

## DOCTRINE OF EMINENT DOMAIN VIS-A-VIS RIGHT TO FRESH AIR UNDER EASEMENT LAWS – A COMPARATIVE STUDY

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### Abstract

*Right of easement is necessarily grown with the right to property. Origin of this right can be traced back from the days when people started acknowledging the rights of each other with respect to property. Owners right over the property were subjected to the condition that enjoying one's property should not result in disturbing the right of his neighbor to enjoy his property. Right to fresh air is one of the easement rights which is statutorily recognized in every civilized country. However, this right is superseded by the doctrine of eminent domain, wherein the state is empowered to use public property to construct dams, roads, etc. on public property or by acquiring private property. To validate this action of the government, modern law of environment protection, fixes a mandate upon the government to get environmental clearance for such developmental activities. Municipal corporations and other local bodies of the government decide the width of the road and further need of expansion of road or construction of bridges and flyover based upon the need to regulate the motor vehicle traffic on roads. This paper, examines the impact of such activities on easement right to fresh air of the people residing in the nearby areas. In a developing country like India, most of the traffic conjunction is on the business roads, where such kinds of developments are carried out by states. Acquisition of lands for construction of cement roads, flyover near residential places are affecting these private rights as well. Through this paper the researcher also wishes to point out the importance of easementary and private right to fresh air, statutory framework in India and other developed countries as well as international mandate for developing countries.*

**Keywords:** Easement right, Eminent domain, Entitlement theory, Environmental clearance.

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#### Suggestions

### Introduction

Right to property includes right to easementary right on neighboring land. Easement law recognizes the right to air by prescription of twenty years resulting into restriction to the right of servient owner of property in India. Right to acquisition of private property and use of common property for public

welfare is the right of state. State can use property for developmental work in two situations; Firstly, when property is public property or acquired under the process of acquisition by paying compensation to the owner of the land and secondly, if it clears the test of environmental clearance.

Law permits developmental activities as valid act of the welfare state on the ground of eminent domain. Servient owner can not affect the dominant owner's easementary right to fresh air over his property. But when the government acquires servient owner's property, the action of state is justified even if it results into violation of easementary right of the dominant owner which he is entitled to exercise on the land of another. Thus, though his neighbor's land is acquired and not his land, owner is deprived of his right to wholesome environment of fresh air named as easementary right. Thus, owner's easementary right to fresh air is also acquired along with the acquisition of neighboring land that too without payment of compensation to him.

As almost all the countries in the world gives compensation or rehabilitate the person whose land is acquired under land acquisition act for developmental purposes (Jonathan Mills Lindsay, 2012). There is no issue about this, but what about surrounding or adjacent areas that were not acquired and purchased by the state but were nevertheless made vulnerable by such development projects?. Through this paper researcher investigates few prominent questions:

- Is public and social right always superior to private right when it comes to satisfy the need of people and on the ground of public use?
- What is the parameter of measuring public benefit? Is it allowed at the cost of health and wholesome environment?
- Is Environment Impact Assessment a substantial tool to validate the developmental activity?

No doubt environment audit is an important component of ascertain factor of GDP. In India, the idea of environmental auditing was formally introduced in industrial units in March 1992 with the overarching goals of reducing resource consumption and encouraging the use of clean technology in industrial production to reduce waste generation (R S Mahwar, N K Verma, S P Chakrabarti, 1997). State cannot claim GDP by ignoring actual environmental loss, which even counts the loss of an individual private right to fresh air and wholesome environment. Right to environment is a fourth generation collective human right (DINAH SHELTON, 2005). Moreover, violation of an individual right to fresh air cannot be ignored as subordinate to public right. It is no defence that the nuisance (pollution), although injurious to the plaintiff is beneficial to the public at large. Whether the government should be forced to pay compensation for violating an easement right to fresh air is one of the most difficult legal questions arising from the law of eminent domain.

### 1. Doctrine of Eminent Domain: Theoretical perspective

The doctrine of eminent domain has played a distinct role in the achievement of social and economic goals of any welfare state for the benefit of the people. 'Eminent domain' is an authority of the government to acquired private property and rights attached to the property for its own use without the owner's approval. (Cormack, 1931) The property is taken for state use or can be delegated to other who will allocate it to public use. The most common public use of property taken by eminent domain are public utilities such as construction of roads and dams. The idea of eminent domain can be traced in the writings of natural law jurists Hugo Grotius in 17<sup>th</sup> century as inherent power of sovereign authority coupled with a duty to pay compensation. The phrase eminent domain was coined by Grotius, Lock, and Hobbs in the natural law theory to describe the state's power over all private property within its jurisdiction and control (Arthur Lenhoff, 1942). Both state and federal governments have the authority to purchase private property for public or semipublic purposes, which is theoretically described as either a "reserved right" or a power inherent in "sovereignty." According to the theory of "reserved right", the state is believed to be the initial owner of all property, with subsequent private ownership subject to the sovereign's power to reclaim possession whenever the best interests of society demand it (Richard S. Harnsberger, 1969). 'Public' use developed as one of the fundamental bases for eminent domain gradually over the time. Principle of egalitarianism promotes the idea of distributive justice where every person should be entitled to equal number of goods,



resources and services by state (BHATTACHARYYA, 2015). John Rawl's difference principle permits distribution that does not follow strict equality unless inequality has the effect that the least advantaged people are immensely better off than they would be under strict equality. Welfare based principles are motivated by the idea that what is of primary moral importance is the level of welfare of people. These jurists advocated the idea of distributive justice towards welfare of people. Robert Nozick proposes Entitlement Theory which appeals that *'no one is entitled to holding except when a person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding or who acquires a holding in accordance with the principle of justice in transfer'*. (Ratnapala, 2013) People own themselves. Nozick started his entitlement theory by denying that anyone is entitled to engage in distribution of property. He was in favour of system of exclusive property rights with least interference by government.

## 2. Doctrine of Eminent Domain: Global perspective

Right to respect property right is adopted in many European nations. The European convention on human rights under Art. 8 provides protection from acquisition of private property by the state.

*"everyone has the right to respect for his private and family life, his house and his correspondence" and prohibits interference with this right by the state, unless the interference is in accordance with law and necessary in the interest of national security, public safety, economic wellbeing of the country"* (Meenakshi Gogoi, 2018)

United States, recognizes the right of government to take private property in the tune of English Common law. Eminent domain is recognized by US courts as a fundamental power of government. In the USA, it means compulsory purchase. Old English jurisprudence also supports the power of state as supreme and uncontrollable power by which state is governed. The power to do everything in a state without responsibility which includes power to make laws relating to acquisition and to apply them. The concept of sovereignty is closely related to the growth of doctrine of eminent domain. It even gives liberty to states to make their own definition of public use (Jesse Saginor, 2009). Moreover in the number of cases, courts have clarified the meaning of public use such as in the case of *Kelo v. City of London* (Lanza, 2013) US court held that creating local employment in the project does not fulfill the requirement of public use (*Kelo v. City of New London*, 2005).

## 3. Eminent domain and EIA

In modern civilized state doctrine of eminent domain in relation to developmental activities is regulated by EIA system. This system is evolved to foresee the result of a proposed developmental activity on the environment. EAI is a decision making tool which seeks to recognize the best solution to balance economic and environmental costs. It also ascertained the possible ill effect of the project over environment. EIA is a mandatory process and initially started with USA in 1969 and followed in other developed countries like, Canada, Australia. The World Bank also adopted the EIA process in many developmental works making mandatory for the borrowing country to clear the process of EIA. In European Union nations under the guidelines of Directive on EIA, 1985, seeks advice from the stakeholders including NGO and affected public. Similarly, World Bank and other funding authorities at global level requires to consult with the affected persons and NGOs. Thus including participation of all the stakeholders right from developer, state and people. Report in these countries are provided mostly in local language for the purpose of requiring active participation of people in this process. In India too, we are getting expertise in the preparation and application of EIA but lacks representation of NGO and people at initial stages. Local people also do not understand the reports because mostly it is written in English and not in local language (Sinclair, 2012).

## 4. Relationship between Natural rights and Easement rights

Natural rights are incidental to property right of the owner. It comes in ordinary course where it is attached to land as a property of owner or occupier of the land. those incidents and advantages which are provided by nature for the use and enjoyment of man's property. Thus, every owner has the right to build on his land in any way he likes, to enjoy the air and light passing over his land, he has a right not to have his physical comfort disturbed by wrongful act of another, he has a right to water which



passes by or over or percolates in his land, he has a right to enjoy air of quality over the open area of his land. These are all natural rights.

They need no age to ripen nor any particular incident to create them. Easement on the other hand, are not given to every owner of land but are created by special human acts or incidents. They are artificial or conventional, and must be acquired by grant, prescription or other means (The Indian Easement Act, 1882 Sec 4, n.d.).

### 5. Easement Right to Fresh Air

An easement is a kind of right where the owner of a property can exercise his servient right over other's property. It is a privilege of the owner/occupier of the property to enjoy easement rights such as right to air, water, open space over other's land. The land for the beneficial enjoyment of which the right exists is called the *dominant heritage* and the owner or occupier thereof the *dominant owner*; the land on which the liability is imposed is called the *servient heritage* and the owner or occupier thereof the *servient owner*. The characteristic of an easement to attach itself to the dominant property is called "*appurtenance*", and the easement is said to be "*appurtenant*" to the dominant tenement. It is because of this peculiarity that not only the owner, but also the occupier of the dominant property can enjoy the easement and sue if obstructed.

Easement right to air is limited to stop the owner or occupier of a connecting land from constructing any structure which results into illegally obstructing the fresh air of the dominant tenement. This right protects the owner against nuisance. However, it is subject to condition that this right is used by the occupier/owner for twenty years without any interruption. It can be attained by way of grant or by covenant expressly or impliedly or by prescription without any interruption for a period of 20 yrs. or by reservation on the sale of the servient tenement expressly mentioned.

Compensation is a relief given by courts in the form of money to be paid to a person who suffered loss and injury. Under original Constitution, right to property was protected as fundamental right. However, constitutional validity of acquisition of land is upheld by 44<sup>th</sup> amendment in the constitution and under Art 300A. however in several cases court has pronounced that the right to private property is a human right. Owner of the property acquires right to fresh air, water and open space over a period of time as an easement right. A servitude is a limited right over a piece of land. Such rights include right to air, light and water across an adjoining land. However, in view of this easement right one's property can be subjected to dominant heritage and servient right as an encumbrance can be exercised. Thus the land on which the liability is imposed is called the servient heritage which exist even on the transferee of the land. Thus when the transferee is a state and acquires the land for public use, question arises, can dominant owner restrict the state from carrying developmental project which may result into violation of his easement right to fresh air?

According to positivist, the state has an indefinite power to create legal right for itself. However, state possesses right against the subjects and it also owes duties to the subjects. Every right of easement imposes on the servient owner a restrictive use of the property. In case of violation of such right, he may sue the owner for compensation and damages by filing a civil suit.

*The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* provides for appropriate government to consult the concerned people in the affected area to prepare social impact assessment study in consultation with them. It requires publication of notice and public hearing. Report needs to be make available in local language. This social impact assessment reports further needs to be placed before the assessing officer whenever environmental impact assessment is carried out.

State has power to land acquisition for the purpose of industrialization or development of any infrastructural facilities by providing compensation to the affected party. State can also acquire the land for any specific purposes such as Metro Railway construction by passing a special law to that effect. Such kinds of constructions often cause adverse effects on the living organisms because of the pollution caused during the activities. It is blamed that the economic growth is the primary cause of



pollution. (Saleem H Ali, 2018) Air pollution includes noise pollution. There is no mechanism to control the noise pollution under the *Railway Act, 1890*. Motor vehicle rules contain description of horn so as to control noise pollution (Leelakrishnan P., 2019). The ambient air quality standards in respect of noise for different areas and zones is specified in the schedule annexed to noise rules.

Since right to property is not a fundamental right, land can be acquired by payment of compensation by making appropriate provisions in law. However right to air which includes as easement right relating to property is a right to wholesome environment which is interpreted as fundamental right under *Article 21* of the constitution. Hence, law requires a fair and just procedure to deprive a person from this right. Of the three essentials air, food and water that man needs for his survival, air occupies the prime position. Man needs about 13kg of air every day. Polluted air has direct impact on the health of human being. Air pollution along with other particles like dust, soot, smog, fly ash affects lungs, causes insomnia, loss of appetite, eye irritation, respiratory infection, lung cancer etc.

Millions of people have been arbitrarily displaced by a number of dams constructed. When tribal people are displaced, they do not get any compensation since they have not legal title to land. After passing of the Forest Rights Act, 2006, rights of the forest dwelling tribal communities and other traditional forest dweller to forest resources are recognized.

Environmental justice is a comprehensive idea to define governmental actions to stop the oppression of disadvantaged people by developmental plans that cause environmental harm. In India, rehabilitation has been taken up for the construction of various dam but little has been done to ensure the compensation to those who are deprived of with fresh air due to acquisition of neighboring land.

#### **6. Restoration of a traditional property right to air to protect right to fresh air- Global Perspective**

Concept of traditional easement right belong to the English common law maxim, '*cujus est solum ejus est usque ad coelum et ad inferos*' which says that owner of the land also owns the sky and the depths. (Jonathan Sashe Chieza, 2018) In modern period requirements of aviation is have revoked private property right to use air. Any type of entry on land without authorization even extending hand over the property amounts to trespass. However, air pollution is an invisible invasion to right to fresh air of the land owner which is provided a very little legal protection in all over the world. According to standard definitions, air rights include all property that is at or above a specific horizontal plane, as well as any caisson and column lots required to house the improvement's structural supports. This effectively creates a horizontal split of real estate, with each section having its own owner and a set of obligations and rights (American Planning Association, 1964).

The fifth amendment to USA Constitution provides for property right of the landowner where state can not acquire property unless it is for the public use and owner is adequately compensated for that. This is also known as 'taking clause' under USA Constitution (Daniel H. Cole, 1999). USA's Clean Air Act also provides for payment of conveyance as emission allowance to property owners including private and public property. Moreover, State reserves the right to dismiss or limit the payments. Right to conveyance of air rights is enforceable only in three states of USA. Under this law property rights can be validly created in favour of a person even other than the owner of the land. Municipalities are entitled to lease or sell this rights. In US, Railway companies earned huge money by selling the open space air right to builders by constructing a platform above the rail way tracks and allowed to construct structures and building above. Rising land values and increasing transportation infrastructure are two interconnected characteristics of urban growth that provide the motivation to build structures on air rights. The core business centre, where land values are highest and where transportation systems are often concentrated, is where these have the greatest impact (Cole & Ostrom, 2012).

The United states' The Clean Air Act is a notable piece of legislation that has had a positive impact on the environment and public health across the country. The Clean Air Act's core framework was largely created by Congress in 1970, and it underwent significant changes in 1977 and 1990. The Clean Air Act mandates that EPA create national ambient air quality guidelines for a number of common and





pervasive contaminants based on the most recent scientific knowledge in order to safeguard public health and welfare nationally. It provides to attain and maintain air quality that meets the standards, states must create enforceable plans. State plans must also manage pollutants that cross state boundaries and impair the air quality in states that are downwind. Other important provisions aim to reduce pollution rises brought on by an increase in the number of industrial plants and motor vehicles. The law requires to use best available technology to reduce pollutants as per the standards for existing sources.

The Clean Air Act provides EPA's responsibilities for protecting and improving the quality of air in the country and the stratospheric ozone layer. It consists of five titles; title I is relating to Air Pollution Prevention and Control which includes Air quality and emission limitations in part A, Ozone Protection in part B, prevention of significant deterioration of air quality in part C and part D includes plan requirements for non attainment areas. Title II is relating to emission standards or moving sources such as motor vehicle emission and fuel standards(*Clean Air Act Title II - Emission Standards for Moving Sources, Parts A through C*, n.d.), aircraft emission standards, clean fuel vehicles. Title III includes general areas such as economic impact analysis(United States Code, 2013, n.d.), mandatory licensing, administrative proceedings and judicial review.

The Clean Air Act Amendments of 1990, the final significant revision to the statute, were passed by Congress in that year. Several amendments have been made to the law since then. As per the second prospective report uploaded by EPA most of the economic benefits are attributable to reductions in premature mortality associated with reductions in ambient particulate matter. It has added new title IV relating to acid deposition control under the title IV relating to noise pollution. The chart uploaded in the report reflects the adult mortality rate in the year 2010 and in 2020 and the benefits of clear air program that has reduced the fine particles and ozone(*Benefits and Costs of the Clean Air Act 1990-2020, the Second Prospective Study*, 2011).Moreover, the indoor air pollution is not covered under this Act.

The European Union, in order to maintain and protect health and environmental rights passed variety of legislations to fight air pollution and improve air quality. Legislation provides for standard of quality of air, permissible emission limits of air pollutants, mitigation controls. These laws also set a limit over motor vehicle pollutants and greenhouse gases. In order to maintain the air quality law also provides for standard of fuel quality and restrictions on plying vehicles near residential sensitive areas in order to secure quality of air. United Nations also have recognized the clean air (both indoor and outdoor) as human right.(*United Nations*, 2019)In order to facilitate widespread access to information, public participation, and access to justice in environmental matters, the UNEP Governing Council adopted the Bali Guidelines in 2010 as a tool to help countries fill gaps in national and sub-national legislation. UNEP and UNITAR teamed up in 2012 to promote the Bali Guidelines, including through a World Resource Institute project to create a Guide to the Guidelines (WRI).(*Bali Guideline Implementation Guide*, 2015)

Commonwealth Constitution also provides protection against acquisition of private land without payment of compensation but there is no clarity with respect to protection of traditional rights to fresh air and provision of compensation in case of violation under the exercise of sovereign power of eminent domain. However, law provides restrictions to acquire open public parks for privatization(Thomas, 2011).

## 7. Legislative framework in India

Law deals with presumptions, legal issues, and factual issues. In law, there are specific presumptions. One of them is that vested rights, whether public or private, cannot be taken away by legislation without compensation. In light of this presumption, a person is entitled to compensation from the state if it denies him of a legal right. (V.D.Mahajan, 2019)*The Indian Easement Act, 1882* provides 'right to enjoyment without disturbance. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.' 'The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto provided that the disturbance has actually caused

substantial damage to the plaintiff'. Suit is maintainable for free passage of air to the opening in house, damage is substantial if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health. Further subject to section 52-57 of the Specific Relief Act also can restraint the disturbance of an easement.

*Forest Right Act (FRA), 2006* recognizes the rights to fair compensation in combination with the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Act, 2013*. These laws protect the tribal forest dwellers from eviction without rehabilitation and settlement. Indian parliament regulated land acquisition by laying down the procedure and rules ensuring fair compensation, rehabilitation and resettlement to the affected person. As the definition of Air pollution under *Air (pollution and Control) Act*, includes noise pollution, government has passed *Noise Pollution (Regulation and Control) Rules, 2000* to regulate the level of noise by providing a schedule with permissible limits.

Making noise and air pollution is also seen as a public nuisance. (Gaur K.D., 2014) under section 290 of the Indian Penal Code, 1860 (Leelakrishnan P., 2005). Moreover, civil remedy for compensation and injunction can be claimed against private nuisance. The Central Pollution Control Board has also proposed a set of fines for those who violate norms relating to noise pollution under the rules of 2000.

In series of Public Interest Litigations, Apex court and High Courts had confirmed that right to life includes right to wholesome environment hence writ petition against state can be filed for the enforcement of fundamental right under art 21 and 14 of the Indian Constitution.

However, none of these remedies address the issue of violation of right to fresh air belonging to person who is subjected to dominant heritage and deprived of his easement right to fresh air by the act of state for public use. Easement law does not provide any remedy to deprivation of right to fresh air by the authority of eminent domain of the state. Thus when the land of servient heritage is transferred under acquisition to State, easement right cannot be claimed against the infrastructure constructed by state under the authority of eminent domain. In the case of *Lata Dinanath Mageshkar v. State of Maharashtra and Ors* (Lata Dinanath Mageshkar v. State of Maharashtra and Ors, 2015) petitioner challenged the construction of flyover in front of her house in Mumbai and authority under MRTTP Act. However, the petition was dismissed on the ground that it is necessary in public interest.

### Suggestions

Historically, act of state as sovereign function can not be questioned by courts. Act done by State's representative with prior approval or subsequent ratification by state is subjected to immunity from wrongful act. Eminent domain' is the power of the State to appropriate private property, right of private property for its own use. This right includes right to appropriate domain heritage of dominant owner which, affects easement right to fresh air if state construct any infrastructure for public use. However, there is no specific remedy or provision of compensation in land laws. No doubt, development and environment go hand in hand by balancing each other for the interest of country, yet violation of private easement right to fresh air should not go unnoticed in law. In view of this study, researcher opined that,

- Developmental projects affecting such rights should not be given clearance unless it is providing sufficient buffer zones.
- Road planning and road networking especially flyovers, metro rail or railways should not be planned through residential areas and adequate public hearings should be given.
- Definition of eminent domain needs defined restriction to the extent of violation of right to fresh air.
- Land Acquisition laws need correction with respect to compensation, rehabilitation and settlement of dominant owner even if his land is not acquired by state but his easementary right to air is abrogated in developmental work carried out by state.
- Traditional easementary right to clean air can restore public health, because right to clean air is not only an environmental issue but also relating to health laws and human rights.

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