POLICY BRIEF

COMPENSATION

1. Introduction

In most countries, the government may acquire private land with the aim of promoting public welfare, infrastructure development, and equitable land use. Land acquisition[1] is, therefore, meant to strike a balance between individual property rights and broader public interests. In Sri Lanka, land acquisition is often carried out for projects such as roads, schools, or other public facilities. Land may also be acquired for environmental reasons. E.g., to preserve natural habitats or address ecological issues. In 2022, the Ministry of Land commenced the acquisition of 325 lots of land for projects concerning highways, irrigation, defence, village expansion and other public purposes.[2]

Land acquisition in Sri Lanka is primarily governed by the Land Acquisition Act, No. 9 of 1950 (LAA). This Act sets out the procedures for land acquisition, the basis for compensation, and the rights of affected landowners. Regulations may be issued under the LAA setting out the basis for assessing the market value of land. Such regulations also form part of the legal framework.

The process set out in the LAA includes notifying affected landowners, assessing the value of the land, and providing compensation. However, this process has encountered various challenges. Such challenges concern the precise meaning of the words 'public purpose', urgent acquisitions, fair compensation, procedural delays in granting compensation, and displacement of communities. According to one account, the minimum time-period for the completion of a land acquisition process in Sri Lanka is 72 weeks.[3]

The institutional framework pertaining to land acquisition features a number of state institutions. The Ministry of Land, or 'state lands' (MOL) is responsible for acquiring land on behalf of the government and handing over the land to the relevant government agency. For example, in the case of highway construction, the land would be handed over to the Road Development Authority. The MOL will carry out the acquisition by issuing instructions to the relevant divisional secretary (DS) to acquire the identified land. The DS must coordinate with the Valuation Department, Survey Department, Attorney General's Department, the Department of Government Printing and the relevant grama niladharis. These entities play a role in overseeing the process, ensuring adherence to legal requirements, and addressing disputes. Meanwhile, the Sri Lankan judiciary has played an important role in interpreting the law and ensuring that land acquisition is just, transparent, and complies with constitutional principles.

Land acquisition for industrial development and public welfare continues today, especially in districts such as Kandy, Matara, Jaffna, and Kurunegala. The extent of the acquired land in these areas is often substantial.

2. A Legal Analysis of Land Acquisition in Sri Lanka

Fair compensation ensures that landowners affected by land acquisition receive an equitable remedy for the loss of their land. It prevents the unjust enrichment of the government at the expense of individual landowners. According to some studies, when individuals believe they will be fairly compensated, they are more likely to cooperate with the government in implementing development projects and fostering economic growth.[4]

The LAA sets out the process for determining and awarding compensation to persons whose land is acquired. Section 7 of the Act requires the acquiring officer to issue a notice requiring any persons interested in the land to appear before the officer. Section 9 of the Act then outlines the inquiry process pertaining to claims for compensation. The acquiring officer must determine the market value of the land, compensation claims, respective interests of claimants, and any other relevant matters for making an award of compensation under section 17. The inquiry may be held at various locations, and the acquiring officer can issue summons to gather necessary evidence, including documents and witness testimonies.

Section 10 of the LAA provides that the acquiring officer must either make a decision on the claim and dispute or refer them for further determination. A claimant or party to a dispute dissatisfied with such a decision can, within fourteen days, apply for a reference to the District Court. If a reference is made, the acquiring officer defers making an award under section 17 until the court determines the matter. If no reference is made, the acquiring officer's decision becomes final.

Section 17 of the LAA outlines the process for the acquiring officer to make an award after their decision under section 10 becomes final or after the determination of any reference to the District Court. Such an award includes:
Identifying persons entitled to compensation;
Specifying the nature of the interests of these individuals in the land;
Determining the total amount of compensation; and
Apportioning the compensation among the entitled persons.

The acquiring officer must provide written notice of the award to the individuals entitled to compensation. In cases where there is no known person with a right, title, or interest in the land, specific details in the award may not be required. If a claimant has submitted a compensation claim within the specified time, the awarded compensation should not exceed the amount claimed. Moreover, if a reference to a District Court has been made, the award must align with the Court's decision.

Part IV of the LAA sets out the process for calculating and paying compensation. Section 29 provides that when an award is made under section 17, the acquiring officer must offer compensation to entitled individuals according to the award. The amount of compensation can either be the original amount or a new amount determined through an appeal. Payment is made upon the recipient's consent.

Under section 22 of the LAA, a person aggrieved by the amount of compensation awarded to them can submit an appeal to the Board of Review established under section 19 of the Act. The said Board comprises sixteen persons appointed by the President. Eight such members, including the chairperson, are required to be attorneys-at-law. Such appeals must be submitted within 21 days of receiving notice of an award. The Board is then required to make a decision on the amount of compensation, and the claimant may appeal such decision before the Court of Appeal under section 28 of the Act, provided the appeal is on a question of law, i.e., on a matter relating to how the LAA should be interpreted and applied.

In Hewage v Weerasena & Others,[5] the petitioner appealed the decision of the Board of Review regarding compensation for the acquired land. The appellant presented nine questions seeking a review of the Board's decision. However, the Court of Appeal found that the Board of Review did not err in law, and the questions raised were either factual or mixed questions of fact and law. It accordingly dismissed the appeal and affirmed the decision of the Board of Review. The court emphasised that the scope of an appeal under section 28 of the LAA is confined to reviewing decisions of the Board of Review on questions of law. It held that a question of the validity of the land acquisition does not fall within the scope of the appeal, as it was not part of the Board's decision.

Notably, however, the Court of Appeal has held that an appeal to the Board of Review does not preclude the affected person from separately challenging the acquisition. In Joseph Fernando's case, the Court of Appeal held that the petitioner's appeal to the Board of Review for compensation did not preclude them from challenging the acquisition order.

Section 36 of the Act provides that a recipient of an award can accept state land in lieu of compensation. Moreover, section 37 provides that once compensation is paid according to the Act, no further claims against the government may be made.

Apart from this general scheme for compensation, the Land Acquisition Regulations of 2008,[6] issued under section 63(2)(f) of the LAA, offer a more comprehensive approach to the valuation of compensation.

The regulations provide that when only a part of the land is acquired, the value of that part should always be proportionate to the market value of the entire land. Therefore, compensation is always proportionately pegged to the market value of the entire land. The regulations also provide for additional compensation beyond such 'market value' and includes compensation for 'injurious affection and severance' (i.e., damages for severing the land), disturbances, replacement costs, and loss of business income. Moreover, the regulations ensure that affected persons are entitled for a hearing before their land is acquired.

The Land Acquisition (Payment of Compensation) Regulations of 2013, covers compensation for acquisitions made with respect to certain specific development projects. Eighteen road development projects were covered under the original Regulations. These Regulations have been amended from time to time to include newer projects. The most recent amendment took place in 2021.[7]

The said Regulations establish Land Acquisition and Resettlement Committees (LARC). LARCs comprise the following members appointed by the Minister: (a) the Divisional Secretary or Assistant Divisional Secretary of the relevant Divisional Secretary's Division; (b) the Surveyor General or their nominee; (c) the Chief Valuer or their nominee; and (d) an officer not below the rank of the Assistant Secretary nominated by the Minister to whom the subject of the respective specified project has been assigned. LARCs are mandated to determine the market value and the compensation to be paid for any land referred to in the regulations. Such compensation can include: An ex-gratia payment amounting to the difference between compensation under the LAA and the 'replacement cost'[8] of the land, building or structures as determined by the Chief Valuer; loss of business; loss of livelihood or wages; and payment for relocation. Payment for relocation could include a block of land not exceeding an extent of 20 perches from a fully serviced re-settlement site or to cash payment for self-relocation.

A person aggrieved by a determination by a LARC may appeal to the 'Super LARC', comprising: (a) the Secretary of the Ministry to which the subject of the Specified Project is assigned or their representative; (b) the Secretary of the Ministry of Land and Land Development or their representative; (c) the Secretary of the Ministry Finance or their representative; (d) the Chief Valuer or their representative; (e) the Surveyor General or their representative; (f) the Chairman or Chief Executive Officer of the respective Specified Project or a representative nominated by them.

The scheme under the Land Acquisition (Payment of Compensation) Regulations is certainly more advanced than the ordinary statutory scheme offered under the LAA. However, its application is confined to specified development projects, and its overall impact in terms of the process of determining and granting compensation for acquired land remains limited.

A former official from the Ministry of Land mentioned during an interview that due to valuations being inaccurate the quantum of compensation may vary, and many landowners are not satisfied with the amount of compensation they receive.

Moreover, a senior attorney-at-law noted that the payment of compensation remained a serious challenge. This key informant explained that the courts play a significant role when substantial evidence is presented to demonstrate unjust compensation. However, the key informant observed that in Sri Lanka, legal recourse is limited to filing a writ or a fundamental rights application. Consequently, the solutions that the court can offer in such scenarios are limited. The court can effectively protect the rights of landowners and ensure fair compensation only in situations where a nuanced argument, such as the claim that the compensation was unreasonably low, can be successfully made.

3. International Best Practices

In the United States, the URA establishes guidelines and policies for federal land acquisitions. One of the important features of this law concerns the computation of 'just compensation' for the acquired property. The law provides that the Federal agency should establish an amount that it believes to be just compensation and make a prompt offer to acquire the property for such an amount. The law also provides that in no event shall such compensation amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease in the fair market value prior to the date of valuation caused by the likelihood that the property would be acquired must be disregarded in determining the compensation. Another key aspect of the law is the right of the property owner to refrain from surrendering possession of the property before the Federal agency pays the agreed purchase price, or deposits with a court, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property. This provision protects the owner from being displaced without compensation or encountering long delays in receiving compensation after the property is acquired.

The Town and Country Planning Act of 1990 in the United Kingdom contains key sections addressing compulsory purchase and compensation. Notably, acquisitions revolve predominantly around the public interest, leaving little room for inconsistencies. These safeguards include section 227, which specifies the purposes for which land may be acquired and establishes criteria for determining the necessity of compulsory purchase in the public interest.

Section 230 outlines the procedures for confirming and executing compulsory purchase orders. Section 231 addresses compensation determination and outlines the principles and factors considered in assessing the compensation payable to affected parties.

The Land Acquisition Act in Singapore sets out a transparent scheme for compensation in the case of acquisitions. Public engagement, including affected parties in decision-making and ensuring clear communication about land acquisition purposes are key elements of the process. Under the Act, the Singapore Land Authority ensures that landowners whose lands are acquired are paid market value compensation.

Moreover, under Singaporean law, landowners can also object to compensation amounts, and disputes are resolved by the Land Surveyors Board or the Singapore Land Authority. The objective is to ensure landowners secure just compensation for their properties.

During an interview, a senior attorney-at-law drew a comparison between Sri Lanka's compensation process and the process in Singapore. The Singaporean government, primarily through the Urban Redevelopment Authority, employs a systematic planning process with a commitment to transparency in revealing development plans. The Authority oversees urban planning and formulates long-term strategies for land use and infrastructure. Before major developments or land acquisitions, the government engages in consultations, public hearings, and exhibitions to inform the public and seek feedback, aiming to involve citizens in decision-making. The timing and extent of disclosure vary based on the project's nature, with early planning stages revealing some details and more specifics disclosed as plans progress. While Singapore values public engagement, the level of disclosure and public involvement differs for each project based on its nature.
In essence, the interview concluded that early transparency in development projects provides an effective opportunity for landowners to make informed investments in alternative properties if necessary. Therefore, the key takeaway is that a well-defined plan, coupled with public engagement and transparency, has the potential to address numerous challenges associated with land acquisition in Sri Lanka.

Endnotes

(1) For the purposes of this brief, the term 'land acquisition' will be used instead of 'expropriation' as the former is the term that is widely used in Sri Lanka.
(2) Ministry of Tourism and Lands, Performance Report 2022, at https://www.landmin.gov.lk/web/wp-content/uploads/2023/09/Performance-Report-2022-English.pdf.
(3) S.H.U. de Silva (Road Development Authority), 'Public lecture: Land Acquisition Procedure for National Development', hosted by Institute of Engineers Sri Lanka (IESL), at: https://www.youtube.com/watch?v=Yr_O1LwQP9I.
(4) Daron Acemoglu, Simon Johnson, and James A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91(5) American Economic Review 1369.
(5) [2003] 49 Sri.L.R. 3.
(6)Gazette No. 1596/12 dated 7 April 2009.
(7) Gazette No. 1837/47 dated 22 November 2013.
(8) Gazette No. 2257/1 dated 6 December 2021.
(9) Replacement cost' is defined as 'the prevailing cost involved in replacing an asset at the time of acquisition and includes fair market value, transaction costs, interest accrued, transitional and restoration costs and any other applicable payments, if any, but the depreciation of assets and structures shall not be taken into account. Where there are no active market conditions, replacement cost is equivalent to delivered cost of all building materials, labour cost for construction and any transaction or relocation costs.'