

Chapter 5

5.0 Literature Review- Eminent Domain

5.1 Historical Background and Literature Review on Eminent Domain

Historical records and the extant literature have broadly studied and documented the issues related to land and land acquisition mainly from the following perspectives: a) legal issues related to ownership rights; b) right of compulsory acquisition by the authority or the principle of “eminent domain and the associated issue of compensation c) solatium as an option to overcome the land owner’s resistance to sell d) political decision making process and e) rehabilitation issue which has assumed disproportionate social tension among a large section of rural population with rising extremism (read maoist problem) in India,

In the modern world irrespective of the country’s political faith, it is only the people’s representatives who frame policies to acquire land. The right of the States to infringe upon the property of subjects on all occasions, where ever the public good is involved, is subject to the following two conditions:

Expropriation is for public purpose and fair compensation is paid without delay for such loss.

States have, in most cases, left the interpretation of the fulfilment of the above two conditions to the judiciary. In spite of varying socio-political and judicial systems, judiciaries across the world have attempted to interpret the conditions. Legislative guidelines have been varying from state to state and within the same state in defining public purpose and what should constitute the fair compensation.

This has also varied from time to time. Judiciary has also taken varying stands on their right and scope of judicial scrutiny. But there is a near unanimity among all the states in the modern world in accepting sovereign’s right to acquire land from its rightful owner for what is perceived to be the common good by the state. With the time the role of the states are changing from provider of public goods to the role of facilitator of creating

public goods and in consonance with that the interpretation of “public purpose” has kept on changing from “public use” to “public good”. However, defining what is “just” in paying compensation judiciary has been more assertive. U.S Supreme Court had held that “the legislature may determine what private property is needed for public purposes; that are a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial (Monongahela Nav. Co. v. United States, 1893).” This is in spite of the fact that Court has ruled that “There must be something more than an ordinary honest mistake of law in the proceedings for compensation” to justify a judicial scrutiny (MCGOVERN V. CITY OF NEW YORK, 1923). This means a compensation can only be taken for a judicial scrutiny when it can be proved that it was a deliberate unjust.

5.1.1 Legal Issues Related to Land Ownership

Irrespective of the form of governance, societies, in general, accepted the individual's right to own/lease, use and dispose of properties including land. Over time, the concept of *dominium* (exclusive right) and *imperium* (overall right of the state) on property came in, reference to which could be found in Roman law (Jacobs, 2008) and also in the Napoleonic Code of 1804 (*ibid*59). These governing principles had given the state the power of overriding authority to decide on the possession of the land while granting the individual her right to property under this condition. Similar authority of the state over the land is evident since the pre-historic times, which has been discussed in the previous Chapters.

5.2 Public purpose:

Across the world political faiths and believes vary. Strength of judiciary also varies. But there is a near unanimity among all the states in accepting sovereign's right to acquire land from its rightful owner for what is perceived to be a common good. Judiciary has been generally supporting it. With time the role of the states are changing from provider of public goods to the role of facilitator of creating public goods with private sector participation. Many of such projects (like power, telephone, road and rail facilities) in the past were exclusive domain of government for the benefit of the people. Fund starved

states have passed on such infrastructure projects to private sectors. Many of such projects are handed over to private investors to build and operate. To facilitate planned urbanizations and economic developments government needs land to be acquired. These have led to change the interpretation of “public purpose” from “public use” to “public good”. But private investments with profit motive have clouded the purpose of the projects in the eyes of the land losers. Notwithstanding the public mood of opposing acquisition for-profit organizations, judiciary has sided with the government in widening the scope of public purpose. However, political authorities itself have reviewed the scope. After the aftermath of Supreme Court split judgment in *Kelo v City of New London* (*Kelo v. New London*, 2005), President George Bush has issued executive order limiting eminent domain powers of Federal Government of seizing private property only for public use (Fox News, 2006). However, federal decision was not emulated by most of the states. In fact detailed literature review reveals that there is a broad unanimity in accepting the widened scope of “public purpose” across the world.

There are significant variations in the state laws in defining public purposes with reference to their specificity. In some states the lists are specific and contain transportation including roads, canals, highways and public buildings including schools, libraries, hospitals etc. In some others the definition of public purpose is open ended, providing much greater space for the exercise of discretion and interpretation. Despite the variations that exist on this point, an overarching principle in most cases accept government’s taking powers as extraordinary and addresses the requirements which are not met through the operation of the market (Lindsay, 2012). Mangioni has quoted Rosenberg to highlight the density dilemma of the earth’s population, where ninety percent live on approximately ten percent of the land. This has increased the need for land for and renewal of public infrastructure and setting up of new industry (Mangioni, The evolution of the ‘Public Purpose Rule’ in compulsory acquisition , 2009). Governments have been using this imperative to justify the use of the “public purpose” clause. Miceli et al justified the use of public purpose to overcome problems of monopoly power of the individual owners whose lands were required for executing large projects (Segerson, 2012). With increase in the number of owners in a parcel of land (fragmented ownership), the probability of success in direct purchase diminishes vis-à-vis

eminent domain. Eminent domain can be justified if the number of land owners in a notified area is large and different owners fix different reservation prices. The heterogeneity in demand and expectations reduces the probability of a successful purchase drastically. Merrill in his “Basic Model” has argued that in a “thin market, potential for engendering rent seeking may make it economically efficient to confer the power of eminent domain on a buyer”. But in a “thick market” (highly competitive market) setting, eminent domain is more expensive than market exchange. He has termed the use of eminent domain as the “ends approach” since it concerns the purpose to which the land is put. According to him judiciary has also generally adopted the “ends approach” by usually enquiring if the land would be used to provide for public benefit (Merrill, *The Economics of Public Use*, 1986.). Epstein has held that the necessity and division of surplus must be present to satisfy the demands of the “public use” term. The basic theory of the public use demanded that in forced exchanges the surplus must be evenly divided (EPSTEIN, 1985). Bird took a stand in favor of “necessity” doctrine to limit the use of eminent power by judiciary. Here necessity implied imperatives or indispensability of the parcel of the land for the purpose of the project (Bird, 2012). Bird also quoted (*Lynch et. al v. Household Finance Corp.*, 1972) to show that there was no distinction between personal liberties and proprietary rights. It was recognized for long that rights to property were basic civil rights and should be protected with the same standard of review that was granted to other fundamental personal rights.

But there are different views and judiciary has lent support to that. In India, Supreme Court in 1988 in the case of *Coffee Board, Karnataka vs Commissioner of Commercial Taxes* had said that “Eminent domain is an essential attribute of sovereignty of every State. Authorities are universal in support of the definition of eminent domain as the power of the sovereign to take property for public use without the owner’s consent upon making just compensation” (*Coffee Board, Karnataka vs. Commissioner Of Commercial Taxes* , 1988) and in 1996 it has further observed, “Publication of declaration (by the government) under Section 6 is conclusive evidence of public purpose” (*Scindia Employees Union vs State of Maharashtra and Others*, 1996). In an earlier judgment in 1956 Supreme Court has put a dissenting note and observed in the *State of Bombay vs. R. S. Nanj* “Prima facie, the government is the best judge as to whether public purpose is

served by issuing a requisition order but it is not the sole judge. The courts have the jurisdictions.” (The State of Bombay vs. R. S. Nanji, 1956). In 2011 it had further remarked that “the application of the concept of ‘Public Purpose’ must be consistent with the constitutional ethos and especially with the Fundamental Rights and Directive Principles of the Indian Constitution” (Dev Sharan and Others vs State of UP and Others, 2011).

Such differences were evident in the developed countries like the USA as well, where the US Supreme Court in the Berman vs. Parker case (Berman Vs Parker, 1954) concluded that “subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive”. A completely opposite view was expressed in the case Wayne v. Hathcock (Wayne County v. Hathcock, 2004). The court opined that “This was contrary to the fundamental protection of property rights afforded by the Constitution”.

5.3 Fair Compensation:

The act of taking property through compulsory acquisition is not through mutual agreements. State is the willing buyer whereas the land owner is not (a willing seller). In absence of a willing seller, willing buyer here is inherently confrontational and aggressive. By its nature, there is no voluntary sale. Since there is no assent, the compensation cannot be considered as just in the context of a takeover. The normative basis for providing “Just compensation” in all expropriation cases should have the constitutional protection of fairness and indemnity. In actual practice the fair market value is assessed and not calculated. The fair value is thus a fictitious value, an abstraction that is linked to a hypothetical sale of a property at a given point in time. But the indemnity aspect of “just” compensation requires that “an owner of property is entitled to be put in as good a pecuniary position, as if his property has not been taken” (United States vs 564, 1979). However, this has not been given “full and literal force” in the judiciary interpretations because of the need for a “relatively objective working rule” (United States vs 564, 1979). Absence of such rule has led to adopting fair market value as a close surrogate. Laura H. Burney claimed that judiciary has interpreted compensation as “just” unless it can be shown that it fails to indemnify to such an extent that it is very

unfair; i.e. “fair market value is fair unless it is very unfair” (Burney, 1989). Epstein raised a new perspective when he commented that the money raised to finance compensation was a ‘taking’ from taxpayers for which they received ‘in kind’ compensation in the form of benefits from the public project. This necessitated the need to balance the compensation to land owners with the loss incurred by payment of higher taxes by the ordinary tax payers. Just because the land owners can unite faster, the political pressure may force the government to ignore the tax payer’s perspective. Miceli pointed out that the owners did not generally view land and wealth as perfect substitutes, whereas market value compensated their loss as if these were. He commented “Fair market value is not only unfair to land owners; it also potentially leads to an excessive transfer of private property to public use.” (Thomas J. Miceli, 2007). There are two categories of entitlement protection: “Property rules” and “Liability rules”. ‘Property Rules’ refer to voluntary exchange in the market place. But eminent domain provides only “liability rule” protection for property owners. (Melamed, 1972). Chang has proposed the use of “economic value” rather than fair market value. His proposed economic value includes a schedule of bonuses along with fair market value. According to him, this takes care of the subjective value of the land giver. However, this is difficult to compute. (Chang Y. C., 2012). Norell has proposed inclusion of subjective value and have suggested that property owner should be compensated for her reservation price which in most cases higher than the market price (Norell, 2008). Judicial review has attempted to reduce the potential difference between the two, but an adversarial hearing cannot be an acceptable method for determining the subjective value to bridge the gap (Coniston Corporation, et al. v. Village of Hoffman Estates, et al., 1988). However, US judiciary always felt that “The legislature may determine what private property is needed for public purposes. This is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial.” (Monongahela Navigation Co. v. United States, 1893). It has defined “fair compensation” as the “fair market value” of the property, which was the highest price agreed to between a seller and a buyer without either party being unduly influenced for any reason and the one dealing with the other with full knowledge (Joseph Mascioli et al: In re Town of Islip, 1980). Fair market value here is a hypothetical sale value of the plot which is to be

projected. Its accuracy depends on the appropriateness of the adjustments made in the sale prices of the comparable plots using “comparable sales approach”. But “comparable sales approach” assumes free sales for both the plots and not one for expropriation. The above discussions reveal the weakness of paying compensation based on fair market value and call for a more pragmatic approach for determining the “fair value” of land.

Most developed countries in the Western world uses “comparable sale approach” in the “fair market value” derivation. However, “comparable sales approach” requires adjustment in the sale prices for the difference in the comparable “attributes” to make the sale values comparable before averaging. Land plots are generally unique. Attribute vary, so also their prices. Smaller the land plots more variations will be there among the plots. In an active land market and relatively large plot sizes of the western world average is assumed to compensate the variations and average sale price is considered as fair market value.

China pays compensation which is theoretically close to net present value of the asset. Asian Development Bank and World Bank has made a significant departure from the “fair market value” for compensation and the loss of private asset of the project affected people is calculated based on “Replacement value” to prevent affected person’s livelihood from worsening. Compensation should be calculated at full replacement cost (WALLACE, 2009). In an active land market “fair market value” calculated based on current sale price of comparable land can be considered as “replacement cost”. But the same is not true in a developing country where land acquired for development projects immediately pushes up the adjacent land prices significantly in anticipation of imminent use changes of the agricultural land. Judicial review has attempted to reduce the potential difference between the two, but an adversarial hearing cannot be an acceptable method for determining the subjective value to bridge the gap. Judiciary, in general, has also acknowledged this limitation.

Reflecting this concern, in some recent legislative initiatives undertaken by certain states of USA, “just” compensation has been legislated as multiples of fair market value while limiting the use of eminent domain for private purpose (Rubin, 2012).

For determining the average sale price, LARR 2013 specifies “one half of the total number of sale deeds or the agreements to sell in which the highest sale price has been mentioned shall be taken into account” (Ministry of Law and Justice (Legislative Department), 2013). Supreme Court of India has felt the limitations of present estimation process of fair market value of land and commented “The amount of compensation cannot be ascertained with mathematical accuracy” (Viluben Jhalejar Contractor (D) ... vs State Of Gujarat , 2005). In the judgment the court has recommended for consideration of some positive and negative factors, which influence the land price. This includes the characteristics of land like, proximity to road and its frontage. shape and size of the plot etc. Court has also suggested inclusion of local area affluence (nearness to developed area), any special value for the buyer’s etc. as important factors. The court has not recommended any computational methodology excepting suggesting adjustments as positive and negative. The recommended list of factors in the table cannot be taken as exhaustive. In some cases the court has put some figures for adjustments. However, no basis is available as in the case of Nirmal Singh vs. State of Haryana where the court has recommended for inclusion of development charges between 20% and 50% of the total price when a large block of land is developed, (NIRMAL SINGH Etc. Etc. vs. STATE OF HARYANA , 2014). This can be seen that the courts have attempted improvements to overcome the limitations of the present fair market value estimation. But no clear computing methodology evolved.

5.3.1 solatium as an option to overcome the land owner’s resistance to sell

The preceding discussion on determining objective “fair market value” of agricultural land has identified the weakness of the existing process of paying just compensation. Legislative effort to overcome this is often found through paying solatium as a % of the fair market value. This is paid ostensibly to take care of the subjective value the land which the owner attaches with her land. Since the subjective value is personal and differs based on her attachment or dependence (for earning) with the land, an ad hoc increase through solatium cannot meet the requirements of rationality. However, it is not only India where this is being used (increased from 30% in LAA 1894 to 2 to 4 times in LARR 2013), many other countries also this is used. This is discussed below.

In India LARR 2013 uses solatium in a variable scale depending on the location of the acquired property from the urban centers. This varies between 1 to 2 times depending on the distance from the urban centers. This when further supplemented with 100% solatium, the effective value increase over the average sale figures becomes 2 to 4 times. (The First schedule, Sec 30(2) read with Sec 26 (b), Explanation 1).

It is not India alone which had opted for the solatium route to resolve the land acquisition related disputes. In the recent past political authorities across the world had opted for this route at varying degrees. Solatium here is to pay for the subjective value, which the owner attaches. In the aftermath of the Supreme Court decision on *Kelo vs City of New England*, number of states in USA has included additional solatium component over and above the fair market value to compensate takees fully for their losses. Idea is to leave takees subjectively indifferent to takings. But there are significant differences in the solatium among the states in USA. While a large number of states do not pay any solatium, Michigan pays 125% of the fair market value as solatium (STATE CONSTITUTION (EXCERPT)-CONSTITUTION OF MICHIGAN OF 1963, 2015). In Indiana solatium is 125% for agriculture and 150% for residential property and in Kansas a minimum of 200% is to be paid when acquisition is for private party.

Other countries like in Australia, the compensation is valued on Pointe Gourde Principle. This does not include any increase in the value of land which is due to the development project underlying the acquisition' (Mangioni, The evolution of the 'Public Purpose Rule' in compulsory acquisition , 2009). But the solatium is being paid to compensate for the subjective value and the amount varies among the states. Solatium payments are 5 to 10% in some states excepting in Australian Capital Territory, where the solatium payment in Section 51 is set at A\$15,000. Variations are there in Canada also. When Canadian Federal laws do not provide for any solatium over fair market value as "just" compensation, states like Ontario, British Columbia or New Brunswick do provide for 5% solatium over fair market value as just compensation.

In England it is the "open market value"(under rule ii of the Compulsory Acquisition Act), which is considered as "fair market value". It assumes a willing seller. As it is in Australia, England also ignores the value increase by the proposed developmental work

("no scheme world"). But British laws make variations in compensation and have added solatium when the land is acquired from the farmer, that affects his earnings. This is paid as farm loss payment. "The amount shall be equal to the average annual profit derived from the use of the agricultural land for the agricultural purposes" (Land Compensation Act 1973, Art. 35(1), c.26, 1973) (Special Compensation laws for Farmers).

In Italy, when farmers land is taken, compensation varies depending on the owner's legal relation to the land. When the owner is not a cultivator he is paid 1.5 times and when he is a cultivator the amount increases to 3 times. For tenant it is 2 times. When urban land is acquired the compensation is calculated by multiplying cadaster income by 10 and adding it to the market value. The total sum is then divided by two for paying compensation (Danilo, 1998). In China there is no clear scheme as solatium. However, there is a settlement subsidy payment (can be considered as solatium) which is made over and above the compensation amount (s.47, par. 2)..

From the preceding paragraphs this may be concluded that the solatium is paid in a large number of countries to reduce the land owner's resistance to part with her land and the amount not only varies from country to country but also among the states in the same country. This even varies depending on how the owner engages herself with the agricultural land she owns. In England the farmers are treated separately for compensation. However, the solatium thus paid are ad hoc and is applied as a percentage of historical "average sale price" of comparable lands in the locality.

5.4 Political decision making process:

An interesting perspective on the issue of land acquisition was offered by Levinson. He said "The role of government in the use of eminent domain is often guided by the political costs rather than financial ones". As per Levinson even though the number of evictees are generally not very large, yet they having a common cause and because of their locational proximity they often turn into a political power. The beneficiaries, on the other hand, often remained politically inert majority. But "Government actors respond to political incentives, not financial ones--to votes, not dollars" (Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 2000.). Lunney, Jr. commented that political factors almost invariably influenced the selection of

the project sites, instead of project benefit and the costs. And the political powers often yield to pressure from the interest groups who are better organized and concentrated. (Glynn S. Lunney, 2000). Political actors would like to avoid a property which is characterized by the three characteristics (shown below) increasing the subjective value of the property.

Figures 5.1: Political Decision Making

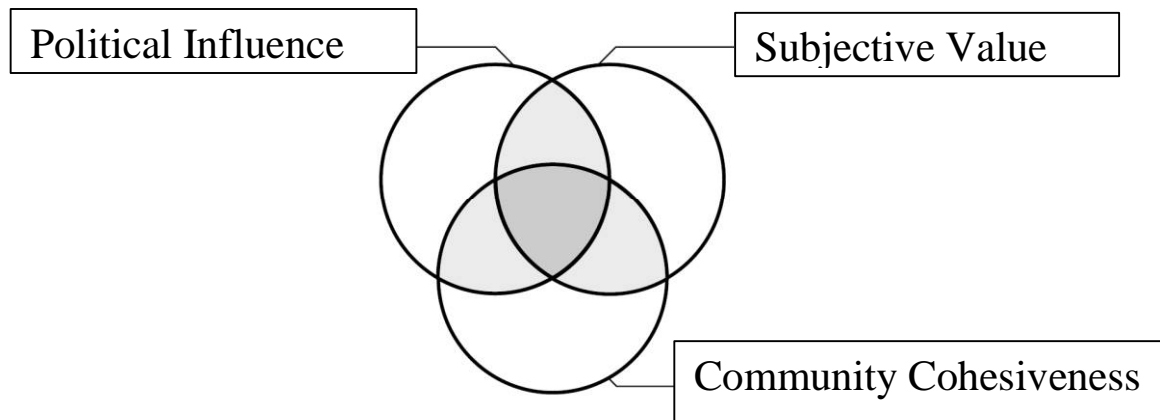


Figure is taken from “The Neglected Political Economy” where Garnett has suggested that the darker zone as being most sensitive. Citing the example of Chicago expressway, he has claimed that such decisions are irrespective of their other social costs. In a reference to the preservation of Chicago Expressway Churches, Garnett wrote that “planners rerouted the freeway to avoid demolishing a church; they instead destroyed homes that would have been spared according to the original plan”. He further commented “political actors are likely to be most sensitive to the concern of the political insiders” and “can be expected to refrain from the use of eminent domain (Garnett, 2006).

5.5 Rehabilitation Issue

Development affected people are not only getting physically removed from their land but also are affected economically, socially and culturally. Every year fifteen million people

are displaced by development projects worldwide. “Almost all of the surveyed experts agreed that compensation for lost assets and lost income is generally inadequate.” Affected people are generally politically disadvantaged and are often remain unattended in the main stream politics. Their assets are difficult to assess since in many cases these are not legally documented but their livelihood depends on those land. In tribal society, there is a different meaning to land. Land has ‘use value’ since the produces from the land are instantaneously consumed by the community itself. This makes their separation from their land make them economically and culturally destroyed. It is generally perceived that when the land owners give up land, they get compensation in lieu. But the landless people are seldom in the net of compensation. In India during the first 50 years of independence around 50 million people have been displaced due to development projects. Of these displaced people, over 40 percent people are tribal and another 40 percent are Dalits and other rural people (Lok Sabha Secretariat, 2013). These people also donot have the skill of managing cash.. When given cash compensation in lieu of land the research shows that in most cases the tribal people have failed to utilize the cash for a sustainable productive purposes.

Figures 5.2: Homeless People of India



(Sourced from TOI, New Delhi, 6 April, 2012.) .

Amit Bhaduri has argued that it is not the “growth first, and full employment later” which is suited for India. He suggested that it should be the other way round. Here it should be the “Employment first, with growth as the outcome”. There should be a program for productive full employment (Bhaduri, 2007). Compensations are paid to displaced (from their homes) persons (DP) and to those who lose most of their land and other sustenance but are not paid to them who do not own but are physically displaced, known as project-affected persons (PAP). There is a large percentage of rural population who are dependent on common property resources (CPRs). They are rarely being taken within the compensation net, since the state recognizes only those people who have individual land ownership deeds (patta). A study revealed that out of 14 lakh acquired land in Assam, over 10 lakh was CPR and as per record only 4.5 lakh people were DP/PAP and compensated as against 19lakhs dependent on the land. The analysis shows that though the development projects are important for the progress of the nation they tend to become a major threat to the livelihood of the project affected people (Bharali, 2006).

5.6 Central Issue- Just Compensation

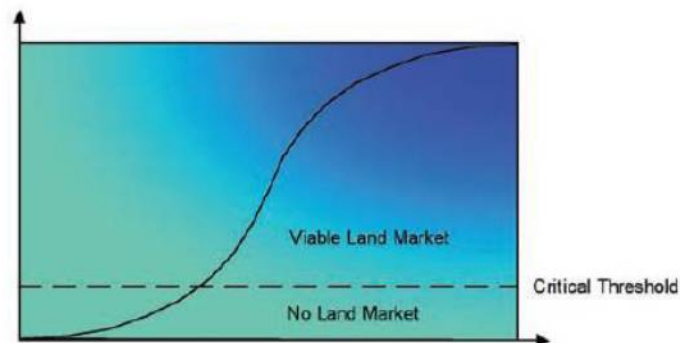
From the above literature review this may be concluded that central issue in the land acquisition conflict remained just compensation while the sovereign’s right to expropriate land for greater interest of the public has been generally accepted. Whether it was in the past or in the present, “alodial title” of land is not in practice in any part of the world. And in all cases whether public or private projects it is the state who is acquiring land. Thus the controversy revolved around what should be paid by the state as compensation which can be rationally defended as “just”. Judiciary interpreted “just” compensation as “fair market value”, which is the average exchange price of comparable lands in the locality. Many countries have made departure from the above definition of “fair market value” where “the highest and best use” is considered for payment (as in USA or in India). Obvious differences crop up between the condemner and the owner on what should be considered as “highest and best use”. LARR 2013 in India defines “fair market value” as the average of the sales which are in the higher bracket of 50% of the

comparable lands sold. In absence of appropriate attributes bounding a property which are comparable with the reference land, computation of fair market value using comparable sales approach can often be disputed. This is also evident in the judiciary interlocutions in different case specific judgments across the world. India is no exception. Supreme Court of India had deviated from the concept of averaging of the sale price of the similar lands unless they fall in a "narrow bandwidth". Taking cue from an earlier Madras High Court judgment Supreme Court had directed to consider the highest value unless there are strong circumstances to accept a lower figure (Supreme Court of India on "Just compensation " in Land acquisition, 2010). Variety of discourses and judicial opinions across the world have shown that the central issue which has led to the age old unresolved conflict on eminent domain lies in the apparently innocuous term of "just compensation".

5.6.1 Land Market in India

India's land market is yet to mature. This is in the process of evolution to a modern market. A land market can be said to exist when the number of transactions passes a critical threshold.

Figures 5.3: Land market Transition- Thin to Thick



Transition in Lifecycle of Land Markets (Peter Dale, 2017).

In India land market is thin. Land titles are frequently contested in Indian land markets. A study by McKinsey suggests that 90 percent of land parcels in India are subject to legal disputes over ownership. Further, the huge black money that operates in the land

market, has distorted the recorded figures in the transactions. They are often much lower than the market prices. This has made the determination of “fair market” price of land from the sale deeds difficult. Government circle rates can be the other option to estimate the “fair market” price. But the circle rates are not updated often and remain substantially lower than the actual market value.

5.6.2 Fair market value in a thin land market of India

India is one of the most densely populated countries in the world. Of the 1.21 billion people of India nearly 70% live in villages and depend directly or indirectly on agriculture for livelihood. Due to her predominantly caste based social structure and a colonial past of 200 years, the land holding in India has become highly skewed. All India Report on Agriculture Census 1991-2000, in 1995-96 reveals that as many as “61.2% of holdings accounted for only 17.2% of the total operational holdings” confirming high fragmentation. This has resulted in smaller plot divisions. Quality and locational attributes vary among the plots and so also the price. In absence of active land markets in India, information related to land prices are generally scanty and it is more so for agricultural lands. For the compensation purpose, market value of the acquired land is generally derived from the average of the actual sale price of the lands sold in the near vicinity during the previous 3 years. It assumes all lands in near location command the similar premiums or sufficiently close to permit averaging and their average represents the market value of any land in the locality and the same is true for the acquired land. But the land value varies based on their qualitative and quantitative attributes and with smaller plots this is more so. Further in a thin land market number of recorded sales is normally not many. And when it comes to comparable land sales with similar attributes it is even fewer. Simple average of the local sales data without making suitable adjustments in their price figures for the varying attributes, cannot meet the accuracy demand of a fair estimate of the market value of the acquired plot (Tapas Roy, 2017).

Merril in his *Incomplete Compensation for Takings* (2002) has highlighted the inadequacy of using average market price as fair market value in a thin land market. “Takings compensation can be viewed as a form of Corrective Justice. A taking can be

regarded as a governmental interference with a property right and compensation as an attempt to make the victim of the interference whole by returning her to the pre-interference base line". (Wyman, 2007). The attempt to make the victim whole has made the compensation issue controversial even in a thick market. In India it is difficult for the rural population to migrate to non-agriculture economy any time soon in absence of any massive migration mechanism. As a result land owners are forced to look for a replacement land to sustain her livelihood. Thus to make the victim whole there is a need to know the replacement cost of the land expropriated in a post-acquisition scenario. Ad hoc solatium may be able to meet the subjective loss in a thick market but it is unlikely to meet the requirements of replacement cost in the Indian market. LARR 2013 has continued with the solatium route with increased percentages. This has increased the amount but not the objectivity.

In LARR 2013 fair market value in India is computed based on the higher 50% of the land sold figures. Such approach is inherently ad hoc and cannot meet the requirements of objectivity in the estimation. There is no special consideration for lack of comparable sale data or for small plots with fragmented ownerships. This makes the fair market value as assessed and not computed. A value that is fictitious and is linked to a hypothetical sale of a property, sold at some point in time. It becomes even more complex when a part of a property is expropriated. At this compensation is determined as the difference between two fictitious values, the remaining property's market value before expropriation and the value after expropriation. Summary of the literature review and the gap analysis is shown in Annexure- 1.1 to 1.4.