Taking Land Around the World

International Trends in the Use of Eminent Domain

Antonio Azuela

Compulsory purchase, expropriation, eminent domain, or simply "taking" are different names for the legal institution that allows governments to acquire property against the will of its owner in order to fulfill some public purpose. This tool has been used for a long time as a major instrument of land policy, but now it is subject to a number of criticisms and mounting social resistance in many parts of the world. Campaigns for housing rights, movements for the defense of property rights, and legislative and judiciary activism are among the factors changing the conditions under which governments exercise their power of eminent domain.

In some cases this is good news. The rise of democratic regimes in many countries has reduced the arbitrary taking of land, and new forms of legal protection are helping individual homeowners or peasants adversely affected by infrastructure projects. At the same time, satisfying diverse public needs has become highly complex, precisely because the power of eminent domain has been weakened. In metropolitan areas like São Paulo, judicial decisions have forced local governments to pay exorbitant compensations with enormous financial consequences. In Mexico City, conflicts over expropriation cases took the country close to a constitutional crisis due to extreme and erroneous judicial activism.

As part of the institution of private property, eminent domain attracts an ideological debate in which many observers will be for or against it as a matter of principle; but it is difficult to deny that there is a justification for the existence of this power when a public need is considered more important than the interests of those who own the land. This article explores the diversity of conditions that, in different parts of the world, are changing the shape and the reach of eminent domain (Azuela 2007). We take as a point of reference the hypothesis that legal systems around the world are converging toward the principles and rules of the takings law in the United States (Jacobs 2006; Woodman, Wanitzek, and Sippel 2004).

A Growing Discontent

Not long ago the dominant approaches in urban law, planning, and the social sciences in general saw the expropriation of land as a crucial component of any development strategy. Since the early 1980s, however, it has become evident that expropriation was imposing high social costs, as in the

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Traffic backs up regularly on a brand new highway on a long bridge over a ravine near Mexico City (left) because the highway ends in a one-lane road (above). The local government does not dare to use its eminent domain powers to widen the road for fear of losing a legal suit.

case of dams in developing countries. In the last decade of the twentieth century, the number of displaced persons due to infrastructure projects reached between 90 and 100 million (Cernea and McDowell 2000).

Expropriation should not be confused with resettlement. The latter can take place without the former, and vice versa, but it is important to keep these two situations in mind, in order to recognize two extreme forms of social cost. On one hand, there is a social and humanitarian impact in expropriations where land is taken with low (or no) compensation and people are forced to leave the place they inhabit. On the other hand, expropriation procedures may result in high costs to society as a whole when, due to judicial decisions, governments are forced to pay exorbitant sums to landowners, as happened recently in Mexico and Brazil.

Cultural changes have also played their part. Dams, highways, and ports have lost the appeal they once had as symbols of progress. As environmental and wider social arguments gain importance in public opinion, widespread resistance against such large infrastructure projects becomes relevant. One example is the ill-fated plan for a new airport in Mexico City. After intense opposition from one of the villagers whose land was being taken, and the later mobilization of dozens of social organizations from many parts of the country, the federal government decided to abandon the project in 2002.

In the United States both political and judicial activists have made serious attempts to put limits on eminent domain powers. The property rights movement enjoys growing support in several states and has launched initiatives to that effect (Jacobs 2007). At the same time, cases before the U.S. Supreme Court have resuscitated the issue of whether it is correct to take land from one person to give it to another person, even if the latter would promote development projects from which the community would obtain benefits. But a *cause célèbre* such as *Kelo v. City of New London* does not indicate a general trend. Can we know what is happening in practice?

Policy Changes: Facts and Trends

Insofar as expropriation is employed as an instrument of land policy, an evaluation of its use requires quantitative data. We need to know how extensively it is used, for what purposes, and how its uses change through time. However, there is a serious lack of official sources for that kind of systematic information and precise data. The main sources are the judiciary branches of governments, which

provide information with high qualitative value in helping us understand the way conflicts over expropriations are dealt with, but they do not document the number of cases that do *not* become legal conflicts.

In a project sponsored by the Lincoln Institute, it took several months to build a database with all the expropriation decrees issued by the federal government in Mexico between 1968 and 2004, and it does not include information about the amount of compensation paid (Saavedra 2006). Figure 1 shows a clear reduction in the use of expropriation for urban development and infrastructure over this period.

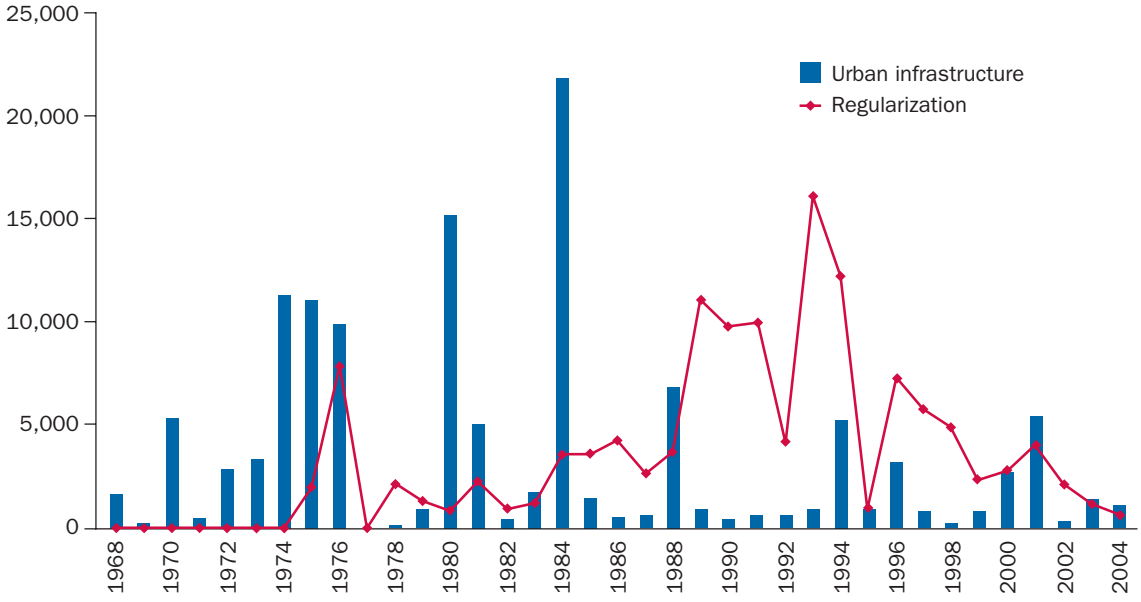
These data do not tell us whether the decrease has to do with structural adjustment policies that reduced funding for infrastructure or other factors such as social resistance or changing priorities within government. It is only a starting point that allows us at least to pose the question. The main point is that there is no systematic information about the dimensions of expropriation within the context of urban policies. Thus, the notion that the use of expropriation is declining appears to be a sound hypothesis, but the reasons cannot be documented easily. In fact, according to the few indications contained in the literature, trends seem to be rather heterogeneous.

We suggest that countries can be divided into three groups regarding the use of eminent domain. In the first group are strong states with a correspondingly weak rule of law that make extensive use of the power of eminent domain in the context of high economic growth rates. The most obvious case is China, along with other Asian countries such as Korea, Singapore, and Taiwan. Recent legislation on property rights, combined with growing social resistance, might change this trend in China, but that remains to be seen (China Law Blog 2007).

The second group includes countries with weakened states (and economies) where the use of expropriation has decreased. Apart from structural adjustment programs that reduce public investment and social resistance that places political constraints on projects, the judiciary is playing a growing role in many parts of the world, although this does not always mean the protection of legitimate individual interests. Brazil deserves a special mention here, as many expropriations for urban development projects are successfully challenged in courts, and judges award huge compensations that, combined with high interest rates and legal penalties, cause local governments to accumulate large judicial debts (*precatórios*). In the State of São Paulo alone, 104 intervention orders have been issued against 60 municipalities, and in one single expropriation the amount of the *precatório* was equal to five years or more of the entire municipal budget (Maricato 2000).

The third group includes highly industrialized countries where public opinion movements chal-

FIGURE 1
Area Expropriated According to Type of Expropriation, 1968–2004 (hectares)



Source: Saavedra, 2006

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lenge the use of eminent domain, but do not prevent governments from using it on a regular basis as part of their urban policies. Recent debates around the *Kelo* decision might create the impression of a crisis of eminent domain in the United States. However, according to a 2003 survey that covered the 239 largest cities in the country, expropriation seems to be alive and well, and it passed the proof of equity, effectiveness, and efficiency. The study reported that the level of success in the use of eminent domain can be seen in the fact that "…only in 3 percent of the cases did litigation create an extensive delay in the development of various projects" (Cypher and Forgey 2003, 264).

In sum, there are sufficient indications that there is not a universal, let alone a uniform, decline in the use of expropriation. While there is not enough quantitative data about its actual use, trends in policy orientation are also unclear. As noted earlier, governments do not set explicit goals or generate evaluation exercises about its use. In contrast, multilateral organizations have been adopting clearer positions in this respect. In particular, the World Bank has documented the social impact of expropriations for populations displaced by infrastructure and urban development projects, and has adopted policy orientations in this respect, although there are no signs that things have improved in a significant way (Cernea and McDowell 2000).

Despite the lack of information that would allow us to undertake comprehensive policy analysis and evaluation, two extremes can be identified very clearly. First, human rights activism has become an important frame of reference to fight expropriations in which vulnerable people are deprived of a basic need. Second, commercial property interests have managed to put limits on the capacity of governments to satisfy public needs through eminent domain procedures. Again, Mexico City is a good example since the local government has ceased to even consider projects that require the expropriation of land, fearing that litigation will make them unviable.

It is extremely difficult to take land for public purposes in Mexico, as in many countries. As a result, roads are often discontinued due to litigation against eminent domain.

Legal Changes: Issues and Contexts

When we look at legal developments we get a somewhat clearer image of general trends. The literature seems to indicate that, with few exceptions, legal changes in the last two decades have tended to reduce the power of eminent domain.

Correspondingly, the rights of both individual and collective landowners *vis á vis* the state have been strengthened. In particular, the criteria for compensation tend to stabilize at market values, and authorities are subject to more rigorous procedures. However, this is far from being a homogeneous process. In fact, when we take a closer look at the way eminent domain law is changing in different parts of the world, we find that the specific issues depend on the institutional context in which eminent domain is discussed. For this purpose, we distinguish four different contexts: traditional law-making procedures in nation states, and three types of international cases (see table 1).

In the context of nation-states, including legislative and judiciary legal mechanisms, issues are discussed from a constitutional point of view. Of course, different issues are more salient in some countries than in others. The definition of public use, which is the substantive justification for taking land, has become the main issue in eminent domain law in the United States, particularly since the *Kelo* case. Most other countries acknowledge that the legislative and the executive branches have wide discretionary power to decide when there is a public interest that validates an expropriation.

Determining the right compensation can be a particularly difficult issue in developing countries, where far from being a mere "technical" issue, it is the core of the question. The ultimate example is the *Paraje San Juan* case in Mexico City, where the scandal created by the exorbitant compensation awarded by a Federal Circuit Court forced the Supreme Court to strike down the award, in open violation of the *res adjudicata* principle.

Such different approaches challenge the hypothesis of a global convergence in eminent domain law. Nevertheless, within national contexts, eminent domain is a constitutional issue in the deepest sense. Changing the rules of eminent domain, or construing them in different ways, means changing the content of property rights, i.e., the balance between state power and private owners, which is one of the most salient themes in the (trans)formation of nation states.

At the other extreme, there is a type of international context in which eminent domain is discussed and negotiated. Free trade agreements and other international instruments have at their core the question of expropriation—a specter that has haunted international relations for decades. However, the issue here is not the content of rights, but the procedures to protect them. These instruments usually reiterate traditional constitutional formulae of public use and fair compensation. Legal protection against unfair expropriation is guaranteed through the creation of arbitration panels and other mechanisms. In the end, foreign investors in a given country may enjoy greater legal protection compared with nationals, not because the law gives them more substantive rights, but because of the existence of certain procedures to which only they have access.

The third and fourth contexts are less clear in their impact on the law of eminent domain, although they are quite distinct in the doctrine they sustain. One is the dominant approach within development agencies, such as the World Bank, that eminent domain is part of a doctrine that views property rights as a prerequisite for economic development. Using neo-institutional theories, the rules on expropriation are seen as part of an institutional arrangement whose main purpose is to establish the correct incentives for market growth. In short, this is a utilitarian doctrine of property rights oriented toward economic development.

TABLE 1
Contexts and Issues on Eminent Domain

Institutional Contexts	Constitutional Issues	Economic Development	Housing as a Human Right	Protection of Foreign Investors
The nation state	**China, the United States**		**India**	
Development agencies (World Bank; International Monetary Fund)		**Africa, Asia**		
The UN system; NGOs			**India, South Africa**	
Free trade agreements				**North America**

Countries following that doctrine have difficulty reconciling it with developments in an international context such as the United Nations system, which is supported by a network of NGOs whose main issue is human rights. When the use of expropriation is linked with the forced eviction of people who use the land as a basic need, be it for agriculture or housing, it is seen as a gross violation of a human right. The philosophical implications of this approach are rooted in strong moral ideas about human dignity and human needs. Its main contribution for the issue of eminent domain is a substantive distinction between expropriating goods that are used to satisfy basic needs and the expropriation of assets held for a profit.

While it is difficult to find the phrase human rights in the leading documents of international development agencies, it is also rare to find in the discourse of human rights any mention of the importance of market forces. These views correspond to two different and in many ways opposing legal cultures—perhaps even two different world views. By ignoring each other, however, these approaches follow the opposite route to convergence and are the most notorious divergence in the field of eminent domain today.

To illustrate the relationship between contexts and issues in eminent domain law, Table 1 presents some examples of countries that have engaged in debates over expropriation. The case of India illustrates that some countries may see changes in more than one context.

Understanding Diversity

Pointing at those four contexts is like drawing a gross road map to explore the way ideas and initiatives are processed in different ways and, in particular, to pose the question of whether or not there is convergence at the global level in the way eminent domain powers are used. Indeed, there seems to be a general trend towards a weakening of the power of eminent domain in many parts of the world—or at least a growing dissatisfaction about the way it is used. A number of factors seem to explain this trend: growing social resistance, judicial activism, public opinion, and above all changing international conditions.

However, it is not clear that all countries are following the same direction. In particular, there are signs that changes are taking place in different contexts that have an influence on the specific issues being addressed in initiatives to modify the law and policy of eminent domain. Much more empirical research is necessary to document and understand changes that are taking place in the way it is used in practice.

This is not a purely academic question, as there are relevant implications of a decline in the use of eminent domain when more efficient mechanisms for the satisfaction of public needs are put into practice, or when the vulnerable sectors of society are enjoying broader legal protections. Surely the same trend has a different meaning when it is the result of an expansion of the power of private owners who are able to impose their interests on society as a whole—particularly when judges and other public officials are not able to explain what is happening.

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