in their respective jurisdictions constitutes the very edifice on which, traditionally, the identity of tribes is constructed and without which they will disintegrate.”<sup>145</sup>

### C. RESISTANCE AND THE EXTRA-LEGAL: KEEPING ONE’S LAND THROUGH OCCUPATION OR VIOLENCE

In Badhkhalsa, village residents had been in negotiations with a private developer who had offered significant sums for their land. While some of them were contemplating the offer, the developer met with the local government and subsequently withdrew the offer. Soon after, the government decided to expropriate the land and acquired title of Badhkhalsa and approximately one hundred nearby villages. In violation of the *LAA*, the government did not provide notice of the public purpose for which the land was being acquired. The compensation deemed appropriate by the government was much lower than what the private developer had previously intimated. In the end, the government acquired the land for approximately Rs.260 per square foot, and then sold it (to private education institutions) at Rs.5400 per square foot.<sup>146</sup> After years of agitation,

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<<http://www.frontline.in/fl2812/stories/20110617281200900.htm>>.

142. Interviews with Badhkhalsa residents (on file with author).

143. Rajagopal, *supra* note 10.

144. Upadhyaya, *supra* note 89 at 52.

145. *Supra* note 116 at 357.

146. Interviews of Badhkhalsa residents (on file with author). See also BS Malik, “Now, education

the government increased the compensation offered to the villagers, but village residents in Badhkhalsa have held out, arguing that it is still many times below market value.<sup>147</sup>

The other villages near Badhkhalsa decided to accept the below-market value compensation offered by the government, but Badhkhalsa decided to resist and have used a variety of ways to keep its land. Residents brought a lawsuit, went to the newspapers, staged various sit-ins along the highway, and intimidated government officials who attempted to survey the newly 'acquired' land. In my mind, however, what had the most influence on the rules and norms regarding who had entitlement to what was the fact that they *stayed* on the land.<sup>148</sup> In fact, they still farm it. As the government has taken title, the villagers cannot sell it or use it as collateral to take out a loan. But they continue to farm on it.

In conversations with residents of Badhkhalsa, it is clear that within the village, and even within families, there are a plurality of views regarding whether and how to resist, just as there were different opinions on whether to accept the initial preliminary figures from the private developer. For the purposes of this article, it is the macro-strategies of resistance—the legal and non-legal routes pursued by the village—that most serve this inquiry's purpose of highlighting the disparities between the goals of eminent domain and the motivations of the people it is meant to benefit.

The government has attempted to enforce control over this land less and less as years have passed and seasons of crops have been harvested. Despite the law of eminent domain, the reality is that the village residents are still attached to the land. The poles used by the government to demarcate the land claimed have been dug up and now form fence posts for some of the residents' animal pens. It seems that by remaining committed to their own norms regarding who has rights to what, they have managed to keep at least possession of the land and control its use. Some of the residents of Nagpur have also managed to remain on their land, though, like the inhabitants of Badhkhalsa, they are unable to sell it and remain uncertain regarding the future.

The people in these examples are not alone in the recognition that possession is crucial. Keeping land under one's own control has proven to be a rational means of eventually gaining back total control. Eduardo Peñalver has explored the "inertia

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city oustees gang up against govt," *The Tribune* (8 August 2011), online: <<http://www.tribuneindia.com/2011/20110809/haryana.htm>>.

147. BS Malik, "Rai farmers reject three-fold hike in land acquisition rate," *The Tribune* (26 November 2011), online: <<http://www.tribuneindia.com/2011/20111127/haryana.htm#6>>.

148. Interviews with Badhkhalsa residents (on file with author).



of land's memory" and the path-dependence that seems to exist with regard to its use.<sup>149</sup> As he explains, "once in place, land uses presuppose and reinforce one another in ways that make it difficult to undo one piece without affecting many others." For example:

After it has been built, a highway cannot be shifted without doing significant harm to the numerous businesses and homeowners who have come to depend on it for access to their properties. A city founded in a particular location to take advantage of access to waterborne transportation will remain in the same place long after cultural change or technological advance have dissipated its locational advantages.<sup>150</sup>

Peñalver points us to other empirical examples of the strategic use of staying on land: Nomi Stolzenberg's work on Jewish settlement in the West Bank and his own work with Sonia Katyal "about squatters on the American frontier employing the same strategy to resist restrictions on their use of federal lands."<sup>151</sup>

Media and academic accounts have explored numerous examples of violence in reaction to compulsory acquisition. The dams on the Narmada Valley have drawn international attention. The coordinated efforts of the Narmada Bachao Andolan resulted in the World Bank withdrawing from the project. I argue that these acts of resistance provide spotlights on the most significant chasms between norms regarding land and eminent domain—including why people believe they are entitled to their land and why resettlement or compensation is inadequate. A system of property rights fully committed to including the masses would have space to engage with these issues, as would a realistic effort to formulate and enforce human-rights mechanisms.

Through these acts of resistance, the impugned law becomes a focal point for communities and the resistance itself reinforces communal identity. In her examination of Jharkhand, Upadhyya found that the *Chhotanagpur Tenancy Act*,<sup>152</sup> which was widely viewed as progressive, in fact became a rallying point for *adivasi* resistance.<sup>153</sup> The "land tenure system in Jharkhand emerged from a history of struggle against the state—a history that is not in the past but is vibrantly alive, providing a potent source of identity for adivasis."<sup>154</sup> These struggles were driven by the clear "disjuncture between the structure of land rights in law and people's

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149. Eduardo M Peñalver, "Land Virtues" (2009) 94 Cornell L Rev 821 at 831.

150. *Ibid.*

151. *Ibid.*

152. *The Chotanagpur Tenancy Act, 1908*, No 6 of 1908, Bengal Code.

153. Upadhyya, *supra* note 89 at 55.

154. *Ibid* at 54.

claims to land and livelihood practices at the local level.”<sup>155</sup> In particular, some villagers see the *kuntikhattis* (similar to the descendants of the original settlers of the land) as the owners of the land, so they reject acquisition.<sup>156</sup>

When social norms that drive dissatisfaction with the law find expression in resistance, these acts sometimes end up forcing lawmakers to acknowledge them in the law, and in turn adapt to that acknowledgement, as explored further below.

#### D. STATE RESPONSE

Balakrishnan Rajagopal contends that “it is the process by which the ... [International Financial Institutions] have dealt with that resistance and not so much the resistance itself that has revealed the centrality of the resistance to the formation of ... [their] changing institutional agendas.”<sup>157</sup> A similar dynamic can be seen in relation to property rights.

While judicial opinion has occasionally recognized legal norms other than those found in judge-made and statutory law, such norms are deemed to be “custom” (as opposed to the more legitimizing construction of actual law).<sup>158</sup> Additionally, efforts to codify custom are problematic for several reasons. First, they may impose a minimum threshold of consistency on the custom for it to be deemed legitimate, contradicting its intrinsic flexibility. Second, such efforts often homogenize custom, denying its heterogeneity. Third, they may codify a colonial interpretation of custom. Finally, they may distort it in some other way. Sundar writes that “the courts in India do recognize ‘customs’ provided they are ‘ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence.’”<sup>159</sup> Furthermore, if a piece of legislation appears to reflect customs in that it “enshrines the rights of *Mundari Khuntkattidars* (original settlers),”<sup>160</sup> even these representations are often distortions—homogenizations of various communities, “colonial accommodation with resistance or, at the very least, a colonial reading of ‘tradition.’”<sup>161</sup> Even if

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155. *Ibid* at 54.

156. *Ibid* at 35 and 51.

157. *Supra* note 10 at 133.

158. Sundar, *supra* note 40 at 16.

159. *Ibid*.

160. *Ibid*.

161. Moreover, “these notions of ‘custom’ and ‘community’ then, not only enable certain actors to speak... they also serve to silence other kinds of actors, particularly women, or allow them space only to speak in certain ways, as community members first and women second. *Ibid* at 18. See also Upadhyaya, *supra* note 88 at 34; James C Scott, *Seeing Like a State* (New Haven: Yale University Press, 1998) at 34-35.

one seeks to prove a supposedly flexible custom, judges often rely on colonial-era texts rather than real people in making their determinations.<sup>162</sup> The enshrined versions of these customs, therefore, often end up essentialized.

However, as seen in several recent examples,<sup>163</sup> judges are beginning to recognize the legitimacy of informal norms and the very identities of the people who most often lose to formal law. In the cases that follow, it is significant that the courts appear to recognize the legitimacy of the disenfranchised *within* mainstream law, rather than relegating their norms and identities to exceptional cases where “customary law” should apply.

For example, in a 2010 judgment from the High Court in Delhi regarding the forced evictions of *jhuggi* (slum) residents in Delhi, the court stated that:

Even though their *jhuggi* clusters may be required to be legally removed for public projects, but the consequences can be just as devastating when they are uprooted from their decades long settled position. What very often is overlooked is that when a family living in a *Jhuggi* is forcibly evicted, each member loses a “bundle” of rights —the right to livelihood, to shelter, to health, to education, to access to civic amenities and public transport and above all, the right to live with dignity.<sup>164</sup>

The court also recognized the need for slum residents to be respected and the difficulties they face in securing the rights to which they are entitled:

This Court would like to emphasise that ... *jhuggi* dwellers are not to be treated as ‘secondary’ citizens. They are entitled to no less an access to basic survival needs as any other citizen. It is the State’s constitutional and statutory obligation to ensure that if the *jhuggi* dweller is forcibly evicted and relocated, such *jhuggi* dweller is not worse off. The relocation has to be a meaningful exercise consistent with the rights to life, livelihood and dignity of such *jhuggi* dweller ...

It is not uncommon to find a *jhuggi* dweller, with the bulldozer at the doorstep, desperately trying to save whatever precious little belongings and documents they have, which could perhaps testify to the fact that the *jhuggi* dweller resided at that place. These documents are literally a matter of life for a *jhuggi* dweller, since most relocation schemes require proof of residence before a ‘cut-off date’. If these documents are either forcefully snatched away or destroyed (and very often they are) then the *jhuggi* dweller is unable to establish entitlement to resettlement.<sup>165</sup>

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162. Upadhyaya, *supra* note 89 at 36.

163. In addition to these recent decisions, the seminal “Pavement Dwellers” case is worth noting. See *Olga Tellis & Ors v Bombay Municipal Corporation & Ors Etc*, 1986 AIR 180 (India SC).

164. *Sudama Singh & Others vs Government Of Delhi & Anr*, 2010 (168) DLT 218 (Delhi HC).

165. *Ibid* at paras 57-58.

The court also cited the Supreme Court's articulation of the necessity of decent housing in order to participate in society.<sup>166</sup>

In its January 2011 decision regarding public sexual abuse of a tribal woman, the Court explicitly recognized the history of tribal people as the original inhabitants of India, the centuries of abuse that they have suffered, and the unacceptability of further disrespect to them.<sup>167</sup> This nascent mainstreaming of respect and recognition of other norms is a significant leap from cases as recent as 2000, when the Court declared that "[r]ewarding an encroacher on public land with a free alternate site is like giving a reward to a pickpocket."<sup>168</sup>

Further, the executive branch's increased scrutiny of certain development projects has slowed the runaway train of development, displacement, and environmental damage. In late 2010, an approved SEZ in the state of Goa was revoked by the Minister of Commerce. Commentary in a leading news magazine speculated that:

The central government is in two minds about the provision for denotifying [*i.e.*, revoking] SEZs, but Kamal Nath, the Union Minister for Commerce and Industry sees no difficulty in denotifying for, he says, which industry would like to go in against people's wishes? This is the first time that people have counted in the process of land acquisition and macro planning.<sup>169</sup>

Similarly, the Ministry of the Environment has increased its enforcement of environmental standards regarding several large mining operations.<sup>170</sup>

Despite these few changes on the judicial and executive front, there has been no real movement towards a more nuanced expropriation law via Parliamentary

166. *Ibid* at para 40, citing *Chameli Singh v State of UP*, 1996 AIR 1051 (India SC).

167. *Kailas & Others v State of Maharashtra TR*, 2011 AIR 598 (India SC).

168. *Almitra H Patel And Anr v Union Of India And Ors*, 2000 2 SCC 166 at 3 (India); see also Menon & Bhan, *supra* note 114. In 1951, the Court in *P Thambiran Padayachi And Ors v The State Of Madras* cited Nichols on eminent domain (an American source), which justified clearing slums in New York through the use of eminent domain because they were disease-infested and crime-breeding communities. [1952] 2 MLJ 208 at para 11 (India SC) quoting Philip Nichols, *The law of eminent domain: a treatise on the principles which affect the taking of property for the public use*, 2d ed vol 2 (Albany: Matthew Bender, 1917).

169. Vasudha Dhagamwar, "Post Nandigram and Goa," *Seminar Magazine* 582 (February 2008) 48, online: <[http://www.india-seminar.com/2008/582/582\\_vasudha\\_dhagamwar.htm](http://www.india-seminar.com/2008/582/582_vasudha_dhagamwar.htm)>.

170. See Shoma Chaudhury, "Cat On A Hot Tin Roof," *Teelka Magazine* 8:10 (12 March 2011), online: <[http://www.teelka.com/story\\_main49.asp?filename=Ne120311COVERSTORY.asp](http://www.teelka.com/story_main49.asp?filename=Ne120311COVERSTORY.asp)>; Kunal Majumder, "Green hunter: Jairam Ramesh," *Teelka Magazine* 7:51 (25 December 2010), online: <[http://www.teelka.com/story\\_main48.asp?filename=Ne251210GREEN.asp](http://www.teelka.com/story_main48.asp?filename=Ne251210GREEN.asp)>.

redrafting.<sup>171</sup> The *LAA* was amended in 1984 in a way that made acquisition easier, opening the door wider for expropriation and transfer to private companies and adding an “urgency” clause allowing for even faster expropriation with fewer checks in place.<sup>172</sup> An effort to clarify public purpose and compensation in 2007 failed.<sup>173</sup> In 2011, the Minister of Rural Development introduced a draft bill that would add rehabilitation provisions to the *LAA*.<sup>174</sup> It remains to be seen how this reform will fare. The “urgency” clause and other loopholes allowing for circumvention of process and social assessment reports remain in place, despite the greater emphasis on rehabilitation provisions.

Finally, there are also unofficial responses, often in the form of failure to carry out planned expropriations. It is hard to quantify these or determine how often and for what reasons they occur (popular resistance, political manoeuvring, or some other combination), but another look at two earlier examples is informative. In both Badkhalsa and Nagpur, residents have been able to stay on their land despite the law. In the case of Badkhalsa, the election of the village head as a local member of the legislative assembly appears to have improved their situation. The government might be holding off withdrawing the acquisition officially so as not to look sheepish, but might also be appeasing one of its own by not exercising it. It is difficult to discern the implications of these informal non-exercises of power without insider political knowledge, but their presence underlines the importance of looking at the realities of how eminent domain works in practice.

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171. However, for an account of Jharkhand's state level efforts, see Sundar, *supra* note 40. Also, that said, with regard to some state-level policy, Amita Baviskar has found that there has been some grudging recognition of complex notions of place. See *supra* note 113 at 63.
172. The amendments introduced in the *LAA* of 1984 made several changes that made it easier for private industry to receive land acquired by the government. In particular, a list of examples was included under the term “public purpose,” which included “the provision of land for residential purposes to the poor or landless ... or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State.” *Land Acquisition Act, 1984*, ss 3(f)-(v). This, in effect, means that the government can displace in order to provide housing for the displaced. As Ramanathan points out, however, there is “no concomitant right to land on which to resettle!” Ramanathan, *supra* note 33 at 136. The amendments introduced in the *LAA* 1984 also left the idea of “market value” in place, though it did add a solatium of 30 per cent (*ibid*, s 23(2)).
173. The 2007 bill passed in one house of Parliament but lapsed because it was not introduced in the other. As such, it is not in force. For a description of the proposed amendment, see Priya Parker & Sarita Vanka, “Legislative Brief: The Land Acquisition (Amendment) Bill, 2007” *PRS Legislative Research* (10 March 2008), online: <[http://www.prsindia.org/uploads/media/Land%20Acquisition/bill167\\_20080311167\\_Legislative\\_Brief\\_Land\\_Acquisition\\_Bill.pdf](http://www.prsindia.org/uploads/media/Land%20Acquisition/bill167_20080311167_Legislative_Brief_Land_Acquisition_Bill.pdf)>.
174. *The Land Acquisition, Rehabilitation and Resettlement Bill, 2011*, No 77 of 2011.

## V. CONCLUDING THOUGHTS

What are the implications of the chasm between the colonial institution of land acquisition as practiced today and the social norms explored in this article? I argue that when land that is linked to identity is taken, the expropriation is far more complicated than the current system of compensation and rehabilitation recognizes. As such, there is significant work to be done to rethink the law and respect heretofore unrecognized relationships to land without codifying an essentialized or static view of what those relationships should be. These disparities need attention, not just for the normative reasons regarding the legitimacy of the law explored by many scholars,<sup>175</sup> but also because it is this disjuncture that gives rise to resistance. Indeed, once the link between property and identity is acknowledged, the magnitude and duration of resistance to acquisition is hardly surprising.

Despite the reconstitution of eminent domain and of the identities of those engaged with it,<sup>176</sup> the regime remains ill-fitted and wedded to its colonial purposes and sources of legitimacy. It was not established from the perspective of the people whom the Constituent Assembly meant to empower, but rather from that of the colonial authorities. It is, therefore, hardly surprising that it continues to operate to the advantage of those in power.

Part of its continuing rhetorical power stems from its focus on the commodification of land. In the case of India, if land were fungible and there were not such strong bonds between particular lands and groups of people, 'development' would be relatively easy—the state would just have to move people to new locations (assuming that rehabilitation was actually enforced). It would simply be a problem of administering adequate compensation and rehabilitation rather than the gargantuan battle of livelihood, identity, and legitimacy that plays out in a myriad of forms across the country over the course of many decades.<sup>177</sup> Legal

175. See e.g. Laura S Underkuffler, "Property as Constitutional Myth: Utilities and Dangers" (2007) 92 Cornell L Rev 1239 at 1248-49; Eduardo Moisés Peñalver & Sonia K Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership*, (New Haven: Yale University Press, 2010); John Dwight Ingram, "Eminent Domain After *Kelo*" (2007) 36 Cap U L Rev 55; Julie A Degen, "The Legislative Aftershocks of *Kelo*: State Legislative Response to the New Use of Eminent Domain" (2007) 12 Drake J Agric L 325; Trebilcock & Veel, *supra* note 53 at 457.

176. Craig Anthony (Tony) Arnold, "The Reconstitution of Property: Property as a Web of Interests" (2002) 26 Harv Envtl L Rev 281 at 290; Upadhy, *supra* note 89 at 50.

177. Nitya Rao, "Conflicts and Contradictions: Land Laws in the Santhal Parganas" in Nandini Sundar, ed, *Legal Grounds: Natural Resources, Identity, and the Law of Jharkhand* (New Delhi: Oxford, 2010) at 57.

recognition of people's attachment to land might translate into a narrower scope of public purpose or a higher bar for displacement from residential areas, a presumption against eminent domain, or an entitlement for residents to participate in decisions relating to the division of profits if they choose to sell their land to developers. This latter inclusion might begin to recognize both the relationship of people to land as well as the agency of people to choose the fate of their land and themselves.

Chakrabarty recognizes the limitations of attempting to "provincialize Europe." His aim is not to go back to a nativist history or to reject modernity outright. Neither, as I hope is clear, is mine. Rather, he seeks:

[A] history that deliberately makes visible, within the very structure of its narrative forms, its own repressive strategies and practices, the part it plays in collusion with the narratives of citizenships in assimilating to the projects of the modern state all other possibilities of human solidarity. ... This is a history that will attempt the impossible: to look toward its own death by tracing that which resists and escapes the best human effort at translation across cultural and other semiotic systems, so that the world may once again be imagined as radically heterogeneous.<sup>178</sup>

Analogously, one cannot extricate the influence of European thought from the law and practice of eminent domain in India. That said, I have attempted to show how the institution's exploitative uses have flowed from its original design and that if other purposes are to be imagined, another design must be as well. Once we acknowledge the attachment to and reliance on land in ways that go beyond market value and title, we open up space to acknowledge that property is far more intertwined with identity than is generally recognized in the common law and that a property regime meant for the masses must recognize such relationships. Throughout this article, I have highlighted the complexity of property rights in India and argued that the colonial institution of eminent domain remains an institution of exploitation and abuse. I have also maintained that, in practice, it accomplishes its (questionable) goals of acquisition of land for public purpose less and less as time goes on and as resistance to it increases. Moreover, I have argued that it is these very chasms between eminent domain and social norms regarding property that drive resistance to expropriation and the cycle of state response and adaptation.

The various acts of resistance occurring throughout India highlight the spaces between formal legality and accepted norms as well as the contradictions arising from the use of an institution set up to take from the people and give to a central power under the dubious guise of helping those very people.

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178. *Supra* note 6 at 45.

