

Expropriation or Negotiated Settlement?

Susanna Price

Australian National University

Plan

- Define and explain the terms
- Recognise that displacement for development is difficult for everyone but especially for vulnerable people
- Highlight livelihoods as an issue for vulnerable people
- Ask what countries do to manage vulnerability in the context of displacement
- Review some cases of both expropriation and negotiated settlement in relation to these special challenges
- Conclude .

Defining Terms

- **Expropriation:**

- Use of eminent domain through legal instruments used in the public interest to expropriate, or acquire compulsorily, forcibly or involuntarily to override the right of citizens to use, own or hold interest in land, assets and resources on land and associated water resources
 - LAND TAKING

Negotiated Settlement:

- A direct negotiation with land users, interest holders and/or owners to access land prior to or instead of use of eminent domain
 - MARKET TRANSACTION between WILLING BUYERS AND WILLING SELLERS
 - OFTEN A FIRST STEP OR ALTERNATIVE TO EXPROPRIATION

Examples

- New South Wales Land Acquisition Act
 - While notice may have been given by an acquiring authority to acquire land, this does not prevent the land being acquired by agreement.
 - vast majority of land acquisitions in NSW are in fact by agreement.
 - Negotiations to purchase the land from the landowner will often continue after the issuing of a notice by the acquiring authority to acquire the land. The issuing of a notice does not preclude acquisition by agreement.
 - (David Russell 2014 Review of the NSW LAA of 1991)

Example

Russell review recommended:

- **Recommendation 1** That there be a compulsory negotiation period of 6 months, before any step can be taken to compulsorily acquire land under the LAA.
- **Recommendation 2** That prior to commencement of the negotiation period, the acquiring authority is obliged to provide a detailed written explanation to the landowner, written in “plain English”, setting out an explanation of the land acquisition process and setting out the rights and responsibilities of both the landowner and the acquiring authority.
- **Recommendation 3** That the landowner and the acquiring authority, during the fixed negotiation period, conduct at least one face-to-face meeting, with a view to negotiation of an appropriate acquisition price, unless both parties agree that such meeting is not necessary or can be conducted by a different means e.g. telephone conference

Why promote negotiations?

- Negotiated settlement is recommended by lenders because it is seen to be faster, less cumbersome and to embody an element of choice.
- This is particularly used for private sector projects.
- But may also apply in the public sector for example in the Pacific for customary land.

Taking the tough tests

- Restoring or enhancing livelihoods and living standards/quality of life? An old debate
- Livelihoods can be complex and are difficult to restore, let alone enhance
 - Vulnerability : poverty, age, disability, gender, ethnicity,
 - Matching skills
 - Problems of cash compensation which is insufficient to replace lost income generating assets
 - Loss of traditional/customary /informal networks and support mechanisms
- This is particularly true for communities which are isolated, informal or marginal

Why does it matter?

- Displacement and resettlement are more than an economic transaction.
- Solutions are expressed not just in economic but also equity, human rights, social, cultural, psychological, and political terms.
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Sustainable development goals (SDGs)

Goal 8 decent work and economic growth

- The global unemployment rate in 2017 was 5.6%, down from 6.4% in 2000.
- Globally, 61% of all workers were engaged in informal employment in 2016. Excluding the agricultural sector, 51% of all workers fell into this employment category.
- Men earn 12.5% more than women in 40 out of 45 countries with data.
- The global gender pay gap stands at 23 per cent globally and without decisive action, it will take another 68 years to achieve equal pay. Women's labour force participation rate is 63 per cent while that of men is 94 per cent.
- Despite their increasing presence in public life, women continue to do 2.6 times the unpaid care and domestic work that men do.
- 470 million jobs are needed globally for new entrants to the labor market between 2016 and 2030.

Goal 8 Targets

- **8.1** Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries
- **8.2** Achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors
- **8.3** Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services
- **8.4** Improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead
- **8.5** By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value
- **8.6** By 2020, substantially reduce the proportion of youth not in employment, education or training
- **8.7** Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms
- **8.8** Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment
- **8.9** By 2030, devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products
- **8.10** Strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all

Livelihoods are complex: Some models

- Cernea Impoverishment risk and reconstruction model (IRR) sets out 7 major risks interlinked with an 8th risk, joblessness
- Scudder and Colson – 4 step model with stages of reconstruction
- Downing and Garcia-Downing Routine and Dissonant Culture – livelihoods can be fundamentally unravelled and lost through disturbance in routine culture, that also undoes years, sometimes generations, of negotiations on land, labour and production.

What does it take to rebuild livelihoods?

Cernea, Scudder the Downings, and others all argue for

- REPLACEMENT RATE COMPENSATION
- BENEFIT SHARING
- ADDITIONAL RESOURCES TO REBUILD LIVELIHOODS TO MAKE UP FOR:
 - DOWNTIME DURING DISRUPTION
 - TRANSFER COSTS
 - INCOME LOSS
 - LOST OPPORTUNITY DURING DISPLACEMENT
 - RESKILLING, RETRAINING ETC.
 - SOCIAL NETWORKS etc

Negotiation or Expropriation?

- Expropriation:
 - Very few eminent domain laws/regulations mention livelihoods
 - Some do not even recognise loss of income
 - Many do not recognise use rights to land
 - Some exceptions: Lao PDR Prime Ministerial Decree 2005 revised 2016; India LARR 2013
 - Or allow hardship allowance for vulnerable groups
 - Or require monitoring and remediation if livelihoods are not improved

Country frameworks assume greater importance.

Negotiation or Expropriation

- Negotiation
 - Not necessarily clear how negotiations deal with livelihoods, loss of income, hardship, lack of formal title, etc
 - What about impacts which emerge only after the negotiation?
 - Communities find that developers do not fulfil agreements and governments do not act to ensure agreements are met.

Some good examples of negotiated settlement

- Sharing of project jobs: Some resource extraction projects have negotiated good conditions for local employment, with on the job training
- Percentage of royalties: China Water Conservancy/reservoir projects

Tanggung LNG West Papua

- One of the poorest regions in Indonesia
- Indigenous peoples
- Political unrest
- History of resource extraction without reparation
- Pre-project subsistence and livelihoods:
 - Fishing in locally made canoes
 - Sago processing
 - Few workforce skills

The Tangguh Resettlement with Development Model

- Negotiated settlement at a level higher than national standard – to “improve” livelihoods
- MDB financing
- Human rights report – but pre-FPIC
- Regular external M&E and reporting
- Recognition of customary land, trees, marine rights for compensation
- Baseline for income, livelihoods, wellbeing
- Participation and grievance redress mechanism
- Livelihood program, incl women’s program
- Benefit sharing scheme for resource losing clans
- Area wide development effort - revenue streams

Tangguh Outcome

- Livelihood enhancement was a major challenge
- Long term commitment
- Flexibility
- Careful monitoring of workforce policy

Final audit: Success but not for all equally.

Can Benefit Sharing be used in co-design with communities?

- Tina Hydropower project: a negotiated agreement using FPIC on indigenous customary land in Solomon Islands – a benefit sharing model with a package comprising hydro royalties and other measures.
- Land is not lost in perpetuity to the customary group

Do negotiated settlements have better outcomes for vulnerable people?

- No formal comparisons. Hard to obtain data.
- May depend upon:
 - Recognition of the need to address livelihoods
 - Lender policy coverage
 - Government efforts to ensure fair play during negotiation and honouring of agreements
 - Adherence to human rights standards by governments and developers
 - Efforts to address asymmetries of power and information
 - Legal assistance to the displacees
 - Independent monitors
 - Access to grievance redress mechanisms and/or appeal

Conclusion

- Displacement: especially hard for vulnerable people
 - Country frameworks do not necessarily recognise vulnerability in law and regulations
 - Livelihood rebuilding is challenging: limited resources, skill-sets, age, gender, disability, ethnicity, location
 - If no land title, often no eligibility for compensation
 - Usually, no hardship allowance

NEGOTIATED SETTLEMENTS SHOW SOME PROMISE BUT WE NEED TO KNOW MORE ABOUT THEIR OUTCOMES