

Eminent Domain, “Public Use,” and Mineral Resource Exploitation in South Africa

ISSAH MOSHOOD, UMEJESI IKECHUKWU, and NOKUTHULA MAZIBUKO

Abstract: Eminent domain is the power of the state to expropriate privately or communally owned land subject to the meeting of the requirements of “public use” and payment of just compensation to the affected parties. Contentiously, scholars have been divided on the “public-use” doctrine of eminent domain. While some scholars argue that eminent domain is needed for socio-economic development (public interest), others stressed that the exercise of eminent domain serves only private interest. However, this debate has not been fully extended to South African mineral resource development. Therefore, the aim of this paper is to extend the theoretical and conceptual argument of “public-use” discourse of eminent domain to some mineral-rich communities in South Africa. Based on the conceptual analysis of public use discourse of eminent domain, this study developed a three-stage model of eminent domain discourse. It is expected that this model would help deconstruct the complex relationship between the four major stakeholders in the mineral resource extractive space in South Africa in order to highlight sources of conflict as well as opportunities for sustainable relationships.

Keywords: Public use, eminent domain, mineral resource exploitation, South Africa

Introduction

Eminent domain is the inalienable power of a sovereign state to take possession of the privately or communally-owned property in the interests of its citizens. Before possession can occur, two fundamental conditions must be met: (i) a public use requirement; and (ii) compensation.¹ This implies that property of any citizen or group can be sacrificed for greater good subject to the payment of just compensation to the owner of the property.² In South Africa, since the discovery of diamonds in Kimberley in the 19th century, subsequent governments have used this doctrine for the exploitation of mineral resources. However, there has been an intense

Dr. Issah Moshood teaches in the department of sociology, University of Ilorin, Ilorin, Nigeria. His research interest focuses on natural resource exploitation and criminology. He is an alumnus of the University of Fort Hare, East London Campus, South Africa.

Prof. Umejesi Ikechukwu teaches in the department of sociology, University of Fort Hare, East London Campus, South Africa. His research interests focus on natural resource exploitation, state-community relations, environmental risks, vulnerability and policy. He is an alumni of the International Institute for Applied Systems Analysis (IIASA), Laxenburg, Austria.

Prof. Nokuthula Mazibuko teaches in the department of sociology, University of South Africa, Pretoria, South Africa. Her research interests focus on gender studies and natural resource exploitation.

<http://www.africa.ufl.edu/asq/v19/v19i1a1.pdf>

debate on the supposed fairness of the application of eminent domain in mineral resource exploitation in South Africa. This debate can be categorized into two strands.

The first strand of debate argues that “compulsory acquisition” of privately or communally-owned property for mineral resource development is important for sustainable development in South Africa³. The proponents of this position argue that the use of the power of eminent domain for resource exploitation in the country has yielded remarkable macro and micro-economic advantages.⁴ Based on this, it can be surmised that these proponents believe the public-use requirement of eminent domain is satisfied. The second strand suggests that the use of the acquisitive power, by the state, in mineral resource exploitation violates the fundamental rights of the people since mineral-bearing communities in South Africa enjoy very few benefits of the mineral resources exploited in their ecologies.⁵ Specifically, the massive displacement that often accompanied mineral resource development makes large-scale mineral resource exploitation most uncongenial to the local inhabitants⁶. In addition, scholars argue that “the rapid mineral policy reform that has taken place in numerous developing countries, which helped to attract significant investment, has largely excluded the interests of local communities.”⁷

From the above argument, it is evident that there is a contradiction in the existing knowledge of the public use requirement of eminent domain in mineral resource exploitation in South Africa. In other words, stakeholders in mineral resource exploitation, particularly in platinum-rich communities of Limpopo and North-West Province, gold and diamond-rich communities in Gauteng Province, and coal-rich communities in Mpumalanga Province have yet to reach consensus on what constitutes the “publicness” of mineral resource exploitation. For instance, while the South African state and mining companies argued that resource exploitation in resource-rich communities have yielded positive results in terms of socio-economic and infrastructural development, the affected communities and environmental advocacy groups stressed that mining operations have further pauperized resource-rich communities through impacts on their local economy as well as the destruction of sense of community.

The article is divided into two parts. The first part highlights and critiques the public use requirement of eminent domain. The second part examines the eminent domain, public use and mineral resource exploitation “nexus” in South Africa with specific examples from the resource-rich communities.

Eminent Domain: A Discourse of Public Use

As stated in the introduction, eminent domain is the power of the state to dispossess privately or communally-owned property for the benefits of the majority of citizens⁸. One of the critical components is public use doctrine that the state’s application of eminent domain must meet.⁹ Some scholars argue that the application of eminent domain is in the interest of the general citizens¹⁰. Others are skeptical of the state’s ability in satisfying the public use requirement in eminent domain practice.¹¹ In this section, both views are examined in order to provide the new understanding of public use doctrine within eminent domain.

The Pro-public Use Discourse of Eminent Domain

Essentially, eminent domain serves public interests because it is one of the vital political tools for ensuring even development through redistribution of resources.¹² Campbell and Lindberg argued that “the ownership of property by one person is usually equivalent to the lack of ownership or control by another.”¹³ By extension, ownership of property by one community is also equivalent to the lack of ownership or control by another community.¹⁴ This lopsidedness in property brings about unevenness in development. Thus, in the interest of the public, taking control of privately or communally owned property for collective and even development is both justifiable and rational.¹⁵ If government did not take the ownership of land and resources therein and thereon, some areas would grow richer than other areas.¹⁶

Thus, Campbell and Lindberg hinged their argument on the fact that, in the interest of even development, central government should take possession and control of key mineral resources. Allowing individual ownership of key mineral resources might also cause frictions and crises among members of mineral-rich communities¹⁷. Similarly, it is likely to pitch one community against another especially when resources are situated at the border between two or more communities. In addition, mineral resource exploitation often involves huge capital outlay which neither individual members nor the entire community could afford.¹⁸ If they communities could afford the financial implications of exploration and mining, there are technicalities involved in resource development.¹⁹ Therefore, for the sake of efficiency in the exploration and mining of these resources, central government must take full ownership of land and mineral underneath, but in trust and in the interest of the larger society.²⁰ As such, “eminent domain can be used to distribute and redistribute material benefits.”²¹

For instance, the state’s acquisition of private lands belonging to some residents of Fort Trumbull in New London (United States of America) for the pharmaceutical company Pfizer in February 1998 hinged on sustainable development.²² Consequently, these affected property owners sued the City of New London, stating that it was an outright violation of their property rights. However, the Supreme Court ruled in favor of the city. The Court based its decision on the fact that:

...the City has carefully formulated a development plan that it believed will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue ... promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.²³

The Court maintained that since the purpose for which the property was expropriated would benefit the residents, the action of the City of New London was justified. Eminent domain is also fundamental in the provisions of basic infrastructures such as roads, hospitals, schools, among others.²⁴ According to the Bower, public roads benefit all who move throughout a community. Public schools, available to all children in a community, educate future generations, and education is generally recognized as a responsibility of governments, public utilities, even those privately owned but franchised to provide key services such as providing water, electricity or natural gas, are generally recognized as important community service controlled by the government.²⁵

If the property expropriated was used for the construction of basic infrastructures, the public use requirement could be deemed satisfied. Aramian pointed to the public use requirement of eminent domain when he gave account of the construction of the U.S. national cemetery in 1867.²⁶ The U.S. Congress authorized the exercise of eminent domain for the construction.²⁷ The public use doctrine was justified since the expropriated property was of national importance. Albonesi detailed how plans to expropriate land belonging to private individuals for construction of the Cayuga Water Front Trail in Ithaca, New York.²⁸ The city rationalizes this action on the grounds that the construction will serve the public interest.²⁹ One of the residents attested to the publicness of the proposed project when he stated that:

...and in this case for the trail, I think the trail has a lot of different public benefits and public uses. Recreation is certainly one of them, but I think transformation is a pretty important purpose, particularly for phase two of the trail, which will really go through a commercial district. It will connect the West side of the inlet to the East side, will make a direct connection between the farmer's market and Inlet Island and the West Hill area. In conjunction with phase three, it will make an important transportation connection for folks who live in the North side neighbourhood or fall Creek to be able to go to Cass Park.

Levien sees eminent domain as an instrument to attract foreign investors and multinational corporations through the assurance that the state will use its power to acquire land and natural resources required for their economic survival in a particular political society.³⁰ In many contexts, eminent domain has been used to ease the process of acquisition of private property to address some basic economic challenges.³¹ Some argue that it has been often employed by states to correct their fiscal difficulties.³² Schaffer et al. maintain the use of eminent domain is crucial for the attainment of fiscal efficiency.³³ For instance, a former Minister of West Bengal in India stated:

Providing land is one of the most important things, you see, because until and unless you get a hold of the land, there is no question of setting up industry...that is the most important input. If you don't get it, if you cannot provide it, then they will seek somewhere else where they can get that land.³⁴

Anti-public Use Discourse of Eminent Domain

While eminent domain serves a public use requirement, scholars have noted limitations in the use of eminent domain to serve public interests. Somnin criticized the use of eminent domain to expropriate individually or communally owned property for private corporations for the purpose of encouraging economic development. She argues that government is more likely to be focused on the prospects of job creation and payment of taxes to the extent that appropriate checks on these corporations may be ignored:

while the economic development rationale may not be limitless, it is certainly close to it...this lack of a binding obligation creates incentives for public officials to rely on exaggerated claims of economic benefit that neither they nor the private corporations have any obligation to live up to.³⁵

She adds that

although...condemnations are defended on the grounds that they are needed to promote economic growth in poor communities, they often destroy far more wealth than they create. Economic development could be better promoted through other less destructive means.³⁶

This point resonates with land-use practices. One can therefore argue that the private or communal use of land may be more productive than any justification that the state might give for condemnation of the property. For instance, can we say with utmost certainty that the communal and private use of land for either subsistence or commercial farming or ecotourism is less economically viable than the state's use of the expropriated land for mineral resource exploitation?

Bower was also skeptical of the public use requirement of eminent domain.³⁷ According to him, using development as a justification for acquisition can be quite misleading and misguided because promises of job creation and tax revenue are based on probability, which may never materialize. Then, who loses and who gains? Albonesi agreed when arguing that more contentious projects such as private housing developments, mineral resource exploitation among others have been incorporated into public use discourse of eminent domain because the state assumes it has an inherent capacity to enhance the revenue-base and generate employments.³⁸ In his condemnation of the ruling on *Kelo versus City of New London*, Albonesi argued that

the US. Supreme Court erroneously ruled in favor of using eminent domain for a private housing development that was never built, and which never benefitted the public through decreased tax rates"³⁹

The failure of the state to differentiate expropriation of land for public benefits and critical public purposes raises serious ethical questions.⁴⁰ Phillip and Shillah lament that eminent domain serves not the interest of the public, but rather the interest of private corporations.⁴¹ According to them, "in every instance, the government was a conduit to take property from one private owner and sell, exchange or give it to another private owner under the guise of public purpose."⁴²

It is common that private corporations circumvent due process in acquisition of land for resource exploitation. Instead, they convince local government or the state to expropriate the land, promising that such land would be used in the public interest. Consequently, they acquire properties cheaply through the instrumentality of government without fulfilling promises made while contracting the land.⁴³

There have also been cases of inefficient projects and corruption in the exercise of eminent domain. Oswald argued that most applications of eminent domain for development projects lack "good faith."⁴⁴ By good faith, Oswald means that the state should inform members of the affected communities of any likely harmful consequences of the proposed developmental projects as well as their expected benefits.⁴⁵ Trustworthiness and honesty should be maintained by the state in its exercise of eminent domain for public good. According to Aramian, "if a municipality condemns a piece of property, but openly provides a clear explanation, such as its harmful effects on the community, and the societal benefits of clearing the land for public use," the community acceptance may be higher, and public backlash may be prevented.⁴⁶ While eminent domain policy can be for the good of society, and often necessary for economic

development and social well-being, it can also be constitutionally unsound, and in some cases increase inequality, if the good faith principle required is not duly observed.

Chen and Yeh also critique of the public use requirement. They state that “while public use projects may spur growth, these projects do not necessarily benefits, in term of employment, those people whose homes, businesses, lands were affected or displaced as a result of the application of eminent domain.”⁴⁷ For instance, in Uganda, the state expropriated communal land for the exploitation of oil.⁴⁸ The Ugandan government gave multiple justifications for its action on communal property.⁴⁹ These include: (i) increased electricity supply; (ii) development of road networks; (iii) improvements in education; (iv) generation of employment opportunities; and (v) revenue for the government.⁵⁰ However, this action on communal property caused more harm than good:

Villagers around Lake Albert had high hopes for how oil would transform their region. Companies pledged new roads, schools and health clinics. But nearly a decade after the discovery of oil in Uganda, a little of that promised infrastructure has been built. Meanwhile, exploratory drilling has ruined crops and killed off fish, eroding people’s livelihoods. Oil companies have made cash pay outs to affected families, but that money has sometimes increased tensions among family members and torn through the social fabric of village.⁵¹

Eminent domain has been linked with neo-liberal economics that encourages privatization of land and natural resources for economic development.⁵² This ideology has been championed by the multinational financial institutions such as the World Bank and International Monetary Organization (IMF).⁵³ Thus, the state uses eminent domain to facilitate economic development by acquiring individually or communally owned land for private corporations. Somnin argues that this neo-liberalism has succeeded in facilitating “accumulation by dispossession.”⁵⁴ Under the influence of neo-liberalism, land is seen as a commodity to be used for increasing exports, enhancing GDP, fast-tracking growth and for overall economic development. Harvey argued that eminent domain has become a veritable instrument of accumulation by dispossession in the neo-liberal age, submitting that state transfer of land and mineral resources from peasants to private corporations led to the underdevelopment of local communities.⁵⁵ Similarly, Levien stated:

many states have long periods in their history limited the forcible dispossession of land from their own citizens to public purposes, construed narrowly as projects of the state. While some classes inevitably profit more than others from state projects, one must distinguish between dispossessing land for public infrastructure and dispossessing land directly for private capital.⁵⁶

Within this framework, many tribal lands have been transformed to private entities without due consultations of the concerned communities. The state views opposition to the acquisition of privately or communally owned property as a major hindrance to attainment of its developmental objectives.⁵⁷ Harvey and Levien agree that expropriating for private corporations on the condition of engaging in industrial production failed the “public use test” because it substantially benefitted the bourgeoisie and capital, not the general public⁵⁸. Sanyal even describes the current application of eminent domain as a new form of primitive accumulation.⁵⁹

This primitive accumulation has been facilitated by capture of state institutions by large private corporations which sponsor candidates and influence winners to formulate and implement favorable legislation/policy frameworks against the interests of citizens. The hijacking of state institutions by large private corporations leads directly to accumulation by dispossession.⁶⁰ In the name of development, many states and mining corporations engage in systemic accumulation of land and resources through expropriation. This has been institutionalized in many independent African states without a proper assessment of impacts on local economies and livelihoods.

According to Chipkin, this dispossession disrupted existing local paths to sustainable development in sub-Saharan Africa.⁶¹ For instance, local farmers in resource-rich countries have been dispossessed of their arable lands to permit mineral resource exploitation⁶². For Nathan, “such accumulations through expropriation marginalise local people” and reduce “their access to a decent life partly due to the absence of land for subsistence purposes.”⁶³ Amin illustrated how arable land belonging to indigenous people was dispossessed “by force and deliberately drove them into confined, poor regions, with no means of modernising and intensifying their farming.”⁶⁴

In most cases, states embark on development projects on communal lands without seeking informed consent of the communities. For instance, land in the Niger Delta region of Nigeria has been expropriated and destroyed as a result of oil explorations and exploitations since 1956.⁶⁵ The affected communities in the region narrated that oil exploitation in the region has brought about massive contamination of water, land and other environmental resources.⁶⁶ As noted by environmental advocacy groups, members of the affected communities lament that farming and fishing, which are the dominant occupations in the region, have been severely impacted. In neighboring Niger, the Tuareg complain of serious ecological damage that uranium mining has caused to their lands.⁶⁷

In Uganda, the government dispossessed lands belonging to the Benet, a small hunting-gathering community living in the northeastern part of the country. The land was converted into a national park, and the Benet were evicted from their ancestral lands. The Benet took their case to the Ugandan High Court and judgment was declared in favour of the plaintiffs. Accordingly, the Benet are entitled to stay and live in the said areas and carry out agricultural activities.⁶⁸

Mining activities in the Karonga region of Malawi pitched different occupational groups against each other.⁶⁹ Many fishermen complained that the release of toxic wastes from mining operations have caused a decline in fish populations. Subsequently, this group mounted a strong resistance opposition against mining operations. But other members of the communities who benefit from mining wanted the operations to continue. This created social rifts among members of the same community. Lindskog stated that:

The commencement of mining activity in Karonga has not been limited to the social impacts on mining communities. It also appears that mining companies have been careless of environmental concerns and have failed to provide plans on how they plan to restore the land that they have exploited, and any emergency-action plans in the event of the spillage of tailings. If the toxic waste were to contaminate surrounding rivers and Lake Malawi, the consequences would be

dismal as many rely on fish as a source of their livelihood. As these companies are showing little concern for communities despite the clashes that have taken place, the chances of them responding to the adverse environmental effects of mining appear grim.⁷⁰

Eminent Domain, Public Use and Mineral Resource Exploitation in South Africa

Since the 19th century when gold and diamonds were discovered, South Africa's economy has been based on and influenced by mineral resources.⁷¹ The rise of cities such as Johannesburg and Pretoria, and towns such as Soweto could be credited to the Witwatersrand gold rush of the 19th century.⁷² The country's known "in-situ mineral endowments were valued at \$2.5 trillion."⁷³ The country has large reserves of the platinum, gold, chromite, manganese, vanadium and refractory mineral resources (alumina-silicate).⁷⁴ The country also produces resources such as coal, iron ore, titanium, zirconium, nickel, vermiculite, and phosphate in large quantities.⁷⁵

Following the fall of the apartheid regime in 1994, the new government embarked on land reforms with the intention to correct past social injustices against certain groups. For instance, the Restitution of Land Rights Act 22 of 1994 provides that lands dispossessed from persons or communities after the enactment of the Natives Land Act of 1913 must be restituted to the rightful owners. The Communal Property Association Act 28 of 1996 provides land ownership rights for those living in communal homelands. Under the apartheid regime, communal land ownership was not recognised so the Act created a formal framework that gave property rights to a legal entity called a Communal Property Association, which then registered the property. Similarly, the Traditional Leadership and Governance Framework Act (TLGFA) No. 41 of 2003 and Communal Land Rights Act (CLARA) No. 11 of 2004 empower traditional authorities to oversee the administration of mineral resource development on their communal lands.⁷⁶

However, scholars have argued that local chiefs have not been forthcoming in land administration/allocation and effectively turned it into their personal properties.⁷⁷ At Rakgwadi in the Limpopo Province, Claassens stressed that the transfer of communal land title to Chief Matlala allowed him to "revert to his previously autocratic style of operating."⁷⁸ Oomen argued that local chiefs extort money from their subjects in land governance.⁷⁹ Similarly, Marcus observed other traditional leaders converting land held in trust for the community into their personal property, and some of them even sold portions of this land for personal gain.⁸⁰

While there are many studies on mineral resource exploitation in South Africa, few of these studies consider the public use doctrine of eminent domain.⁸¹ Having presented the broader discourse of public use doctrine of eminent domain, we now examine this within the context of mineral resource exploitation in South Africa. This section is divided into five case studies: (i) Mogalakwena and Potgietersrus Mines; (ii) Twickenham Mine; (iii) Modikwa Mine; (iv) Platinum mining in Sefikile; and (v) Coal mining in Soutpansberg.

Mogalakwena and Potgietersrus Mines

The South African government used eminent domain to expropriate communally-owned lands for the exploitation of platinum in Limpopo Province at Mogalakwena Mine.⁸² The government based its action on the grounds that the mine would produce jobs for unemployed youth in the communities and improve local economies. In this regard, the mining company issued a

statement committing that 30 percent of its employees would be from the host communities. However, the company subsequently cut this to 20 percent due to the fall in the price of platinum in the world market.

Another justification by the state for this acquisition is the company's contribution to provision of social services such as education, healthcare facilities, and other public infrastructure. This is quite significant given the fact that the level of education is abysmally low in the host communities. In terms of education, the company embarked on rigorous, well-planned skill acquisition and capacity-building initiatives. Anglo Platinum Company reiterated that "natural resources generate significant economic benefits for the nation as well as new economic and social opportunities for local people."⁸³ However, the affected communities lamented that mining operations brought more hardships than good, thus challenging the public use doctrine as a justification for the project.

In 2003, the communal lands of Ga-Pila were taken for an expansionary project of the Potgietersrus Platinum Limited Mine (PPL). Consequently, members of this community were displaced and taken to a new settlement called Sterkwater. In addition, each family was compensated with R5,000 and a new home constructed by government. Nonetheless, a study by Action-Aid revealed that although they were compensated, this did not address the loss of community and goodwill that they had built over the years.⁸⁴ These simply cannot be valued monetarily.⁸⁵ According to narratives of the affected villagers, neither the state nor the mining company (or its representatives) held meetings with them to discuss the modalities of the displacement as well as reaching agreements with the community on how the affected villagers would be compensated.⁸⁶ Many important considerations were omitted in the unilateral decisions of the state and the mining company on the condemnation of communal lands⁸⁷. These include: the loss of livelihood; the desecration of shrines; the loss of goodwill, and the destruction of local economies. Nonetheless, Anglo American Platinum (Amplats) agreed to pay R10 million to 42 villages in the Mogalakwena municipal area.⁸⁸ This was to serve as a compensation for the lands, graves and livelihoods destroyed by mining operations. Also, the company showed its readiness to build a clinic, improve a water supply network, and ensure that villages have land for vegetable gardens.⁸⁹

Twickenham Mine

The state also used eminent domain to expropriate communally-owned land for the Twickenham Mine in Limpopo Province, citing public use doctrine as a justification. This mine is situated in the eastern part of the Bushveld complex, not far from Burgersfort. Anglo Platinum decided to expand this mine in 2008 to raise its production rate. This expansion led to the displacement and relocation of five villages: Maotsi, Makobakombe, Dikganong, Botshabelo, and Monametse. The first four displacements occurred in 2003 while inhabitants of Monametse were relocated in 2005. According to the company, "a total of 114 households agreed to the resettlement and individual agreements were signed by the head of each household."⁹⁰ The company stated further that "it paid for new houses for each of the households and all relocation costs."⁹¹

To be specific, R5,000 was paid to each household and additional money was paid as compensation for mealie fields, fruit trees and boreholes bringing the total compensation paid to between R10, 000 and R20, 000 per household.⁹² The company stated further that

communication with the community regarding the relocation to Magobading/Mecklenburg started in 2001. The communities elected their own representatives, and were represented by an independent legal advisor. All affected tribal authorities and the Department of Land Affairs were involved from the start of the process. The Greater Tubatse Municipality was involved through ward councilors.⁹³

Nevertheless, many farmers in these villages were not content with the compensation because they viewed their farms as worth more than monetary compensations.⁹⁴ Action-Aid reported that “Jerry Tshehlakgolo was relocated from his home village of Dikganong to the new village of Magobading, losing two hectares of land that grew sorghum, beans and maize. He now lives in Magobading without any farming land.”⁹⁵ Limited access to farming and grazing lands existed in the new village of Magobading, causing food insecurity.

Implicitly, the concern raised by affected communities is that eminent domain in South Africa serves private not public interest and it further compounds food insecurity. Also, in terms of development of local economies,

there are few jobs in the new villages or surrounding areas and no unemployment benefit is paid by the state. The overwhelming majority of men over 18 are unemployed – no – one knows the figure, but it is likely to be the large majority of the people. The only other income for people is a small amount for pensioners – who usually receive R750 per month from the state – and for children – R170 per child and R500 for orphans.⁹⁶

In the context of South Africa, Cousins concluded that for the indigenous peoples, lands are not only for providing food, medicine, fuel, grazing and browsing for livestock, fish and game, but also, and perhaps more importantly, lands have “non-market values such as ... water retention, inheritance value, aesthetic, shade, initiation sites, sacred areas, and the prevention of soil erosion, [which] are rated highly in [an indigenous] community.”⁹⁷

Modikwa Mine

The South African state acquired communally-used land for Modikwa mine in Limpopo Province situated very close to Twickenham mine. It is jointly owned by Anglo Platinum and African Rainbow Minerals. The operation was granted mining licenses covering 14,313 hectares of land, extending over five farms: Driekop, Maanidagshoek, Hendriksplaats, Onverwacht and Winterveld.⁹⁸ These farms are predominantly used for grazing. The public use doctrine of expropriation is contestable as community animal husbandry is severely disrupted. The expropriation of these farms for mining operations cut off the livelihoods of about 360 families who heavily depended on these farms as means of sustenance.⁹⁹ The affected farmers were only paid minimal compensation.¹⁰⁰ According to lawyers advocating for Maandagshoek village, the mining company has:

Unlawfully damaged and destroyed arable lands, fences, crops and infrastructure on tribal lands and persist in making provocative forays onto tribal land and that in doing so they demonstrate a complete disregard and contempt for the community’s land rights and for the due process of the law.¹⁰¹

Due to the contestation of public use doctrine, the affected farmers began a resistance movement against the mining operations. This resistance came to a head in June 2006, when about 150 inhabitants of Maandagshoek gathered at Onverwacht farm to resist the mining operations on the farms. Unfortunately, resistance was criminalized and law enforcement agencies descended on the protesters, culminating in the arrest of most of them. Yet the company claimed that “the communities at Modikwa mine...own 8.5% of Modikwa Platinum Mine, which is a new but substantial operation currently building up to targeted production levels...They fully supported the mining venture.”¹⁰² However, Action-Aid found that 8.5 percent interest in the Modikwa mine was not actually held by the affected communities but instead by groups that the company claimed representing the communities, but which the communities rejected.¹⁰³

Platinum Mining in Sefikile

In North West Province, the state also applied its power of eminent domain to acquire land in platinum-rich communities for prospective mining companies. Mnwana’s comprehensive study on the platinum mining in Sefikile is useful, however it is not situated within the framework of the public use in eminent domain.¹⁰⁴ Union Mine started operations on the farm Swartklip in Sefikile prior to 1970.¹⁰⁵ In the 1970s, mining operations expanded, culminating in extension to the farm Spitskop.¹⁰⁶ Spitskop was communally-owned so the commencement of mining operations brought about enclosure of farming and grazing areas for the people of Sefikile.¹⁰⁷ Many farmers stated that their farming and land-use practices have been severely altered:

I can remember clearly when they began mining in this village. I was about ten years old. On one side of this farm, we were ploughing. On the other side, we grazed cattle. There were families that had cattle posts on the part of the farm that is now occupied by the mine. They were removed by force from that area. There was no compensation from the mine.¹⁰⁸

Further demonstrating their displeasure over the mining operations, the people of this community referred to the mine as *Sinkgalaleng* (don’t undermine us).¹⁰⁹ Grievances over expropriation by the mining company with state assistance led to the development of a community-based resistance group.¹¹⁰ Towards the end of 1990s, community activist groups began to gather momentum. These groups confronted mine officials and demanded increased job opportunities as well as investment in community projects. In response, the mine renovated Sefikile primary school and a tarred road network in the western part of the village.¹¹¹ This brought a temporary cessation of the struggle against the mine.¹¹²

However, the confrontation resumed in 2006 when residents found that the mining company was paying royalties to the tribal administration office since the early 1980s and these royalties had been siphoned off. One of the protesters stated:

the mine has been operating here for more than fifty years to the disadvantage of the people of Sefikile. We have refused on many occasions that the Chief should give away this land to the mine because it is our grazing land. But he insisted. The White people told him that there was a lot of money there (where the mine is operating). We do not know how much money the Chief has made.”¹¹³

Coal Mining in Soutpansberg

Upon discovery of coal in Soutpansberg, a semi desert area with little rainfall in Limpopo Province, the Department of Mineral Resources granted mining rights to Coal of Africa Mining Company which then established Makhado Coal Mine Project close to Makhado (Louis Trichardt). The state's justification for this mineral development project is national coal requirements for the generation of electricity. According to the state, this satisfies the doctrine of public use. However, communities around the mine countered that the mining operation would not serve a public use; rather it would disrupt and compound the problem of water shortage in this region.¹¹⁴ Communities asked what value is public use for those farmers who would lose their land or have their farms contaminated as a result of mining operations? According to Jonathan Mudimeli, Chairperson of the Mudimeli Royal Council, there is a huge fight coming... We fear our borehole will dry up if this mine is allowed. This is because coal mining is water-intensive activities, and the region is extremely water-scarce."¹¹⁵ Mphatelene Makaulule, member of the Venda environmental group *Dzumo La Mupo* (Voice of Nature), said "the miners are taking our water that our community needs... Look at what coal mining did to pumalanga. Look at the scars. We don't want that."¹¹⁶

Conclusion and Policy Suggestions

This article critically reviewed the fundamental arguments on public use requirements in the state's application of eminent domain in resource development in South Africa. While the state and mining corporations argued that application of eminent domain is fundamental for attaining the goals of sustainable development and achieving fundamental state objectives, the affected communities and environmental advocacy groups stressed that the exercise of power violates fundamental rights and disrupts local economies. The South African state considered that the application of eminent domain for mineral resource exploitation satisfied a public use requirement. On the other hand, affected communities insisted it was not a public use but a public ruse.

Although the public use doctrine of eminent domain is frequently understood to involve mainly the state and local communities, this study brings in two other stakeholders (mining corporations and environmental advocacy groups) in the public use discourse of resource development. To demonstrate these relationships, we use a three-stage model of eminent domain. Figure 1 illustrates these three stages. This model could help South African policymakers to recognize the issue of mineral resource exploitation as a complex phenomenon involving four key stakeholders. In formulating policies or making laws on mineral resource exploitation in South Africa, the interests of all four need to be considered. This study generates a new understanding of the public use discourse of eminent domain not only for the South African context, but in many mineral-rich communities around the world.

This model enables policymakers to reconsider eminent domain and the expropriative power of the state which promotes hierarchical hegemony by reinforcing an "arrogant" state posture through top-down policy making. The principle of eminent domain is often undemocratic as it privileges a "single-actor ownership" model, reminiscent of pre-1994 South Africa. The model of expropriation in colonial and apartheid South Africa excluded or alienated

other actors in the mining and land ownership policy discourse. Post-apartheid South Africa must adopt a new “pluralistic model” of resource ownership.

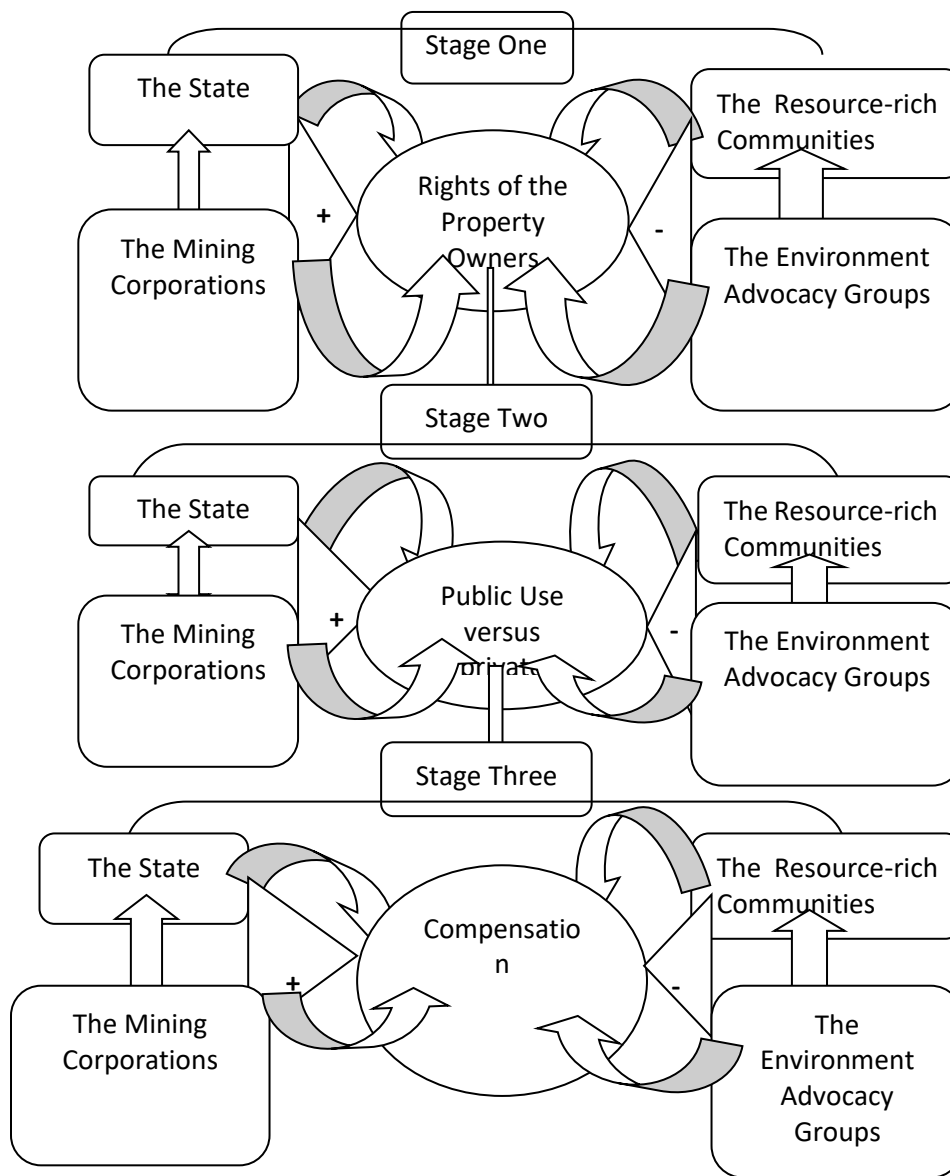


Figure 1: Systems understanding of eminent domain, public-use doctrine and mineral resource exploitation: A three-stage model

Notes

- 1 Stoebruck 1972; Perry 2016.
- 2 Perry 2016.
- 3 Rogerson 2011; Henrico 2012, p. 16.
- 4 Cawood 2011, p. 444; Oshokoya 2012, p. 88.
- 5 Cronje and Chenga 2009.
- 6 Mnwana 2015, p. 501.

- 7 Mnwana 2015, p. 501; Cawood 2011; Oshokoya 2012.
- 8 Levien 2015; Somnin, 2011.
- 9 Bower 2009; Stephen 2011.
- 10 Miller 2012; Becher 2014; Dong and Hanz 2015; Christopher and Niedt 2016.
- 11 Harvey 2003; Somnin 2007; Stubbs 2011; Levien 2015; Christopher 2013.
- 12 Campbell and Lindberg 1990, p. 635.
- 13 Campbell and Lindberg 1990, p. 635.
- 14 Aramian 2010.
- 15 Campbell and Lindberg 1990.
- 16 Campbell and Lindberg 1990.
- 17 Campbell and Lindberg, 1990.
- 18 Miller 2012.
- 19 Mueli and Pancak 2013.
- 20 Campbell and Lindberg 1990.
- 21 Meidinger 1980, p. 3.
- 22 Davis and Ravenell 2006.
- 23 Aramian, 2010, p. 14.
- 24 Bower 2009, p. 58.
- 25 Bower 2009, p. 58.
- 26 Aramian 2010, p. 15.
- 27 Aramian 2010, p. 15.
- 28 Albonesi 2011.
- 29 Albonesi 2011.
- 30 Levien 2015. See also Miller 2012; Christopher 2013; Mueli and Pancak 2013, p715.
- 31 Christopher and Niedt 2016; Becher 2014; Hockett 2013.
- 32 Schaffer 2014; Anacker 2015; Dong and Hanz 2015.
- 33 Schaffer 2014; Anacker 2015; Dong and Hanz 2015.
- 34 Interview, 2/28/11; Levien, 2015.
- 35 Somnin 2007, p. 192.
- 36 Somnin 2011, p. 2.
- 37 Bower 2009, p. 2.
- 38 Albonesi 2011.
- 39 Albonesi 2011, p. 3.
- 40 Albonesi 2011, p. 3.
- 41 Phillip and Shillah 2009.
- 42 Phillip and Sillah 2009, p. 116.
- 43 Phillips and Sillah 2009, p. 116.
- 44 Oswald 2008.
- 45 Oswald 2008.
- 46 Aramian 2010, p. 43.
- 47 Chen and Yeh 2012, p. 5.
- 48 Wallice 2016.
- 49 Wallice 2016.

- 50 Wallice 2016.
- 51 May Jeong, Al-Jazeera AM, May 30, 2015.
- 52 Somnin 2007.
- 53 Sanyal 2007.
- 54 Somnin 2007.
- 55 Harvey 2003.
- 56 Levien 2015, p. 13.
- 57 Levien 2015.
- 58 See also Bardham 1984; Dwivedi 2006; Nilsen 2010.
- 59 Sanyal 2007.
- 60 Harvey 2003.
- 61 Chipkin 2016.
- 62 Sahoo 2016.
- 63 Nathan 2015, p. 3.
- 64 Amin 1976, pp. 327-8
- 65 Akpan 2009; Umejesi 2011.
- 66 Umejesi 2010.
- 67 Keenan 2008.
- 68 <http://www.actionaid.org/uganda>; <http://www.ulaug.org>
- 69 Lindskog 2015, p. 21.
- 70 Lindskog 2015, p. 21.
- 71 Tom 2016.
- 72 Nielson et al. 2013.
- 73 I-Net Bridge, 2012.
- 74 Tom 2016, p. 2.
- 75 Tom 2016, p. 3.
- 76 Mnwana 2014a.
- 77 Claassens 2001, p. 38.
- 78 Claassens 2001, p. 38.
- 79 Oomen 2005.
- 80 Marcus 1991, p. 82.
- 81 Actions Aid, 2008; Groenwald 2012; Mnwana 2015.
- 82 Mnwana 2015.
- 83 Action Aid 2008, p. 4.
- 84 Action Aid 2008.
- 85 Chen and Yeh 2012; Gothan and Greenberg 2014.
- 86 Action-Aid 2008, p. 14.
- 87 Action-Aid 2008, p. 15.
- 88 Sizwe 2016.
- 89 Hamann, in his article on corporate social responsibility in mining in South Africa, argued that the mining company (Impala) and the host (Luka) community were at loggerheads over the planned open cast mine which would be situated adjacent to Luka community. The Luka community strongly opposed the planned mine on the grounds that the community had

never benefitted from the company's age-long mining activities in their community, and that the community had not been adequately compensated for negative socio-ecological consequences of mining activities in their supposedly pristine community (Hamann 2004, p. 287).

90 Action-Aid 2008, p. 35.

91 Action-Aid 2008, p. 35.

92 Action-Aid 2008, p. 35.

93 Action-Aid 2008, p. 36.

94 Levien 2015; Christopher 2013; Becher 2014.

95 Action-Aid 2008, pp. 35-6.

96 Action-Aid 2008, p. 36.

97 Cousins 2000, p. 161.

98 Action-Aid 2008, p. 37.

99 Action-Aid 2008, p. 37.

100 Action-Aid 2008, p. 37.

101 Action-Aid 2008, p. 38.

102 Action-Aid 2008, p. 46.

103 Action-Aid 2008, p. 46.

104 Mnwana 2015.

105 Mnwana 2015, p. 504.

106 Mnwana 2015, p. 504.

107 Mnwana 2015, p. 504.

108 Mnwana 2015, pp. 504-505.

109 Mnwana 2015, p. 504.

110 Mnwana 2014, pp. 826-42.

111 Mnwana 2015, p. 505.

112 Mnwana 2014, p. 826-42.

113 Mnwana 2015, p. 505.

114 Groenewald 2012.

115 Groenewald 2012, p. 3.

116 Groenewald 2012, p. 3.

References

Actionaid. 2008. *Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa*. [https://www.actionaid.org.uk/sites/default/files/doc lib/angloplats_miningreport_aa.pdf](https://www.actionaid.org.uk/sites/default/files/doc_lib/angloplats_miningreport_aa.pdf). Retrieved on 10th October, 2011

Akpan, W. 2009. "When corporate citizens 'second-class' national citizens: the antinomies of corporate-mediated social provisioning in Nigeria's oil province." *Journal of Contemporary African Studies*, 27.1: 105-18.

- Albonesi, Stephen H. 2011. *Public Opinion of the Use of Eminent Domain for Phase Two of the Cayuga Waterfront Trail*. <https://ecommons.cornell.edu/handle/1813/23131?show=full>. Retrieved on 23rd March, 2015
- Anacker, Katrin B. 2015. "Analyzing Census Tract Foreclosure Risk Rates in Mature and Developing Suburbs in the United States." *Urban Geography* 36.8: 1221-40.
- Aramian, Gabriel. 2010. *Confiscation or Serving the Public Good?* Paper 431. Kennesaw State University.
- Bardhan, Pranab. 1984. *The Political Economy of Development in India*. Delhi: Oxford University Press.
- Amin, Samir. 1976. *Unequal development. An essay on the social formations of peripheral capitalism*. New York: Monthly Review.
- Arrighi, Giovanni et al. 2010. "Accumulation by dispossession and its limits: the Southern Africa paradigm revisited." *Studies in Comparative International Development* 45.4: 410-38.
- Becher, Debbie. 2014. *Private Property and Public Power: Eminent Domain in Philadelphia*. Oxford: Oxford University Press.
- Bower, Tracy. 2009. *Eminent Domain: The Unintended Consequences of Kelo*. University of Nevada Las Vegas Paper 139.
- Campbell, John and Leon Lindberg. 1990. "Property Rights and the Organization of Economic Activity by the State." *American Sociological Review* 1: 634-47.
- Cawood, Frederick Thomas. 2011. "Determining the Optimal Rent for South African Mineral Resources." Doctoral Dissertation, Faculty of Engineering, University of the Witwatersrand.
- Chatterjee, Partha. 2008. "Democracy and Economic Transformation in India." *Economic and Political Weekly* 43.16: 53-62.
- Chen, Daniel L. and Susan Yeh. 2014. *Growth Under the Shadow of Expropriation? The Economic Impacts of Eminent Domain*. Working Paper, George Mason University.
- Chipkin, Ivor. 2016. *State, Capture and Revolution*. Johannesburg: Public Affairs Research Institute.
- Christophers, Brett and Christopher Niedt. 2016. "Resisting Devaluation: Foreclosure, Eminent Domain Law, and the Geographical Political Economy of Risk." *Environment and Planning A* 48.3: 485-503.
- Christophers, Brett. 2013. "Banking and Competition in Exceptional Times." *Seattle University Law Review* 36: 563-76.
- Claassens, Aninka. 2001. *'It is not Easy to Challenge a Chief': Lessons from Rakgwadi*. Programme for Land and Agrarian Studies: University of the Western Cape.
- Cousins, Ben (ed). 2000. *At the crossroads: land and agrarian reform in South Africa into the 21st century*. Cape Town: Programme for Land and Agrarian Studies.

- Cronjé, Freek and Charity S. Chenga. 2009. "Sustainable Social Development in the South African Mining Sector." *Development Southern Africa* 26.3: 413-27.
- Dashwood, Hevina S. and Bill BuenarPuplampu. 2010. "Corporate social responsibility and Canadian mining companies in the developing world: The role of organizational leadership and learning." *Canadian Journal of Development Studies*, 30.1-2: 175-96.
- Dong, Hongwei and J. Andrew Hansz. 2016. "The Geography of the Recent Housing Crisis: The Role of Urban Form." *Housing Policy Debate* 26.1: 150-71.
- Dwivedi, Ranjit. 2006. *Conflict and Collective Action: The Sardar Sarovar Project in India*. London: Routledge.
- Gqada, Ichumile. 2011. "Setting the boundaries of a social license for mining in South Africa: The Xolobeni Mineral Sands Project." Occasional Paper No. 99. Governance of Africa's Resources Programme. Available at: https://swc.org.za/pdf/SAIIA_Occasional_Paper.pdf. Retrieved on the 18th April, 2016.
- Groenewald, Yolandi. 2012. Coal's Hidden Water Cost to South Africa. Available online: <http://www.greenpeace.org/africa/Global/africa/publications/coal/CoalsHiddenWaterCost.pdf>.
- Harvey, David. 2003. *The New Imperialism*. Oxford: Oxford University Press.
- _____. 2006. *Spaces of Global Capitalism: Towards a Theory of Uneven Geographical Development*. London, U.K: Verso.
- Hart, Keith and Vishnu Padayachee. 2013. "A history of South African capitalism in national and global perspective." *Transformation: Critical Perspectives on Southern Africa* 81.1: 55-85.
- Henrico, Jan Hendrik. 2013. "Royalties on Non-Renewable Resources in South Africa: An International Comparison." MComm thesis, University of Pretoria
- Hockett, Robert. 2013. "Accidental Suicide Pacts and Creditor Collective Action Problems: The Mortgage Mess, the Deadweight Loss, and How to Get the Value Back." *Cornell Law Review Online* 98: 55-77.
- I-Net Bridge (2012). "SA failing to capitalise on its minerals wealth." Available at: <https://www.timeslive.co.za/sunday-times/business/2012-02-06-sa-failing-to-capitalise-on-its-minerals-wealth/>
- Keenan, Jeremy. 2008. "Uranium goes critical in Niger: Tuareg rebellions threaten Sahelian conflagration." *Review of African Political Economy* 35.117: 449-66.
- Kelly, Daniel B. 2006. "The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence." *Cornell Law Review* 92: 1.
- Levien, Michael. 2017. "From Primitive Accumulation to Regimes of Dispossession: Theses on India's Land Question." In Anthony P. D'Costa and Achin Chakraborty (eds.), *The Land*

Question in India: State, Dispossession and Capitalist Transition. Oxford: Oxford University Press: 49-75.

Meidinger, Errol. 1980. "Public Uses of Eminent Domain: History and Policy." *Environmental Law* 11:1-66.

Miceli, Thomas J. and Katherine A. Pancak. 2013. *Using Eminent Domain to Write-Down Mortgages: An Economic Analysis*. University of Connecticut Department of Economics Working Paper Series.

Lindskog, Daniella. 2015. "The resource curse on a micro level: A case study of mining in Malawi." Available at: <https://lup.lub.lu.se/student-papers/search/publication/5435691>. Retrieved on the 10th April, 2017.

Marcus, Tessa. 1991. "Palace coup on land reform." *Indicator South Africa* 8.4: 49-54.

Miller, Brad. 2012. *No Wonder Eminent Domain Mortgage Seizures Scare*. Wall Street, American Banker, 11 July.

Mnwana, Sonwabile. 2015. "Mining and 'Community' Struggles on the Platinum Belt: A Case of Sefikile Village in the North West Province, South Africa." *Extractive Industries and Society* 2.3: 500-08.

_____. 2014a. "Chief's justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area." *South African Crime Quarterly* 49: 21-29.

_____. 2014b. "Mineral wealth – 'in the name of *morafe*'? Community control in South Africa's 'Platinum valley'" *Development Southern Africa*. 31.6: 826- 42.

Morris, N. and N. Baartjes. 2010. "The social impact of diamond mining: Is it time to revisit the scorecard?" *The Southern African Institute of Mining and Metallurgy. Diamonds—Source to Use*: 293-302.

Nathan, Andrew. 2015. "The politics of land ownership and livelihoods: An exploration of land dispossession in Ghana's mining communities." International Studies Association Global South Caucus Conference, Singapore Management University, Singapore, January 8-10.

Nielsen, Øystein et al. 2013. "Quantifying rural livelihood strategies in developing countries using an activity choice approach." *Agricultural Economics* 44.1: 57-71.

Nilsen, Alf Gunvald. 2010. *Dispossession and Resistance in India: The River and the Rage*. London: Routledge.

Oomen, Barbara. 2005. *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era*. Oxford: James Currey.

Oshokoya, Praise Oluwatomisin. "The New South African Mineral Royalty Formulae. Will all Miners become Refiners? Platinum Case Study." Doctoral Dissertation, Faculty of Engineering and the Built Environment, University of the Witwatersrand.

Oswald, Lynda J. 2008. "Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law." *Environmental Affairs* 35:45-76.

Perry, Nancy. 2016. "Eminent Domain Destroys a Community: Leveling East Arlington to make way for the Pentagon." *Urban Geography* 37.1: 141-61.

Phillips, Sandra and Marion R. Sillah. 2009. "A House is not a Home: Effect of Eminent Domain Abuse on the Poor, African Americans, and the Elderly." *Housing and Society* 36.1: 115-36.

Ravenell, William H. and Bobby Davis. 2006. "Government Acquisition of Private Property for Public Use: An Analysis of United States Supreme Court Decisions." *Negro Educational Review* 57.3/4: 203.

Rogerson, Christian M. 2011. "Mining Enterprise, Regulatory Frameworks and Local Economic Development in South Africa." *African Journal of Business Management* 5.35: 13373-82.

Sahoo, Braja Kishore. 2016. "Environmental justice movements and Gandhi's ecological vision: A study on human rights violation by developmental projects in Odisha." *Innovative Issues and Approaches in Social Sciences*, 9.1: 91-111.

Sanyal, Kalyan. 2007. *Rethinking Capitalist Development: Primitive Accumulation, Governmentality, and Post-Colonial Capitalism*. New Delhi: Routledge.

Schaffer, Marissa. 2014. "Stemming the Tide of Foreclosure: Evaluating the Use of Eminent Domain to Relieve Underwater Homeowners." *Columbia Business Law Review* 1: 215-66.

Sizwe, S.Y. 2016. "Anglo pays up millions." Available at: <https://citypress.news24.com/News/anglo-pays-up-millions-20160416>. Retrieved on the 30th May, 2017.

Somin, Ilya. 2007. "Is Post-Kelo Eminent Domain Reform Bad for the Poor?" *Northwestern University Law Review*: 1931.

Stoebuck, William B. 1972. "A General Theory of Eminent Domain." *Washington Law Review* 47: 553-608.

Stubbs, Matthew Thomas. 2011. "The Eminent Domain in Australia: The 'Individual Rights' Approach to Section 51 (xxxi) of the Australian Constitution." Doctoral Dissertation. Adelaide Law School, University of Adelaide.

Tom, Zonwabele Zweli. 2016. "Analysis of the key factors affecting beneficiation in South Africa." Doctoral dissertation, Faculty of Engineering and the Built Environment, University of the Witwatersrand.

Umejesi, Ikechukwu. 2010. "Land use, compensational justice and energy resource extraction in Nigeria: A socio-historical study of petroleum and coal mining communities." Doctoral thesis, University of Fort Hare.

Umejesi, Ikechukwu . 2011. "Coal sector revitalization, community memory, and the land question in Nigeria: A paradox of economic diversification?" *African Studies Quarterly* 12.3: 1-21.

_____. 2010. "Land use, compensational justice and energy resource extraction in Nigeria: A socio-historical study of petroleum and coal mining communities." Doctoral thesis, University of Fort Hare.

Van Wyk, David, F. Cronjé, and Johann Van Wyk. 2009. *Corporate Social Responsibility in the Diamond Mining Industry on the West Coast of South Africa*. Johannesburg: The Bench Marks Foundation.

Wallace, Anne G. 2016. *Natural Resource Ownership and Use Rights under Civil, Islamic, and Customary Legal Systems*. Virginia: William & Mary Law School.