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Private Property Rights versus Eminent Domain in Nepal: A reference to road widening drive in the Kathmandu valley

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Abstract

A road widening drive was really required in the Kathmandu valley to deal with its ballooning traffic volume. Initiated in 2011, the drive initially brought cheers to the denizens of the valley, who were choking due to traffic congestion. But the way roads were widened only added misery to many locals, mostly indigenous Newars. The drive rendered them homeless, and left them covered with dust. This article thus tries to analyze the highly political framework of 'eminent domain' and right to property in relation to road widening drive. This paper also tries to look into what the private property rights entail and the cases of violation of property rights of private individuals. Similarly, it will look into how the private property rights have been undermined by a government capable of physically taking away private property.

Introduction

The road expansion drive in the Kathmandu valley was initiated by the Maoist government led by Baburam Bhattarai in 2011, and continued even after Bhattarai's exit. The drive was hailed by denizens of the valley as a much-needed campaign to deal with traffic congestion. The roads in the valley now look better, and commuters enjoy more open space. But the way roads were widened, or being widened, in valley added misery to the lives of many locals, mostly Newars. The drive made some places look war like, with private houses bulldozed and people covered with dust. The roadside land and house owners in the Kathmandu valley might have never foreseen that the government would one day force them off their property. The laws, including the Constitution of Nepal, have enabled the government to acquire private property for public good, public necessity or public benefit by paying compensation. The rationale is that the individual must sacrifice his/her right to property for the sake of common good benefiting society at large. The government's eminent domain power thus has long been well recognized. In order to combat potential abuse, the restrictions on 'takings' have often been

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placed in the laws of the country. The Constitution of Nepal provisions that the government shall not acquire property of a person, unless it is for 'public use'¹ and 'compensation'² is paid.

There were sporadic street protests³ and defiance by people affected by the road expansion drive. They argued that the government did not give them prior information and pay them fair compensation to force them off their homes and lands. The courts also frequently issued orders for the government to halt the move but the demolition continued. The land taking of private individuals for road expansion has fallen within the exercise of the state's powers of eminent domain. The 'public good' perhaps necessitated government but has brought controversy on whether or under what circumstances, the state may use the power of eminent domain. The constitutional line between 'justified' and 'unjustified' taking was a debated issue in Nepal. According to the Kathmandu Valley Development Authority (KVDA), the body instituted to carry out the road expansion work, 249 kilometers of road have been expanded out of the proposed 465 kilometers of roads in Kathmandu valley.

For Will or against the Will

The locals might support road widening or construction by voluntarily selling their lands if they envision immediate benefits in future. But in the Kathmandu valley, where lands are in high demand and expensive, the government had no other option than to compulsorily acquire the land for expansion of road. The term "compulsorily acquisition" has a number of connotations, also includes government power to 'eminent domain', which is highly debatable.

In the Kathmandu valley, the authorities seemed to have acquired lands against the will of the land owners for public benefits that created apocalyptic scenes in many places. The exercise of this government power brought losses to the affected individuals, who at times went beyond the economic loss of the land and included social, religious and cultural loss. It, thus, required finding the balance between the public need for land and the protection of private property rights.

Road expansion involves both human sentiments as well as law. Due to road expansion, hundreds of people have been displaced inhumanly. The affected families from 22-different parts of Kathmandu valley, where road widening drive was conducted, formed a committee to 'struggle' for justice. They staged protest programs regularly and even called a general strike on January 4, 2016 against the

¹ *Constitution of Nepal*, 2015, art 25 (2)

² *Ibid* (n.1), art 25 (3)

³ 'People affected by road expansion protest at Maitighar', *The Kathmandu Post*, Kathmandu, 23 Feb 2017. Available at <http://kathmandupost.ekantipur.com/news/2017-02-23/people-affected-by-road-expansion-stage-demonstration-at-maitighar.html>, accessed on 2 March 2017

unscrupulous widening of roads. According to the affected individuals, the road widening drive was carried out haphazardly without assessing its social and cultural cost. The bulldozer even mowed down the historical structures like temples and Sattals (roadside rest houses). The government destroyed individuals' houses without prior information and without proper compensation. Many people were rendered homeless and landless with the demolition carried out in the name of road widening.

The Constitution guarantees the individual right to the use and enjoy his/her property. It states that 'a compensation is provided and procedures be followed as provided by laws, in expropriation of property, including land, of any person for 'public interest'.⁴ No one is made deprived of his/her property except upon payment of 'just compensation' and for reasons of public utility. Similarly, the Constitution also guarantees, the 'Right to Housing'⁵, and states that 'every citizen shall have the right to an appropriate housing'. The constitution also further states 'no one shall be evicted from the residence owned by him or her nor shall his or her residence be infringed except in accordance with law'⁶. But the affected families claimed that they were evicted without information, consultation and compensation in the name of road widening drive.⁷

Public Road Act, 1974 identifies 'road' as a 'public good. The law says that the State can acquire private land for the construction and widening of roads. Section 15 of Road Act provisions stipulates that 'compensation of land be given for requisition of land for construction and widening of road.' Similarly, Land Acquisition Act, 1977, sets a due process that the state needed to follow in order to acquire one's private property. The Act also required the state to pay due compensation to the private owner of land. Section 3 of Land Acquisition Act provisions that 'the government has power to Acquire Lands of individual for Public Purpose, if it so deems necessary, at any place, by providing compensation. Section 7 (1) of Act says, 'Compensation shall be paid for losses resulting from...demolition of walls or for any damage.'

The responsibility of the government is to ensure rights to housing of those displaced from the road widening. The victimized individuals lament that they got no compensation when their 'lands' were acquired for road widening. The government, however, has committed to paying compensation if the acquired land houses a physical property over it. The amount of this compensation according to government will be paid to the damage done to the physical property as prescribed by the law. But instances show that they are still struggling for due compensation for over a year now.

⁴ Ibid (n.1), art 25.

⁵ Ibid (n.1), art 37 (1).

⁶ Ibid (n.1), art 37 (2).

⁷ 'People affected by road-widening drive stage demonstration at Maitighar, *Republica*, (23 Feb. 2017) available <http://www.myrepublica.com/news/15396/>, accessed on 2 March 2017.

International Labor Organization (ILO), Indigenous and Tribal Peoples Convention, 1989 (No 169) and UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Nepal is party to, are legal guiding procedures for government for undertaking development works over the land and territories of indigenous peoples.

ILO Convention No 169, Article 6 (1) (a) puts the obligation upon governments to consult with indigenous people, through appropriate procedures and through their genuine representatives, while taking any measures which may affect them directly.

Similarly, UNDRIP, Article 30 (2) says 'States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for any activities.' Numerous other international human rights norms require that indigenous peoples are consulted through appropriate procedures prior to taking any measures in their land and territories.

The houses of private individuals were bulldozed and no compensation was provided by the government. Advocate Jitendra Bajracharya, who has been providing pro-bono legal support and defending appellants in road expansion cases, says, 'the constitution and laws of Nepal have protected private properties. But the government's road expansion drive is against these legal instruments. In Kathmandu, nearly 99 per cent of the people who are suffering from this reckless expansion drive belong to indigenous communities.'⁸

Neither were people consulted nor were they provided information beforehand. The road expansion drive is a violation of the ILO Convention No 169 and UNDRIP, which also require the government to secure the Free Prior and Informed Consent (FPIC) of indigenous people before carrying out any activities that could potentially affect their culture and livelihood. FPIC is mandatory prior to appropriating house where a person is residing in it. But the government failed to fulfill its international obligations to ensure people's right upon expropriation of their properties including land.

Right to Private Property versus Eminent Domain

Eminent domain⁹ also means 'taking clause', as the power of government to take private property for public uses. When the government takes private land or properties for public use, it should fairly compensate the owner for the deprivation. The eminent domain is the right of state to reassert, either

⁸ 'Bulldozing the rights of indigenous people to expand roads in Kathmandu', *Indigenous Voice*, Kathmandu, 15 December 2016. available at <http://www.indigenousvoice.com/en/bulldozing-the-rights-of-indigenous-people-to-expand-roads-in-kathmandu.html>, accessed on 3 March 2017.

⁹ Henry Campbell Black, M. A., *Black's law dictionary*, St. Paul, MINN. West publishing Co. 1990 p. 523

temporarily or permanently, its dominion over any portion of the soil of the state for public need and public good through just compensation. The law of the country authorizes the appropriation of any part of the territory of the state for public purpose including for construction or widening of roads. Eminent domain is the highest authority remaining in the government. It gives a right to resume the possession of the private property in the manner directed by the constitution and the laws of the state, whenever the public interest requires it.

The property right is guaranteed as a fundamental right of every individual. The property right consists of multiple characters often referred as a bundle of sticks, each of which represents a different aspect of property ownership. These characters include the right to use and exclude others from using the asset, so as the right to transfer the asset to others. In its most complete form, ownership of property grants the owner control of all the sticks as long as use does not infringe on the rights of others.¹⁰

The constitution also provides for constitutional remedies in case of transgression of fundamental rights.¹¹ The Supreme Court is constituted as a protector of fundamental rights. The right to constitutional remedy in itself is considered as a fundamental right. But, people have failed to protect their fundamental rights because the state itself transgressed the rights of individual right to property in the road expansion drive while the victims are still struggling for justice.

There are instances where the Supreme Court is not able to safeguard the individuals' right to property. In response to a writ filed by the group of 47 individuals victimized by the 'Kalanki-Nagdhunga Road', on August, 7, 2016, the High Court issued an interim order for the government to halt the road expansion, citing that it would cause a huge loss to the people living in vicinity if the road widening continued.¹² The victims also filed 'a contempt of court' case, but the KVDA paid no heed and continued to destroy the houses built on either side of the road. The experience of availing of justice at court of victims of Balaju road expansion is not different story. Locals of Balaju filed a case at the Patan High Court against the government's decision to expand the Balaju-Bisdhara-Bypass road section. Hearing the case, the Court issued an interim order against the road expansion but KVDA ultimately bulldozed roadside houses.

Many locals have been displaced due to road expansion in different parts of Kathmandu valley including Kalanki, Thankot, Harisiddhi, Balaju, and approximately in other 22 different parts, where road widening drive was

¹⁰ Terry L. Anderson and Laura E. Huggins, *Property Rights: A Practical Guide to Freedom and Prosperity*, Hoover Institution Press, Stanford University, 2009, pp 35-36.

¹¹ *Constitution of Nepal*, 2015, art 133.

¹² 'Supreme Court stays Kalanki-Nagdhunga road expansion', *The Himalayan Times*, Kathmandu, 7 August 2016. Available at <https://thehimalayantimes.com/kathmandu/supreme-court-stays-kalanki-nagdhunga-road-expansion/>, accessed on March 5, 2017.

conducted. Many have complained that they were not given prior information/consultation nor given compensation after expropriation.

Surya Bahadur Magar, a resident of Balaju said that, 'we have been residing here since 1945. In the year 1992, we had a field-book. But now authorities forcefully displaced us from here. We filed a case against the move in the Supreme Court. The court also issued an order. But the authorities stopped only after bulldozing our houses in the middle of the night. We could not even salvage our belongings.¹³ Raj Shrestha, another victim of the road expansion driver, has a similar story to share. "I had built a house meeting all the government standards and obtaining permission from Kathmandu Metropolitan City but now authorities demolished my house. We are not against road expansion, but it should not affect individual private property."¹⁴

The experiences of the victims of the widening of the Jorpati-Sankhu road are similar. Sanubabu Bisankhe, who is leading a committee of local people opposing this expansion, says, "We were not given a notice beforehand. Authorities just started demolition works."¹⁵ People have mentioned their dissatisfaction regarding road expansion not just in Kathmandu but also in Bhaktapur. The local claims that the state has done injustice in the course of expanding the Araniko Highway. Nil Narayan Koju of Bhaktapur says, 'if the government wants to expand the road, it can. We absolutely have no problem with that. But it should demolish our houses along the road, and should give adequate compensation to us."¹⁶

Property Ownership

What constitutes property and who should own it? This question has sparked a debate among scholars and even engaged philosophers from the times of Plato and Aristotle. Plato argued that property should be communal both in ownership and use. He believed that the rulers of a city should not own property so that they would not tear the city to pieces by differing over "mine" and "not mine".¹⁷ Aristotle posed a question challenging Plato's vision, on what should be our arrangements about property: should the citizens of the perfect state have their possessions in common or not?" He concludes that property should be owned privately because "that which is common to the greatest number has the least care bestowed upon it".¹⁸ John Locke later on argued that property rights existed prior

¹³ Interview with Surya Bahadur Magar, a victim of road expansion in Balaju, Kathmandu, 25 February 2017.

¹⁴ Interview with Raj Shrestha, a victim of road expansion in Balaju, Kathmandu, 25 February 2017.

¹⁵ Interview with Sanubabu Bisankhe, a victim of road expansion in Balaju Kathmandu, 25 February 2017.

¹⁶ Interview with Nil Narayan Koju of Bhaktapur, a victim of road expansion in Bhaktapur, 25 February 2017.

¹⁷ Terry (n10), p. 12

¹⁸ Ibid, p. 13

to (and thus with or without) government and that these rights were derived from natural rights such as the right to one's own life and liberty. According to Locke, if a man owns his own labor, he should also own the fruits of that labor.¹⁹ According to Lock, the ownership of a thing must include the right to use that thing and retain gains from its use. Influenced with Locke's perspective, Adam Smith argued that there are mainly two functions of government. Firstly, the 'preservation of property' from external threats and secondly administration of justice to ensure the integrity of property rights in the face of internal disputes.²⁰

Standards for Eminent Domain

Eminent domain is a power of government that involves a physical taking of private property. The exercise of this power is critical if the government's exercise of this power is inefficient, unfair and illegitimate. There are a set of standards that government has to give considerations in exercising eminent domain, with respect to a physical taking of private property. Generally, there are three applicable standards used to govern the lawful exercise of the power of eminent domain viz; Proportionality, public purpose and compensation.²¹

1) Proportionality

The exact wording may vary. But the general is that the government's action should be rationally connected to the stated objective, the government's action seeks reasonably to minimize the intrusion unto private property; and that the intrusion is proportional to the objective. This includes the idea of striking a fair balance between the need to achieve an appropriate public purpose and the infringement on the rights of private property owner. The attempt is to avoid placing a disproportionate burden on a discrete individual or group of individuals when seeking to advance a legitimate public interest.

2) Public Purpose

The exact meaning of this standard may vary but the idea is that the government is meant to wield this power to achieve a public good. There are disputes about the nature of the government's action in terms of the meaning of "use" and "purpose." Some interpretations hold that public use requires actual access and use by the public as in taking private property to build an airport, a highway, or a public school.

3) Compensation

The compensation standard can vary in several ways. Some tests speak in terms of market value, while other in terms of fair value. When the state exercises its power of eminent domain to take title to property, the state must compensate the private property owner. Compensation is a key restraint on the exercise of this power by

¹⁹ Ibid, p. 14

²⁰ Ibid, p. 15

²¹ Robin Paul Malloy, *Private Property, Community Development, and Eminent Domain*, Syracuse University College of Law, USA, Ashgate Publishing Company, 2007, p. 155.

the state as it requires government to think about the costs and benefits of a project and to allocate resources to the undertaking.

The necessity of giving consideration to these standards is mainly to address the extent of implications resulted from the government's action. The government's measure undertaken haphazardly, have created a long-term insecurity and uncertainty due to road widening drive for owners of land and properties in Kathmandu valley.

Conclusion

True, there is no debate that Kathmandu's traffic congestion requires a state's intervention. But the issue arises when the government ordered to demolish private homes and properties in the name of roads widening. In most of the cases, the government seemed to have taken a needlessly a hard-headed line. Thus, the government felt no need to give prior information to the property owners. The government acted as if all the owners encroached upon public land and thus realized it was not at all necessary to pay compensation. The truth however differs from owner to owner. There are cases in Kathmandu valley, where houses were built as per the then Village Development Committee's (VDC) code. Many VDCs have lately been upgraded to municipality. The locals of these former VDCs have been battling litigations against the states for over a year now. It is thus, in the name of road widening drive, the local denizens witnessed a 'tyranny'. Many victims have been left without proper compensation in appropriation of their properties including their land and houses. This incident may not suffice but hints that the property rights in Nepal are not adequately safeguarded.

The road widening drive can be taken an example that how government can exercise its power excessively and encroach upon the private property in the disguise of 'public good'. The predictability, transparency and respect to rule of law have been mockery in the exercise of 'eminent domain' in land takings of private individuals in Kathmandu valley. The general theory of eminent domain is that the police/state power should be used only for public benefits, public welfare, public utility or use. The legitimacy of exercising eminent domain is that societal needs should be larger than the individual loss. But then compensation must be paid, even if the societal needs and individual losses are balanced there-in. Furthermore, international laws explicitly state that appropriate measures need to be taken prior to taking private property for public use. Such measure includes that consent must be sought prior to expropriating private property by informing freely to the concerned individual owner. But better late than never, government should embark to heal mental pain and suffering of the loss that caused to victims even if a small portion of their house has been acquired.
