

Compulsory acquisition of land and compensation

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Compulsory acquisition (or “expropriation”) is when a government uses its power to acquire private rights in land without the owner’s or occupant’s consent. The process is intended to benefit society and is frequently used to enhance social and economic development and to protect the natural environment. Nonetheless, a balance must be found between the public need for land on the one hand and the provision of land tenure security and the protection of private property rights on the other. This is because compulsory acquisition is inherently disruptive – whether compensation is generous or whether the procedures are fair and efficient, displacing people from their homes, businesses and communities always entails considerable human costs. Indeed, where the process is designed or implemented poorly, the economic, social and political costs can be enormous. A focus on the procedures of compulsory acquisition is vital if a government’s exercise of the process is to be efficient, fair and legitimate.

INTRODUCTION

Compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society. It is a power possessed in one form or another by governments of all modern countries. This power is often necessary for social and economic development and the protection of the natural environment. Land must be provided for investments such as roads, hospitals, schools, electricity and water facilities. A government cannot rely on land markets alone to ensure that land is acquired when and where it is needed.

Compulsory acquisition requires finding the balance between the public need for land on the one hand and the provision of land tenure security and the protection of private property rights on the other. In seeking this balance, countries should apply principles that ensure that the use of

this power is limited – that is, that it is used for the benefit of society for public use, public purpose or in the public interest. Legislation should define the basis of compensation for the land and guarantee the procedural rights of people who are affected, including the right of notice, the right to be heard and the right to appeal. It should provide for fair and transparent procedures and equivalent compensation.

Compulsory acquisition is inherently disruptive. Even where compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities entails significant human costs. Where the process is designed or implemented poorly, the economic, social and political costs may be enormous. Problems, such as reduced tenure security, reduced investments in the economy, weakened land markets, opportunities

created for corruption and the abuse of power, delayed projects, and inadequate compensation paid to owners and occupants, may arise where compulsory acquisition is not done well.

SOURCES AND LIMITS OF THE POWER, PURCHASE, RIGHTS AND PROCESS

The constitutions of many countries provide for both the protection of private property rights and the power of the government to acquire land without the willing consent of the owner. However, there is great variation. Some countries have broadly defined provisions for compulsory acquisition, while those of other countries are more specific. Most countries supplement the constitutional basis for compulsory acquisition with extensive laws and regulations. National or subnational laws usually describe in detail the purposes for which compulsory acquisition can be used, the agencies and officials with the power to acquire land compulsorily, the procedures to be followed, the methods for determining compensation, the rights of affected owners or occupants and how grievances are to be addressed. The laws governing compulsory acquisition are part property law and part administrative law (which dictates governance procedures). Principles of administrative justice and good governance often require that such powers be bound by legal rules that allow for hearings and appeals, and be subject to judicial review.

A balanced approach to compulsory acquisition requires a respect for the human rights of the owners and occupants of the land to be acquired. Various international laws reflect the concern for the protection of land rights and the payment of compensation when people are displaced. The acquisition of the land of indigenous communities is particularly sensitive. Protection of indigenous peoples' rights in relation to land is specifically expressed within a human rights framework.

Many constitutions and laws refer to compulsory acquisition being used for public purposes, for public uses and/or in the public interest. In practice, these

terms are often not clearly distinguished and they tend to be used interchangeably. A broad survey of both developed and developing countries reveals the following among the commonly accepted purposes for compulsory acquisition:

- transportation uses, including roads, canals, highways, railways, bridges, wharves and airports;
- public buildings, including schools, libraries, hospitals, factories, religious institutions and public housing;
- public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs;
- public parks, playgrounds, gardens, sports facilities and cemeteries;
- defence purposes.

An exercise in compulsory acquisition is more likely to be regarded as legitimate if land is taken for a purpose clearly identified in legislation. An exclusive list of purposes reduces ambiguity by providing a comprehensive, non-negotiable inventory beyond which the government may not compulsorily acquire land. However, exclusive lists may be too inflexible to provide for the full range of public needs – the government may one day need to acquire land for a public purpose that was not considered when the law was written. The rationale for compulsory acquisition may be straightforward where land is acquired by the government for use by a public entity – for example, for a public school, hospital, road or airport. More controversial are cases where private land is acquired by government and then transferred to private developers and large businesses on the justification that the change in ownership and use will benefit the public. In countries where policies of redistributive land reform have been adopted, these are usually considered as being in the public interest even where the reform transfers land from one private owner to another. Such land reforms are often part of government programmes to address social injustices and to promote agricultural and rural development. Each country has its own set

of agencies, ministries and officials that have the power to acquire land compulsorily. The national level of government is usually granted authority for compulsory acquisition by the constitution, and relevant laws often designate the head of government or a specific minister as the person empowered to authorize the functions associated with compulsory acquisition. Relevant laws and regulations should clearly identify the authorized government bodies in order to reduce opportunities for abuse of power.

The extent of loss of land rights by owners and occupants may vary considerably both in terms of the amount of land involved and the types of rights that are affected. This also has implications regarding the rights and remedies of people affected by that action. Compulsory acquisition is commonly associated with the transfer of ownership of a land parcel in its entirety. This may occur in large-scale projects (e.g. construction of dams or airports) and also in smaller projects (e.g. construction of hospitals or schools). However, compulsory acquisition may also be used to acquire part of a parcel – for example, for the construction of a road. The use of specific portions of a land parcel may also be acquired for easements or servitudes to provide for the passage of pipelines and cables. Rights acquired usually include the right to enter the parcel to make repairs; they may be granted temporarily or permanently, and they may be transferable to others.

People may be deprived of some enjoyment of their land even if it is not acquired. For example, the construction of a highway may cause the value of neighbouring parcels to decrease because of the increased noise, but a project may also increase the values of neighbouring parcels. Some equivalence may be provided through changed tax burdens – people whose land has declined in value may pay less property taxation while others may find their tax bill has increased to reflect the higher land values.

Compulsory acquisition is not limited to contexts in which the state seeks to acquire land that is privately owned. Full private ownership of land does not exist in some

countries, and the state can be the owner of all land. In other countries, the state retains ownership of substantial areas of land. A range of private occupancy, lease or use rights may be permitted over such state-owned land.

Compulsory acquisition is a power of government, but it is also the process by which that power is exercised. Attention to the procedures of compulsory acquisition is critical if a government's exercise of this power is to be efficient, fair and legitimate. Processes for the compulsory acquisition of land for project-based, planned development are usually different from processes for acquiring land during emergencies or for land reforms. In general, a well-designed compulsory acquisition process for a development project should include the following steps:

1. **Planning:** It is necessary to determine the different land options available for meeting the public need in a participatory fashion. The exact location and size of the land to be acquired is identified. Relevant data are collected. The impact of the project is assessed with the participation of the people affected.
2. **Publicity:** The notice describes the purpose and process, including important deadlines and the procedural rights of people, and is published to inform owners and occupants in the designated area that the government intends to acquire their land. People are requested to submit claims for compensation. Public meetings provide people with an opportunity to learn more about the project and to express their opinions.
3. **Valuation and submission of claims:** Equivalent compensation for the land to be acquired is determined at the stated date of valuation. Owners and occupants submit their claims. The land is valued by the acquiring agency or another government body. The acquiring agency considers the submitted claim and offers what it believes to be appropriate compensation. Negotiations may follow.

4. Payment of compensation: The government pays people for their land or resettles them on alternate land.
5. Possession: The government takes ownership and physical possession of the land for the intended purpose.
6. Appeals: Owners and occupants are given the chance to contest the compulsory acquisition, including the decision to acquire the land, the process by which the land was acquired, and the amount of compensation offered.
7. Restitution: Opportunity for restitution of land if the purpose for which the land was used is no longer relevant.

There is a danger that acquisition processes can last for many years, creating long-term insecurity and uncertainty for owners and occupants. Legislation should provide that the acquisition will be regarded as abandoned if the process is not completed within a specified period as a result of delays by the acquiring agency.

PLANNING AND PUBLICITY

The planning phase of a major public investment project should include the identification of any lands to be acquired for the project. Options should be analysed and presented to the public for their understanding and consultation in order to choose the site that presents the fewest obstacles and the best outcomes, having regard to all impacts, including those on any owners and occupants. An impact assessment is a common requirement of the planning phase. Such assessments should ensure that the acquiring agency considers the social, economic and environmental impacts before deciding whether and how to proceed with the project, and should determine ways to minimize any negative aspects. A variety of stakeholders should be involved in research and discussion about the project. The communities affected should be included in the planning process and provided with the support needed to enable them to participate effectively. Decisions, assessment of options and

appeals processes should be based on the collection and analysis of data. Comprehensive mapping of the project area should document land-use and cropping patterns, and the location of protected sites (including cemeteries and sacred areas). The communities should contribute to the mapping. The acquiring agency should establish a clear definition of which owners and occupants will be entitled to compensation in the context of the relevant legislation. An inventory of affected owners and occupants should be prepared. The total compensation costs should be estimated and the necessary budget secured by the acquiring agency.

The provision of notice of the intention to acquire land compulsorily protects the rights of the people affected. Notice should be given as early as possible to allow people to object to the acquisition of their land, to submit compensation claims or to appeal against the incorrect implementation of procedures. To ensure that all affected people are aware of the project, notice should be publicized as widely as possible. Printed information should be sent to affected households and displayed in public areas and prominently on the land to be acquired. The information should be comprehensible and information should be presented in local languages. Oral communication is important in areas with high rates of illiteracy. The information should explain the purpose of the acquisition, identify the land to be acquired and provide a clear description of the procedures. It should describe the rights of owners and occupants, including the rights of appeal, and should reassure people of their rights, including in respect of compensation. The information should include the various time limits.

Public meetings will provide an opportunity for people to learn more about the project, to receive answers to their questions about the process and its procedures and to voice their concerns. The meetings illustrate accountability and transparency when the government

has to justify its proposal to acquire land compulsorily. Open discussion at public meetings should help the government to improve its understanding of the needs and concerns of affected communities and to prepare responses that reduce the number of challenges to the compulsory acquisition. Once notice has been given and the public review process has been concluded, people should submit claims for compensation of losses resulting from the compulsory acquisition of their land.

VALUATION, COMPENSATION AND TAKING POSSESSION

Compensation (whether in financial form or as replacement land or structures) is at the heart of compulsory acquisition. As a direct result of government action, people lose their homes, their land and at times their means of livelihood. Compensation is to repay them for these losses, and it should be based on principles of equity and equivalence. Affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. However, financial compensation on the basis of equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition. In some countries, there is legal provision recognizing this in the form of additional compensation to reflect the compulsory nature of the acquisition. In practice, given that the aim of the acquisition is to support development, there are strong arguments for compensation to improve the position of those affected wherever possible. The calculation of compensation is based on the value of the land rights and improvements to the land, and on any related costs. The determination of equivalent compensation can be difficult, particularly where land markets are weak or do not exist, where land is held communally, or where people have only rights to use the land. Many factors can lead to inadequate compensation. Legislation should ensure fair processes for determining valuation and compensation.

During the valuation phase, the acquiring agency and the affected landowners gather information and evidence to support their arguments for the compensation values they believe to be equitable. Responsibility for the valuation of land varies. In some countries, the work is carried out by or for the acquiring agency; in others, the valuations are the responsibility of independent commissions. In some countries, the acquiring agency makes an offer; if this offer is not accepted by the owner or occupant, the acquiring agency makes an official determination of compensation that can be appealed only in court or to a quasi-judicial body such as a tribunal. In other countries, the acquiring agency is required to negotiate in good faith first. These negotiations can save time and money when they produce solutions that leave the owners and occupants satisfied enough with the outcome and thus unlikely to prolong the process by submitting appeals. A drawback of negotiation is that there can be an imbalance in negotiating power. The government should ensure that owners and occupants know about the negotiation procedures and what their rights are. It should cover the reasonable costs of specialists such as valuers and lawyers as a part of the compensation claim. Special assistance will be needed for most claimants, particularly for indigenous communities and other vulnerable groups.

It will be necessary to build the capacity for valuation in government and the private sector if existing valuers are unable to carry out the work demanded by the project within a reasonable time. Legislation should enable the clear definition of the date at which the land should be valued – as values can change rapidly as a result of awareness of the project. The most equitable approach is to have a valuation date that sets the value of the land as if the proposed project did not exist. Many constitutions state that compensation should be paid promptly. However, the period in which payment is to be made is often left undefined in relevant legislation. Legislation should require that possession take place only after a

substantial percentage of the compensation offer has been paid.

Most laws on compulsory acquisition broadly define equivalent compensation with reference to market value or “just compensation”. In general, compensation should be for: the loss of any land acquired; buildings and other improvements to the land acquired; the reduction in the value of any land retained as a result of the acquisition; and any disturbances or other losses to the livelihoods of the owners or occupants caused by the acquisition and dispossession. If market value is the basis of compensation, legislation should state clearly what is understood by market value. A common approach is to define market value by the amount that a willing buyer would pay a willing seller on the open market where some choice exists. The legislation should ensure that such an assessment does not include changes in the value of the property arising from the process of compulsory acquisition. Assessing the market value of a land parcel is not always simple, particularly where land markets are weak. Frequently, a variety of complex factors must be considered. The value of land is usually affected by regulations that classify land according to permissible uses, such as residential, agricultural, commercial or industrial. Many compensation laws allow for compensation on the basis of the most valuable use – as the person could have used the land in such a manner if compulsory acquisition had not occurred. It may not always be possible to determine compensation based on market value. Alternative approaches vary depending on the political economy of a country, the qualities of the land acquired and the nature of the land rights.

Agricultural land is valued in specific ways in some countries. Improvements to the land can be valued in various ways according to their nature. Houses and other buildings may be valued by applying market values or by their replacement costs. Trees and perennial crops may be valued by calculating the annual produce value for

one season and then providing the owner with a multiple of that annual value.

The value for compensation should include more than the value of the land and improvements. The disturbance accompanying compulsory acquisition often means that people lose access to the sources of their livelihoods (a farmer losing agricultural fields, a business owner losing a shop, or a community losing its traditional lands). Compensation may be awarded for the disturbance or disruption to a person’s life under certain conditions. A pragmatic way of determining when compensation is equivalent and appropriate is to consider all the general categories of expenses caused by the compulsory acquisition and to legislate that payments should cover those categories of expenses. Legislation should allow for flexibility in covering unforeseen expenses in situations where denying compensation would create injustices.

Valuation and compensation for the partial acquisition of land should follow the principles used where an entire parcel of land is acquired. However, additional factors may arise. For example, if a new road cuts a remote portion of agricultural land from the majority of the farm, the isolated portion may have little value to the owner, yet its market value may increase if it becomes more accessible to someone on the opposite side of the road. Alternatively, the value of the remaining land might increase as a result of the project. Equivalence could then be accomplished by balancing the compensation of the land acquired with the projected increase in value to the remaining land. The use of land for easements or servitudes is also subject to compensation in most countries where providers of public services have to place electric power transmission lines and pipelines on private land. In such instances, compensation is usually paid annually and is based on the market value of the area of land used. People whose land is partially acquired usually do not have to relocate, but they may experience problems when the project is implemented. Legislation should ensure that the acquiring agency

is responsible for compensating affected owners and occupants for damages caused during construction regardless of whether or not their land was acquired.

Whether or not land is leased from the state or from private owners, lessees should be entitled to compensation for the loss of their land rights on the basis of the principle of equivalence. The terms and conditions of the leases may identify the basis for compensation in the event of the termination of the lease prior to its expiry. The compensation entitlement should put the claimants in the same position as they were prior to the acquisition. One approach is to base compensation on the replacement cost of finding equivalent land to lease. Alternatively, the compensation can be based on the value of the lease rights. Legislation may also need to provide for the basis on which compensation is allocated between a landowner and a lessee or sharecropper.

Valuation and compensation of sacred areas and religious sites are difficult. In the case of a temple, church, mosque or other building that houses the meetings of a religious group, it may be possible for the acquiring agency either to provide the group with an equivalent building on another site or to pay compensation that covers the cost of constructing an equivalent place of worship at a new site, the cost of the new site, and costs associated with any disturbance. Financial compensation is often inappropriate where the religious site is a burial ground or sacred forest – some sacred areas simply cannot be replaced.

Where a number of members of a family, including women and children, own land jointly, it may be unclear who should receive compensation. Some family members may live together on the land and jointly cultivate it while other co-owners may have migrated elsewhere to seek work. Conflicts may arise when the land is compulsorily acquired – siblings may contest inheritance claims, or there may be intergenerational disputes. Women and children may have a significant stake in the family home or agricultural land but hold few rights to control what happens to

it. Local laws, or cultural or religious rules, may prevent women and other vulnerable groups from having a legal claim to the land on which they live and work. The male head of the family may be automatically considered the landowner and receive the compensation. This decision may lead to injustice and the eventual impoverishment of the entire family if the funds are mismanaged. To remedy these situations, legislation should require the acquiring agency to investigate which family members hold de facto interests in the land and will suffer personal losses from its compulsory acquisition. The legislation could create mechanisms through which compensation is paid to members of an affected family in a manner that ensures joint decision-making about the use of such funds.

In many countries, land is held under customary tenure, with traditional leaders being responsible for the administration of land according to customary practices. Typically, some lands are assigned for the exclusive use of individuals or families (e.g. for residences) while the use of others (e.g. pastures) may be shared by all members of the community. Distinctions have often been made between “customary” and “statutory” tenure (i.e. defined in written laws). However, there is now increasing recognition of customary rights within formal law – this is leading to a blurring of the distinction between customary and statutory tenure. Customary land used by people considered to be indigenous may have special protections. The land may be regarded to be inalienable except under specific circumstances. The use of leases rather than outright sales may be a more appropriate solution for such lands. Decisions regarding the valuation of customary land may be based on a combination of statutory and customary law. Customary laws may dictate different methods of valuation according to local custom. In such instances, there may be a need for the clarification of tenure prior to determining the compensation claim.

The payment of financial compensation may present challenges. The compensation

for the loss of shared resources may be complicated by arguments as to who is eligible to share in the award. Leaders may divide the compensation according to customs that discriminate against women and other vulnerable groups. There may be occasions when financial compensation is inadequate. In cases where a community is to be displaced, the allocation of land for resettlement or leasing arrangements may remove the problems associated with financial compensation. However, the provision of alternative land as compensation can bring its own problems. In cases where only a portion of a community's land is to be acquired, negotiations may reveal that compensation could also take the form of the provision of facilities such as schools, clinics, public toilets, wells, markets or storage areas. Legislation should anticipate such instances for the valuation and compensation of customary land by including mechanisms that resolve them fairly and effectively.

The payment of compensation for rights that are not legally recognized may be a difficult policy question given the variety of cases that exist. In many such cases, people may be regarded as deserving compensation and an alternative place to settle if the land they occupy is to be used for a public investment project. For example, residents of an informal settlement who have only informal rights to their land and homes may be considered to be entitled to assistance, particularly if they are poor and have no alternative possibility for accommodation. It may be difficult to distinguish between cases to determine whether or not a particular illegal or informal occupant is deserving of compensation, but clear guidelines should be developed.

The construction of homes and other structures in informal settlements is usually illegal. However, such illegality alone should not prevent the payment of compensation for the value of buildings.

The decision as to whether compensation should be through resettlement or money may be difficult and complex. Care must be taken to ensure that a proposed

solution is not an attempt to avoid paying equivalent compensation. Providing suitable alternative land may be difficult in the light of current population pressures on the land. However, many owners and occupants may prefer to receive land as compensation rather than money. Providing suitable land can help to reduce objections to the process and reduce the overall costs of compensation. Resettlement of vulnerable people on alternative land is required where the loss of their land means a loss of their livelihoods, and they are unable to use financial compensation to purchase similar land elsewhere or to find new ways to earn a living. Resettlement may be the only way for them to maintain their livelihoods. Where resettlement involves an entire community, social cohesion and networks can be maintained. Resettlement may also be required for people in informal settlements and others who have weak or absent legal rights to land that is compulsorily acquired. Financial compensation may be insufficient to enable them to purchase alternative land through the market. Resettlement may also be appropriate where the land to be acquired is used for a non-commercial use, such as a religious institution. Those who are to be displaced may be more interested in being able to continue their work with minimum interruption than in money. Moreover, the offer of alternative land as compensation may prevent problems that can arise when financial compensation is paid to people who are unused to handling large amounts of money. Without adequate training on how to manage a large lump-sum payment, people may spend the money quickly and unwisely. The end result may be people with no land to farm, no income stream to support themselves and no job skills with which to compete in a non-agricultural economy.

A project can face serious financial consequences if the acquiring agency cannot take possession of the land at the necessary time. As a result, it is common for legislation to contain provisions to allow for the possession of the land even without the cooperation of affected owners and

occupants. The acquiring agency should be able to enter the land on a specific date, as required by the project's schedule. However, people may face hardship and loss if they are not given enough time to vacate the land peacefully and carefully. Legislation should allow owners and occupants a reasonable time to vacate their land.

APPEALS

Legislation should provide opportunities for owners and occupants to appeal against the compulsory acquisition of their land. Procedures to appeal protect the rights of affected people. At the same time, governments have an interest in providing effective procedures – a belief that the appeals process is legitimate will encourage people not to resort to other forms of protest that could lead to violence and even loss of life. Unless care is taken, many obstacles can prevent people from appealing against the actions of government. The appeals process may be expensive, time-consuming, in a language that claimants cannot speak or technically inaccessible and overwhelming. A high level of technical expertise may be needed to counter the claims of the acquiring agency, and people may not have the technical knowledge to argue their cases effectively. Good practice is for an appeal to be allowed only where an agreement cannot be reached in any other manner, for example, only once negotiations have failed. Because the government has much greater access to resources and information, it typically has the burden of proof during an appeal, and it pays the associated costs. This is particularly important where there is an appeal against the purpose of the acquisition, abuses of power, or procedural injustice. If reasonable costs are not covered by the government, fear of having to pay all costs associated with an appeal may deter people from asserting their rights of appeal.

There are generally three types of appeals: (i) against the purpose of the project and the designation of land to be taken; (ii) against the procedures used to implement compulsory acquisition; and (iii) against the

compensation value. Owners and occupants should have the right to appeal to a body that is independent of the acquiring agency. The review of appeals should be fair, inexpensive, easily accessible and prompt. The two main types of review procedures are juridical and administrative procedures, and many countries have a combination of both. In some countries, appeals against the compensation offered are reviewed by a court that deals with civil matters. In others, a specialized commission reviews appeals. Regardless of the approach followed, the body of casework built up over time provides a valuable resource to facilitate future negotiations and to guide decisions in subsequent appeals.

ADVOCACY AND ASSISTANCE

All affected owners and occupants may be at a disadvantage when their land is being acquired compulsorily, but the burden is particularly hard on the poor. They may not know their rights or how to safeguard them during negotiations with experienced officials who are supported by all the powers and resources of government. Moreover, it is often the land of the poorest and most vulnerable that is compulsorily acquired for projects. The value of their land is usually low compared with land owned by others, making it less costly to acquire and thereby reducing the total costs of the project. It is also easier to locate an unpopular public works project in a poor area because of residents' lack of political influence and other resources to block the choice of location successfully. Moreover, local governments may have an interest in redeveloping the poorest areas in order to increase the tax base. Such redevelopment usually requires the removal of residents.

Legislation can help to address the imbalance of power by providing for mechanisms to assist people to become better advocates for themselves. Laws could require that the acquiring agency provide affected people with access to lawyers, valuers and other relevant professionals to help them understand the process and prepare their responses. Alternatively,

people may be allowed to hire their own valuers and lawyers, with the cost of their fees being added to their overall compensation award. Non-governmental organizations can play an advocacy role throughout the process. They can educate people about their rights, advocate on their

behalf and teach them negotiation skills to argue for equitable compensation.

REFERENCE

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