



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
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## **‘Compulsory Acquisition Powers: Essential for emerging economies’**

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## Abstract

Many emerging economies have had a history of state confiscation and control of private property. This experience has framed the views of some new governments in these countries making them reluctant to employ compulsory acquisition in the public interest.

Relying on a number of case studies, this paper argues that failure to implement compulsory acquisition powers will delay the provision of essential services to millions of people and fail to meet the objectives of the New Urban Agenda. It also argues for compensation which reflects existing market values rather than some form of state attributed value as a way of ensuring equitable treatment. Finally it argues for appropriate skills and behaviours among professionals handling such acquisition to provide re-assurance to those whose land is being acquired.

**Key Words:** Compensation, Compulsory acquisition, Land management, Public interest, Planning



1. Introduction
2. Case Studies – developed and emerging economies
3. Challenges for compulsory acquisition in emerging economies
4. Is there a ‘fit for purpose’ approach?
5. FAO Compensation principles
6. Implementation of compulsory acquisition in a ‘fit for purpose’ Environment
7. Essential professional behaviours
8. Conclusion

## 1.0 Introduction

This paper argues for the introduction and effective application of compulsory land acquisition powers in countries which do not already have such measures in place as an essential way of delivering critical infrastructure and sustainable urban development in accordance with the New Urban Agenda (NUA). The term ‘compulsory acquisition’ is used throughout this paper to include the various terminology applied internationally including ‘eminent domain’, ‘expropriation’, ‘compulsory purchase’, ‘land acquisition’, and ‘takings’ among others.

Many emerging economies have had a history of state confiscation of private property together with state ownership and management of this land. Others have experienced authoritarian regimes where democratic legitimacy was lacking, putting the ‘public interest’ justification which underpins compulsory acquisition, in question. This experience has framed the views of some post-authoritarian era governments. Having moved from command economies to market economies where the right to private property has been enshrined as a key signifier of newly won freedoms there may be a reluctance to transfer back to the state the power to compulsorily acquire private property in the public interest.

This reluctance is misplaced as evidenced by countries which historically have had strong rights to private property guaranteed in their constitutions written or unwritten. The United Kingdom without a written constitution is a country where private property rights have been vigorously defended. Besides, in the nineteenth century the right to vote came through the ownership of land and many of the large land owners also sat in the houses of parliament where they could assert the rights of landowners. Nevertheless as the industrial revolution began to build up momentum there was clearly a need to reconcile the management of land in the public interest with the right to private property ownership. Despite initial resistance, compulsory acquisition powers were introduced in the UK and these have evolved ever since as part of the land governance regime. Likewise the USA through its written constitution strongly defends the right to private property, but the powers of ‘eminent domain’ as it is referred to in the USA were essential to enable the benefits of the industrial revolution to be spread across a vast territory through expansion of the railways in the first instance and subsequently to enable the regeneration of declining urban areas. Compulsory acquisition measures were beneficial not just to enable industrial expansion and servicing urban



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ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



areas. They were also essential for advancing land reform in rural areas in some countries. Former agricultural countries like the Republic of Ireland whose independence movement was partly based on the desire to redistribute land for small scale private ownership, soon after attaining independence endorsed the power of the state to compulsorily acquire private land in the public interest in its statutes. Similarly Mexico's compulsory acquisition powers were initially focused on rural land reform.

## Essential powers

The reluctance to introduce or effectively implement compulsory acquisition powers in some emerging economies acts against the public interest in key infrastructure provision particularly in relation to networked services. Myanmar for example does not have the benefit of compulsory purchase powers. Yangon its largest city has grown randomly, lacking adequate servicing. Without effective compulsory acquisition powers the challenge of providing networked services in new areas and retrofitting networked services in existing settlements would seem to be insuperable. Additionally the inability to rationalise land holdings in city and town centres will defer significantly the delivery of building and property infrastructure essential to modern, functioning and sustainable city centres and suburban areas.

Failure to adopt and/or effectively implement appropriate compulsory acquisition powers will render virtually impossible the implementation of the recently adopted HABITAT III, New Urban Agenda to provide urban services to enable the formation of sustainable communities as described particularly in paragraphs 52 (well-connected infrastructure ), 98 (planned urban extensions), 119 (water, sanitation, hygiene, sewage, urban drainage) 120 (universal and equitable access to safe and affordable drinking water) and 121 (universal access to affordable energy services) of the NUA (UNHabitat 2016).

## Compulsory Acquisition Regimes

The area of compulsory acquisition is necessarily a contentious one. At its extreme in emerging economies it pits a powerful state against a weak private citizen whose property may be the sole source of family shelter and security. The requirements for proceeding with such a measure need to be high.

Essentially the compulsory acquisition process reduces to two key areas: the public interest justification for the acquisition in the first place and subsequently the assessment of compensation. The public interest justification which is the constitutional root for such measures is increasingly challenging where the role of the state has grown to compulsorily acquiring private land which is then transferred to another private operator. It places considerable reliance on participatory democratic frameworks of governance to legitimise its actions. Typically this is occurring in the public utility sector where utilities which were previously in public ownership have now been transferred to private companies. The delivery of public infrastructure through public private partnerships (PPPs) further blurs the distinction between public and private interests. The employment of government powers in support of a company whose objective is to increase shareholder value may appear to move a considerable distance away from the original public interest intentions of the legislative powers.



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



Combined with the land owners' fundamental concerns about being dispossessed and displaced there is the question of appropriate compensation. This is usually monetary compensation and the determination of the appropriate level of compensation can be highly contentious. Efficiency and transparency in land markets are important elements of the supporting institutional frameworks although it is recognised that in emerging economies these are likely to be weak or even non-existent.

Where land markets have not developed and where property values may be based on some form of government attributed figure, what constitutes adequate compensation becomes a critical issue. Low levels of confidence in how government implements its land administration more generally will weaken support for specific compulsory acquisition powers.

As the role of the state has expanded in compulsorily acquiring land for private entities, so the scope of compensation has also been evolving recognising that monetary compensation alone may not be sufficient to bring about restitution.

In developed economies where compulsory acquisition has long been a tool of government, many compulsory purchase codes have evolved into complex and difficult measures to implement. In some cases this is resulting in a lack of transparency in the process, in others it has resulted in these mechanisms falling into disuse. It is therefore not sufficient in itself to have compulsory purchase powers in statutes; they must be operable within the skills and resources available to the state, municipality or other public body acquiring the land.

Having appropriately skilled personnel administering the compulsory acquisition system is a significant confidence builder where such an important right is being appropriated. A crucial area for capacity building in the area of compulsory acquisition is the training of suitably skilled professionals. These professionals work as advisers to the acquiring authority. Similarly skilled advisers act independently on behalf of the person whose land is being acquired (claimant). In carrying out this work there is a requirement for a high level of technical knowledge together with high levels of integrity and ethical behaviours. These are essential to bringing increased objectivity to the process further underpinning confidence in the process.

This paper argues for compensation which reflects existing market values rather than some form of state attributed value as a way of ensuring equitable treatment. It also recognises that monetary compensation alone may not be adequate to provide an equitable settlement. Recognising that many emerging economies will not have the institutional frameworks necessary to support a fully developed land governance system raises the question as to whether a 'fit-for-purpose' approach might apply in a compulsory acquisition context. Finally it argues for appropriate skills and behaviours among professionals handling such acquisition to provide re-assurance to the acquiring authority and to those whose land is being acquired.

## **2.0 Case studies – developed and emerging economies**

In addressing appropriate measures for emerging economies it is worth considering briefly the state of compulsory acquisition measures in economies where there is extensive experience over many



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



years looking at how they have evolved and where the balance has been struck in defining public interests and private rights.

- The expansion of the 'public' interest definition in developed economies
- The application of compulsory acquisition in emerging economies

### **Increasing complexity – developed economies**

Scotland has had compulsory acquisition powers since the mid nineteenth century. This regime has evolved over more than 150 years to become a complex web of legislative measures which now constitute what is described as the 'compulsory acquisition code'. But there is growing dissatisfaction with the way in which it has evolved. The Scottish Law Commission has been reviewing its suitability and in a discussion paper expressed the view that the legislative framework was an obstacle rather than an enabler of good practice:

'The present system of compulsory purchase can be and is being made to work. The statutory structure, combined with the subordinate legislation made under it, the decisions of the courts and the guidance issued by the Scottish Government, have produced an operable method of compulsorily acquiring land in the public interest. The operation of the system is, however, hindered rather than assisted by the legislative framework. The age and complexity of the primary legislation may well discourage its use by those who would .....' (Law Commission Scotland 2014)

In its response to this discussion paper the Law Society of Scotland welcomed the proposal to repeal and replace the compulsory purchase legislation and compensation code with a new statute ... to provide ... a more efficient and fairer system of compulsory purchase and compensation which benefits the economy and social justice' (Law Society Scotland 2015).

### **Capacity building – serving the acquiring authority and the claimant**

In addition to the 'business as usual' type uses of compulsory acquisition powers a number of major infrastructural projects are being undertaken in England where the UK government recognises the need to have an effective acquisition process and compensation code in place to deal with these. It regards access to proper professional representation for the claimant as being just as important as ensuring that the acquiring authority is being properly advised.

Government preoccupations are increasingly going beyond the acquisition of property directly affected by the scheme. It is looking to see how some of the cost of funding projects which lead to an increased property values in the general area can be clawed back in some way. It is also anxious to recover some of the betterment which arises from publicly funded infrastructure by capturing some of the uplift in land value generated by this infrastructure as a way of funding the infrastructure.

Two of these large scale projects, High Speed 2 Rail Line linking London and Birmingham; and Heathrow Airport Expansion to service London will require the acquisition of in the order of £5 billion worth of land and property in each case. Building professional/administrative capacity to undertake this acquisition is an important requirement to ensure projects are built on time, within



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



budget and that individuals whose property has been compulsorily acquired are restored to an equivalent position to that before the acquisition. Many emerging economies are undertaking similar kinds of major infrastructural projects in their countries. RICS as the primary professional body whose members have this expertise in the UK is now building this professional capacity among members to service these types of projects there.

### **What is the public interest? The narrow and the broad views.**

The fundamental justification underlying the compulsory acquisition of private property is that it is being carried out in the public interest. The concept of the public interest has constantly been evolving and numerous legal challenges in the US and the UK have led to a very broad definition of the public interest based on national economic rationale. In the context of emerging economies that might seem to open the door to an almost universal right of the state to acquire private property in the pursuit of economic improvement either directly carried out by the state or enable by the state on behalf of the private sector. These issues were fully aired in a landmark US Supreme Court case referred to as the Kelo case where the latter concern was taken up by one of the dissenting Supreme Court justices (Lanza 2013).

The conception of public use is generally divided into two categories: the “narrow” view and the “broad” view. Under the narrow view, the term “public use” means “use by the public.” Under this approach, property is taken for “public use” only if the public has the right to use the property, or the property is owned by the government, after it is taken. Under the broad view, property is taken for “public use” if the taking results in some public advantage or benefit. Under this view, anything that enhances public welfare constitutes a “public use.” The broad view is almost universally accepted and throughout most of American history has been the dominant view.

Advocates of the use of compulsory acquisition for economic development projects contend that the indirect benefits accruing to the public from these projects—job creation, an increased tax base and economic revitalization—constitute public uses because they produce a public benefit. Opponents contend that such projects primarily benefit the developers, provide uncertain public benefits, and, if considered public uses, could lead to unfettered use of the eminent domain power (Cohen 2006)

When job creation, increased tax base and economic development can justify compulsory acquisition then as a private property owner in an emerging economy the threat of compulsory acquisition would be almost impossible to defend.

The US Supreme Court in the ‘Kelo’ Case in 2005 held that it was legitimate for the city to take land from one private owner and transfer it to another private entity in the interest of the economic revival of the area.

Yet the policy implications of the Kelo decision and the precedents underlying it raise significant issues. As Justice O’Connor noted in her dissent in Kelo, the majority’s holding that the construction of economic development projects may constitute a public use means that “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public in the process.” She declared that for the majority to hold that “incidental public



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



benefits resulting from the subsequent ordinary use of private property render economic development takings ‘for public use’ is to wash out any distinction between private and public use of property.” The result, she contended, was “effectively to delete the words ‘for public use’ from the Takings Clause.” (Cohen 2006)

With the wholesale disposal/conversion of public utilities into private entities and the growing creation of public/private partnerships there is an increasingly blurred understanding of what constitutes the public interest. Additionally where the public interest motive is being challenged so too is the compensation adequacy. To some this may appear to be privileging one private interest over another regardless of how the public interest is defined. A compensation code that allows the claimant to participate in future benefits may be the logical evolution of this side of the compulsory acquisition code.

Similar issues to those in the US have arisen in the UK where one London Borough Council compulsorily acquired privately owned property in order to assemble a new site to be transferred to Arsenal football club to enable them to build a new stadium and remain within the borough. Compulsory purchase powers were also used in the public interest in a neighbouring London borough to facilitate the expansion of Tottenham Hotspurs existing football stadium. Both of these were challenged and the settlements led to the provision of alternative accommodation for those displaced together with financial compensation. Increasingly there is tension about the use of compulsory acquisition powers in this way. As stated by Denyer-Green ‘There is resistance to the use of these powers where a private undertaking is able to make a profit from the taking of land at a price that disregards the value of the land to the project’. (Denyer-Green 2014)

Clearly in countries where the right to private property is a recently attained right, the expansion in the scope of ‘public interest’ justification as seen in developed countries introduces greater insecurity for land owners. On the other hand from the perspective of emerging economies the broad scope of the definition must create legitimate opportunity for advancing the economic development of their cities in the public interest. Nevertheless there will be reasonable concern about the potential misuse of such powers particularly against groups who are dis-empowered or who have weak or unverifiable property rights and where the economic justification is used to override the human shelter justification. These concerns are not peculiar to emerging economies but are also shared by a number of US states who following the Kelo decision banned compulsory acquisition on such broad economic grounds.

### **Emerging economies - practical working through of assessment of compensation**

The social functions of property may be well recognised in national constitutions. We have seen the expansive definition of the ‘public interest’ justification for the scheme above. But what about the assessment of compensation? How is does this work out in practice particularly in countries which are emerging from a long period of authoritarian rule. Although the legal administrative measures may be in place the practice of implementation may result in quite diverse and unsatisfactory outcomes depending on the legal administrative culture.

This section looks at three South American case studies conducted by Antonio Azuela (Azuela 2008) which reflect conditions in Sao Paolo, Bogota and Mexico City as these cities were emerging from



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



authoritarian government. These three cities had operated under national dictatorships for many years and their experience in this post-authoritarian environment offers an insight into the challenges of implementation for economies emerging from similar circumstances.

**Sao Paulo** – In the Brazilian constitution (1988) compulsory acquisition powers were seen as part of the restructuring of government with the intention to devolve power locally in support of local democracy. The social obligations inherent in property rights were strongly expressed in the constitution which sought to reinforce security of tenure for dwellers in low income settlements such as favelas. Urban planning was envisaged as a proactive measure to achieve the intentions of the plan in the public interest and compulsory acquisition powers were just one of the tools to achieve this.

In reality there was a big gap between the aspirations of the constitution and the reality of the implementation of compulsory acquisition measures in Sao Paulo. The use of compulsory acquisition powers and the assessment of related compensation coincided with a period of high inflation and high interest rates in the national economy. The way the detailed regulations were framed and implemented with consequential high levels of compensation resulted in Sao Paulo owing vast sums to claimants which the city was unable to pay.

Some explained the outcome as mainly a financial crisis due to inflationary conditions. Others saw it simply as corruption. In between were views on the incompetence of judges adjudicating on final compensation settlements (particularly their inability to penetrate the ‘black box’ of valuations) as well as professional weakness of legal teams at public agencies (Haddad 2000). It was also suggested that judges in a post-authoritarian context took every opportunity to present themselves as defenders of citizens against the government - a kind of judicial activism. The ensuing scandal created a crisis for compulsory acquisition as an institution.

Responses included a reduction in the interest payable for unpaid compensations. Methodologies for carrying out valuation inevitably came under scrutiny. It was also concluded that there was a need for capacity building and a better engagement between the judges and administrators in the assessment of compensation.

## **Bogota**

The exercise of compulsory acquisition powers in Bogota have also been criticised for the awarding of compensation by judges which many regarded as too high.

Prior to the late 1980s municipal authorities were not elected but appointed by central government. Increased democratisation of local authorities provided greater legitimacy to the projects being proposed for which the acquisition was required.

The 1991 Constitution refers to the issue of compensation. Rather than opt for the solution of market value it requires administrators and judges fixing the compensation to take into account the ‘interests of the community as well as those of the affected party’.

It was also noted in Bogota that a very high proportion of acquisition ends with voluntary agreements (something which is not unusual in developed countries also). Experts observing this



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



drew diametrically opposing conclusions. Some suggested this indicates that valuation practices within local government were arriving at land prices which were too high. Others interpreted it as meaning the opposite; that people who do not know their rights tend to accept whatever the government offers and miss the opportunity to obtain higher compensation by going to court. In particular they were referring to homeowners living in low income areas.

Overall it was concluded that Bogota had a functioning compulsory acquisition system which had been enabled by:

1. A legal framework where there was alignment between the constitution, urban law and the prevailing culture in the country's high courts.
2. Healthy finances that allowed the local government to afford the acquisition of land
3. Wide public support for the public works for which the land was being taken.

Nevertheless it was clear that the approaches to assessing compensation are increasingly subject to public scrutiny and dissatisfaction and need to be backed up with the professional application of rigorous methodologies.

### **Mexico City**

The Mexican Constitution 1917 is regarded as placing the interest of individual property owners below the general interest of society. This view was elaborated in a period of agrarian reform where breaking up large estates and redistributing agricultural land to small-holders was the policy intention. Many of these estates were foreign owned particularly by US companies. When it came to cities difficulties arose in adapting the 'social function of property' doctrine to the urban agenda, particularly in the context of a post-authoritarian political order and the urbanisation of the Mexican population. A number of pieces of legislation were introduced to remedy this. The Human Settlement Act 1976 reflected that fact that agrarian reform had ended and Mexico had become a predominantly urban society. A second legislative initiative arose through the North American Free Trade Agreement 1993 which asserted the rights of private ownership. This demonstrated the reach of such international treaties into the reform of what appear to be domestic affairs. This made clear that compensations should amount to market values in line with international trends.

Compulsory acquisition in Mexico had been made difficult by social resistance from agrarian communities. The federal government had a history of acquiring rural lands for infrastructure and urban development paying low or even no compensation to peasant farmers. This opposition from rural communities was so strong that the proposed development of Mexico City airport on a new site was withdrawn by government in 2002. What has been described as judicial activism became a significant element of the acquisition process where judges began granting exorbitant compensations particularly when it came to regularizing informal settlements.

It was suggested that new concepts and mechanisms were required to balance private and public interests in compulsory acquisition in the urban context. The problem was not a lack of legislation but the distinct differences in the way it was implemented in rural areas by comparison with urban areas.



### **India - between public interest with equitable compensation.**

The current evolution of Indian compulsory acquisition powers demonstrates the difficulties in striking the balance between CPO as an enabler of public interest economic development and the payment of fair compensation.

Up to recently India has had an archaic compulsory acquisition law – the Land Acquisition Act 1894 – a relic of the British colonial period. With the rapid development of the Indian economy as well as population growth meant new measures for compulsory land acquisition were necessary. The 1894 Act was replaced in 2013 by The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Shortly after its passing, the 2013 Act was criticised as being anti-industry making the acquisition process lengthy and difficult reducing the availability of land for industry. This was subsequently amended by The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment Bill) 2015.

The 1894 Act had a number of shortcomings. First it was undemocratic in its implementation with provisions for inquiries regarded as formalities and the frequent employment of the ‘urgency’ argument allowed for the bypassing of normal procedures. Secondly compensation payable was based on a government set rate for land which was grossly out of date and was not remotely indicative of actual rates in the area. Compensation was therefore well below the actual market value of the land.

Thirdly, there was no provision for resettlement and rehabilitation of those displaced by the acquisition. Finally a lot of acquisitions in recent years, were challenged in the courts on the grounds that the compensation awarded was inadequate. This resulted in the stalling of legitimate infrastructure projects.

The new Land Acquisition Act 2013, provided for what was regarded as just and fair compensation to those whose land is taken away for constructing roads, buildings or factories. The Act, intended to bring transparency to the process of acquisition of land, provided for generous compensation and rehabilitation of those affected by the acquisition.

The 2013 Act stipulated mandatory consent of at least 70% of affected people for acquiring land for Public Private Partnership (PPP) projects and 80% for acquiring land for private companies. State governments will have to set up a number of independent bodies including the state-level Land Acquisition Rehabilitation and Resettlement Authority, to hear disputes arising out of projects where land acquisition has been initiated by the state or its agencies. The state governments were also required to take immediate steps to create and establish a State Social Impact Assessment Unit, the office of the Commissioner Rehabilitation and Resettlement and the State Level Monitoring Committee.

The 2013 Act met strong opposition from industry after it was passed. It was agreed that the new law would increase land acquisition costs by up to 3.5 times, severely affecting industrial projects and eroding competitiveness in the Indian manufacturing sector.

The amendments in the 2015 Bill set out to remove certain of the protective measures in the 2013 Act. It does away with a social impact assessment and the consent requirements in cases where land



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



is being acquired for specified sectors including, national security, rural infrastructure, industrial corridors, affordable housing and housing for the poor, infrastructure and social infrastructure projects including PPP projects where ownership of the land remains vested in the government. Following debate a number of the dilutions contained in the 2015 Bill were amended to retain the intentions of the 2013 Act. For example, compulsory employment was required to be given to at least one member of the affected family of a farm labourer. (PM India 2015)

### 3.0 Challenges for compulsory acquisition in emerging economies

The foregoing case studies demonstrate the tension between the need to protect private rights to property and the need to override these rights in the public interest. They have also shown the expansion of the concept of the public good to embrace enhanced economic performance. Likewise the definition of equivalence is moving from one of monetary compensation to include other social factors. Although not there at present it is easy to imagine further expansion of the level of compensation which might include sharing in some of the direct benefits of the 'scheme' where a private entity is the main direct beneficiary of the acquisition.

There is a long history of argument over rights to land. There is the concept of community generated land value in urban areas and land as public utility pitched against land as a store of value as part of economic wealth with rising values seen as a return for risk. The public sector and the private sector would seem to split conveniently into these two camps with the public sector advocating the former and the private sector the latter.

At an international level, two distinctive perspectives relate to the compulsory acquisition of land; the perspective of financial organisations as represented by large companies and the World Bank; and the concept of housing rights as espoused by the UN system and associated NGOs. The World Bank version comes from an economic theory of development, whereas the concept of housing rights advanced by UN agencies refers to a moral imperative associated with social economic and cultural rights. Land policies in general set out to achieve security of tenure but these two different approaches colour the priorities given to similar issues (Azuola 2007).

Where the final decision on a compulsory acquisition scheme or assessment of compensation rests with the judiciary/property tribunal an independent judiciary or tribunal is essential. It is important that property holders and other interested parties have confidence in the fairness of the judiciary. In countries where there has been a transition to democracy judges have tended to expand their role beyond that envisaged in statute and may end up awarding settlements above market values or what the municipality can afford.

The importance of agreed methodologies and adequate supporting evidence in the assessment of compensation is a critical component in ensuring that a fair outcome is achieved for both the acquiring authority and the claimant. Lack of market evidence will reduce the possibility of this happening.

Affordable access to the courts/tribunals is also an important point. Cost of access to the court/tribunal may be a barrier and alternative dispute resolution (ADR) measures may contribute to speedier agreement compensation.



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



Assessing compensation is a key issue in operating compulsory acquisition measures involving two fundamental questions: who is entitled to obtain compensation and how is the level of compensation to be determined?

The first question is a legal one and relates to the full spectrum of tenure rights which may attach to a property. In urban areas in developed economies these can include market stall owners; in emerging economies it may include herders and labourers and occupiers of communally held land.

The second question is a matter valuation practice. Good practice is underpinned by concepts of equivalence, putting the claimant back in the position they were before the property was acquired. This has tended to be based on monetary compensation, but other non-monetary measures are increasingly becoming part of the package of compensatory measures. Procurement legislation usually forbids the acquisition of assets by government agencies at prices above market levels but some countries provide incentives to speed up the process. There will also be a public interest in keeping the cost of compulsory acquisition at a reasonable level.

Almost all market economies have a constitution which respects the right to private property but it is moderated by the state's need to regulate the use of land. Property is frequently conceptualised as a bundle of rights so the question is how many of these constituent rights can be removed before a right to compensation is triggered. The state also allocates land for development and through public infrastructure works contributes to the enhancement of land values. From where are development rights and property values derived? Increasingly governments are trying to capture the betterment generated by other publicly funded schemes as part of assessing appropriate levels of compensation.

Overall the objective in any compulsory acquisition regime should be to enable land acquisition in the public interest to proceed providing equitable compensation to those whose land is being acquired.

#### **4.0 Is there a 'fit for purpose' approach compulsory acquisition?**

How is land to be compulsorily acquired with all the due diligence and safeguards necessary to ensure probity where the institutional frameworks are weak? In 2014 the FIG (International Federation of Surveyors) and the World Bank reviewed what was needed to bring about better land administration particularly in emerging economies where resources to undertake highly specified land administration were not available.

They concluded that "there is an urgent need to build systems which can identify the way land is occupied and used and provide security of tenure and control of the use of land". In identifying how these systems might evolve they advised that "when building such systems the focus should be on a "fit-for-purpose approach" that will meet the needs of society today and can be incrementally improved over time".

How does the compulsory acquisition regime engage with the 'fit for purpose' approach to land management/governance? In particular is there a 'fit for purpose' approach to assessing compensation?



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



The 'fit-for-purpose' approach which would include the following elements: (FIG 2014)

- Flexible in the spatial data capture approaches to provide for varying use and occupation.
- Inclusive in scope to cover all tenure and all land.
- Participatory in approach to data capture and use to ensure community support.
- Affordable for the government to establish and operate, and for society to use.
- Reliable in terms of information that is authoritative and up-to-date.
- Attainable to establish the system within a short timeframe and within available resources.
- Upgradeable with regard to incremental improvement over time in response to social and legal needs and emerging economic opportunities.

Fit for Purpose:

- The systems should be designed for managing current land issues – and not guided by high tech solutions and costly/time consuming field survey procedures.
- Basic purposes: Include all land; provide secure tenure for all; and control the use of land.
- Flexibility: Scale and accuracy relate to geography, density of development, and budgetary capacity
- Incremental improvement: Advanced Western style concepts may well be seen as the end target but not as the point of entry.

## 5.0 FAO compensation principles

The FAO has specifically outlined its guiding principles for ensuring equity and equivalence in compulsory acquisition which include the following concepts related to compensation:

- **Equivalence:** people should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land. Appropriate measures should ensure that those affected, and particularly the vulnerable, are not disadvantaged.
- **Balance of interests:** the process should safeguard the rights of people who lose ownership or use rights of their land while ensuring that the public interest is not jeopardized.
- **Flexibility:** the law should be specific enough to provide clear guidelines, but flexible enough to allow for the determination of appropriate equivalent compensation in special cases. Legislators cannot foresee all possible scenarios, and a rigid application of detailed provisions may result in people not being compensated for losses that are not identified in the legislation.
- **Compensation should address both de facto and de jure rights in an equitable manner following the principle of equivalence.** Some form of fair payment for squatters is important, particularly where they are poor, are driven to informality out of necessity, and especially where government has condoned or encouraged the settlement in the first place.
- **Fairness and transparency:** the negotiating powers of the acquiring agency and affected people should be as equal as possible. Reasonable costs of affected people, including support to the poor and illiterate in negotiations, should be paid as part of the compensation. Negotiations should be based on an open exchange of information. (FAO 2008)



## 6.0 Implementation of Compulsory acquisition in a Fit for Purpose Environment

This section looks at how a 'fit for purpose' model might interface with a CPO regime addressing the necessary safeguards for the land holder and for the acquiring authority. Specifically it looks at four key aspects (1) verification of title; (2) establishment of boundaries (3) valuation of property and (4) assessment of compensation.

Much of the thinking behind the fit for purpose approach to land governance has been influenced by the desire to undertake large scale general titling programmes where the existing occupiers remain undisturbed. While the ownership of a piece of land may be 'formalised' or 'regularised' in compliance with an acceptable specification for this purpose the realities on the ground would not change. The levels of accuracy in such cases can be quite variable in relation to the actual land rights and the delineation of land boundaries. Such a 'fit for purpose' specification can therefore be implemented at a very coarse grain.

A 'fit for purpose' approach to compulsory acquisition would seem to contrast strongly with the above measures. Compulsory acquisition has an immediate, specific and material impact on the owners and occupiers of the land being acquired. The resultant project/scheme may also have material impacts on adjoining owners whose lands are not being acquired. It is being pursued in the public interest and usually part of a specific project so will have certain dedicated technical capacities. The implications for each individual owner/occupier will be distinctively different. For this reason the requirements for what satisfies the 'fit for purpose' test will be much higher in compulsory acquisition than in general titling work. Matters of ownership and establishment of boundaries require much more rigorous determination in the case of compulsory acquisition.

I stated at the outset that in determining value and assessing compensation a market value approach would be advocated. There are criticisms of this approach in some developing economies because of its inability to impound important values which are not traded and which may not be captured in transactional evidence. Nevertheless approaches to compensation in compulsory land acquisition have universally been about restoring the parties with an interest in the land being acquired to an equivalent position insofar as monetary compensation can achieve this. The compensation codes have evolved in various countries to include additional monetary incentives to speed up the process, special provisions recognising the disruption to a way of life and a range of other measures relating to customary title, all contributing to what is regarded as an equitable outcome in the particular social and cultural context.

In property valuation terms the principles and definitions set out by the International Valuation Standards Committee with which RICS (Red Book) RICS (2014) standards comply provide the relevant advice for establishing the property value. Fundamental to this is the definition of market value:

*'The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion' (IVSC 2016).*

The challenges therefore come in four key aspects of the determination of value and the assessment of compensation: rights/ownership, boundaries, property valuation, assessment of compensation.



### 6.1 Rights/ownership

What rights over the land is the valuer to value. In a context where land is unregistered and there is little if any documentary evidence this becomes problematic. The valuer will need to make certain explicit assumptions to be reviewed at a later date should more reliable information on rights/ownership come to light. Many of the issues arising here will relate to informal settlements and distinguishing between what are the facts on the ground and who are the legal owners becomes a critical consideration. Frequently this may be adverse possession of public land where the municipality may be acquiring other public land. Ultimately this is a legal decision but the assumption made by the valuer should be declared for legal verification.

### 6.2 Establishment of boundaries

In the same way as the rights/ownership may be indeterminate, establishing the boundaries may also be difficult. In the context of compulsory acquisition it is expected that a clear delineation of the boundaries of the land being acquired would be achieved. There is also the need for this land measurement is to be extended to the total land holding, essential to understanding the impact on the continued use of the property. Clear statements on the extent of this measurement and its reliability should accompany any valuation with comment on the level of reliability.

### 6.3 Valuation of Property

Comparable transaction evidence is at the root of the majority of valuations. Valuation in frequently traded markets with homogeneous properties contrast with valuing heterogeneous properties in weak markets. The latter coupled by uncertainties about title and land boundaries increase risk around the valuation. Markets may often be shallow with few participants and if they depart support drops away to a significantly lower level. It is important therefore that comparable transactional evidence is properly analysed and understood. In thinly traded and opaque market the full terms of transactions may not be available resulting in information material to value not being accessible. The valuation then hinges on the judgment of the valuer with local knowledge.

### 6.4 Assessment of Compensation

Different jurisdictions will have different rules for the assessment of compensation. Some will have a very narrow definition confined to market based verifiable factors, other will incorporate a much wider range of factors including social and cultural as a way of addressing the need for equivalence. It is important to recognise that the skills required for the assessment of the monetary/property aspects of compensation will not necessarily be capable of addressing the broader socio-cultural aspects.

## **7.0 Essential professional behaviours**

Professionals practicing in the area of compulsory acquisition occupy an important position in delivering essential infrastructure and ensuring that land development policies can be implemented to the benefit of the public. There is therefore a balance to be struck between representing the interest of the client and achieving the overall benefits of the scheme fairly and equitably. This is most acutely encountered in the assessment of compensation. Here a key distinction in the role of



## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



the professional emerges where they move from being an advocate of their client's case to assisting the court/tribunal with objective evidence. At this point the professional's obligation is to the court/tribunal not the client. This therefore requires a great deal of independent professional judgment on the part of the practitioner.

A second concern is that where there are weak institutional structures the supporting legal/administrative framework may not be adequate. Additionally there may be a lack of transparency in local property markets which makes the exercise of determining the appropriate level of compensation both challenging and challengeable which may lengthen the process of acquisition considerably.

Therefore the property professional acting in this context may end up relying heavily on ethical professional behaviours and objective professional judgment with little supporting evidence in order to deliver a balanced outcome which ensures fairness to the claimant and an equitable outcome for the acquiring authority.

As part of our capacity building for a large number of infrastructure projects in the UK which require extensive compulsory acquisition of property, RICS is concluding guidance for professionals practicing in this field. Although these have been elaborated for a mature economy with well-developed institutional structures a number of the requirements are more widely relevant and these have been abstracted below:

*1 Professionals must be able to demonstrate a proper understanding of the statutes, case law and government guidance applicable to compulsory purchase and compensation matters.*

*2 Professionals must ensure that they are able to discharge their duties to the required standard.*

*3 In giving advice, professionals must consider all matters material to the instruction. They must maintain reasonable efforts to establish the material information and collect appropriate evidence during the period of their instruction.*

*4 Where information that is material to the advice being given is not available, or is not evidenced or corroborated to the professional's satisfaction, they must state clearly to their client that this is the case and what assumptions have been made.*

*5 Professionals must provide their client with balanced and professional advice that seeks to secure an equitable outcome for their client consistent with the requirement to agree fair and reasonable compensation, in accordance with the relevant compensation code for a reasonable cost and within a reasonable timescale.*

*6 Professionals must, prior to accepting instructions:*

*(a) ensure that there is a written record, held by them, as to the matters on which advice is required and*



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



*(b) be satisfied that no conflict of interest arises. If there is any doubt whatsoever in this respect, any actual or potential conflict must be reported to those offering instructions as soon as it arises or becomes apparent. To avoid doubt, any potential conflict arising after instructions have been accepted must be notified immediately.*

*7 Where an inspection of any property is required it must always be carried out to the extent necessary to produce advice that is professionally competent having regard to its purpose and the circumstances of the case.*

*8 A suitable record of the size, configuration, relevant features and condition of the property, which is representative of the circumstances at the compensation valuation date, must be prepared and, if possible, agreed with the other party.*

*9 Professionals advising claimants must ensure that in all cases the basis on which they propose to charge fees, the arrangements for payment, and any subsequent changes are agreed with the client in writing and presented to the acquiring authority from whom in due course reimbursement will be sought.*

*10 Clients (on either side) can, and do, seek to influence surveyors, who must demonstrate their professionalism by maintaining a reasonable and balanced approach.*

*11 On commencement of an instruction, the professional must provide their client with clear advice as to the basis on which, in their opinion based on the information available, compensation is likely to be assessed in accordance with compensation legislation and case law. If their client is not prepared to proceed on the basis of what the professional considers to be a reasonable approach to the assessment of compensation, this must be identified and resolved. (RICS 2017)*

*12 Recourse to courts and tribunals is expensive and 'alternative dispute resolution' (ADR) measures should be encouraged.*

## **8.0 Conclusion**

Clearly there is a significant gap between the aspirations of national constitutions and the subsidiary institutional frameworks for acquiring land in the public interest. This is less to do with the good intentions of the legislation than the poor implementation of the measures on the ground. There are frequent allegations of both over payment and underpayment of compensation. These are often accompanied by allegations of corruption. Fledgling markets, poor evidence bases and poorly trained practitioners all lead to a lack of transparency in the system and contribute to a lack of confidence in the process.

8.1 For effective functioning there needs to be better alignment between the statement of constitutional rights, the empowering legislation for acquiring land compulsorily and the implementation mechanisms including methods for the assessment of compensation.



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



8.2 A lack of compatibility between these various measures will result in challenges, delays and accusations of misuse of power and corruption, undermining the benefits to be obtained through effectively employing compulsory acquisition measures in the public interest.

8.3 Although justification of the various schemes in the public interest attracts challenges and opposition for a variety of reasons, the negotiation of fair compensation for individual claimants is the part of the process which generates the most potential for conflict and dissatisfaction.

8.4 Compulsory acquisition codes vary in the way compensation is assessed. A measure which at a minimum is benchmarked to market value is likely to be the most robust in gaining public support and satisfying individual requirements to seek restitution.

8.5 In weak markets or environments where markets are not adequately developed to provide supporting evidence, considerable reliance will need to be placed on the objectivity of the professional advisers on both sides.

8.6 Professional advisers need to be aware of the critical position they hold in terms of negotiating fair and equitable compensation. Through their technical expertise and professional behaviours they should seek to carry out their role in an objective way.

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## Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



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