

Are They Set to Lose Out in Others' Gains? An Analysis of Livelihood Security in Acquisition of Lands in Sri Lanka.

9thInternational Research Conference of KDU

LM De Silva¹

¹ Lecturer, Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka
<desilvalihini@gmail.com>

Abstract – Land acquisition in Sri Lanka takes place in a larger scale. Spending a post war era, many development projects are carried out both in urban and non-urban areas. Southern expressway, Hambantota harbour, Uma oya project and Norochcholai coal power project are among the main development projects which led to immense public discussions in the recent past. In acquiring private lands for such projects compensation is paid based on Land Acquisition Act (as amended) No. 9 of 1950 (LAA). However, the problem arises whether livelihood is considered in paying compensation to the affected people. Many of these acquired lands are agricultural lands inclusive of paddy lands and commercial crops with tea, rubber and cinnamon. In most of these cases the only skill the owners of these lands have is cultivating. Therefore when they are resettled in an alien place it directly affects their livelihood. On this basis, this research aims to identify whether any legislations or decided cases provide a threshold to consider livelihood in land acquisition for public purpose in Sri Lanka. Also this research aims to analyse the lessons Sri Lanka can gain from India in addressing the same issue and to propose recommendations with regard to consideration of livelihood in acquisition of private lands. This research is conducted mainly as a library based research. Statutes, decided cases and information gathered through relevant authorities have been used as primary sources and legal treatises, research journals and conference proceedings were used as secondary sources. The results reveal that livelihood is considered to a certain extent in paying compensation in Sri Lanka. However the sale or disposal of the produce of the land is omitted in paying compensation. In India Land Acquisition, Rehabilitation and Resettlement Act, 2013 provides provisions for the consideration of livelihood in paying compensation. In light of the above, it could be proposed Sri Lanka should also put some weight to address livelihood in acquisition of lands.

Keywords: Livelihood, Land Acquisition, Compensation.

I. INTRODUCTION

To any person in the world livelihood is an important factor to secure his/her basic necessities such as food, water, shelter and clothing. In a country like Sri Lanka where the

rural population is above 80%, (World Bank, 2014) lands have become a source of livelihood for many people. After the thirty years of war, Sri Lanka had to rebuild the country with many development activities. Moreover, to move forward, the development of infrastructure such a highways, harbours, airports, road widening and power plants are inevitable. While such development projects are carried out for the benefit of majority of people in the country, it is an undeniable factor that there is a percentage of people who lose their lands for the enforcement of rights of public at large. The Southern Expressway, Colombo-Kandy Highway, Hambantota harbour, Mattala airport are among the massive development activities in Sri Lanka which have resulted in many people to losing their private lands due to land acquisition for public purpose.

When looking at the current legal instruments in Sri Lanka it is visible that they provide express provisions with regard to the consideration of lost livelihood in the acquisition of private lands in Sri Lanka. But they have disregarded the sale of produce of lands. Also only a few judicial decisions, public discussions and academic writings have come out to address this issue.

In Sri Lanka many of the lands acquired are agricultural lands which include paddy lands and commercial crops such as tea, rubber and cinnamon. In most of these cases, the only skill the owners of such lands have is cultivation. Therefore the current legal sphere has created a situation in which the acquisition of private lands have severely affected the livelihood of people.

Section II of the paper will discuss why livelihood should be secured in acquisition of private lands and section III will discuss the domestic legal sphere with regard to consideration of livelihood in the acquisition of private lands. Furthermore, section IV discusses how the same issue has been addressed in India and section V provides recommendations to fulfil the gap between the law and the effects of disregarding livelihoods. Section VI presents the conclusions.

II. WHY LIVELIHOOD SHOULD BE SECURED IN THE ACQUISITION OF PRIVATE LANDS

It is important to pose a question before discussing why livelihood should be secured. Can a matured man survive without livelihood in the present society? For the majority the answer would be 'No'. To justify the security of livelihood in acquisition of private lands, array of ideas could be unfolded.

The preamble of the 1978 Constitution of Sri Lanka aims to guarantee the dignity of people in Sri Lanka. When one loses livelihood it leads to the loss of dignity as well. In Sri Lanka, land ownership is considered as a matter of dignity. Hence it is imperative that loss of livelihood of any person has to be compensated or livelihood losers must be resettled in the places where they can reengage in their occupation.

The power exercised by the organs of the government should be subject to public trust and must be exercised for the benefit of the public in terms of the Public Trust Doctrine. (*Mundy vs. Central Environmental Authority and others*, 2003) In the *Mundy case*, it was more emphatically recognized that the public includes affected individuals. On this basis it could be argued that if livelihood is disregarded in acquisition of lands and paid compensation or people are resettled in an alien place, the main purpose of holding power in trust is not achieved. Therefore, it is important to secure the livelihoods of affected people to uphold the Public trust Doctrine.

The roots of land ownership goes back to classical Roman Dutch Law. As per R.W Lee, classical Roman Dutch Law recognizes that whoever owns soil, owns it up to the Heaven and down the Hell (Lee, 1953). Therefore, it is not reasonable to limit a concept of ownership of lands ignoring the owners' dependence on the land as a means of livelihood which was considered with great importance under the Roman Dutch Law. It is true that due to the necessities of the modern society, the classical Roman Dutch could not be applied in the same manner as earlier. Nevertheless, it does not denote that livelihood should not be restored after the acquisition of land.

Furthermore, Sri Lanka formulated the National Involuntary Resettlement Policy (NIRP) and it came into effect in 2001. The objective of this policy was to focus on involuntary resettlement related to public and private sector development projects covering both land acquisition and resettlement, to ensure that people are not negatively affected and are able to restore their standard of living and integrate into their new environment (NIRP, 2001). Since giving up livelihood is unavoidable in most of the land acquisition cases, the NIRP stipulates that those who are affected and displaced must receive fair competition for losses and adequate support to resettle (NIRP, 2001).

The Southern Transport Development Project (STDP) was the main larger scale project to adopt the principles of NIRP (Godamune, 2013). By implementing NIRP, STDP was able to protect the interests of the displaced. Replacement value which includes, not only the value of the land, but also all costs related to moving and resettlement, became a key feature in STDP. Departing from the market value concept, STDP has gone steps further in utilising a fair compensation approach (Jayawardena, 2011).

In the STDP, income restoration has received less attention (Godamune, 2013). Small land owners of tea, rubber and other cash crops have found it difficult to restore their livelihood to their pre-project level (Kumarasiri, 2009). Hence it is evident that even though STDP implemented NIRP, still a number of incidents have arisen in relation to loss of livelihood.

Moreover, the people who were affected by the Colombo Kandy Highway have faced threats to food security due to disruption of food sources. (Kuruppuand Ganepola, 2005). This reveals that both STDP and Colombo Kandy Highway project has resulted in loss of income for many affected people.

The main reason for the above scenario which occurred even though livelihood is taken into account by the NIRP, is the enforceability of a policy compared to a law. A policy has less binding force and this demonstrates the exigency of laws to recognize restoration of livelihood in acquisition of private lands.

The above discussion reveals the importance of securing livelihood in acquisition of private lands. Hence, the next section will consider the legal framework in Sri Lanka in the consideration of adequate livelihood.

III. EXISTING LEGAL FRAMEWORK IN SRI LANKA

A. The role of legislations

The legislative history of land acquisition goes back till 1876. The first piece of legislation was the Land Acquisition Ordinance of 1876. This was replaced by the Land Acquisition Act No. 9 of 1950. At present, Land Acquisition Act (as amended) No. 9 of 1950 (LAA) provides the provisions with regard to land acquisition in Sri Lanka as the main piece of legislation addressing acquisition of lands. Although more than 60 years have passed since the enactment of the LAA, no extensive change has taken place.

As per section 5 of the Act, the Minister can acquire a land for public purpose by following the procedure given in the Act (Section 5, LAA). This is after acting in accordance with the prior requirements such as selection of site,

determination of title and assessment of compensation and payment mentioned in the Act. The Act provides for compensation to the affected people based on the 'market value'. As defined by section 45 of LAA, 'market value' is the amount which the land might be expected to have realized if sold by a willing seller in the open market as a separate entity on the date of publication as 'market value'.

The above section stipulates that the eminent domain power has been recognized by the LAA in Sri Lanka. Eminent domain is generally known as the state power to acquire private property within its territory. This perspective could be justified based on the utilitarianism since land acquisition is for the benefit of the majority even though several other people lost the livelihood.

The definition given for 'market value' under the LAA does not mandate the consideration of livelihood in acquisition of lands. Even though the LAA has allowed to calculate any reasonable expenses of effecting any change of residence necessarily caused by the acquisition of the land according to section 46 (1) (iv), part (c) of the same section prohibits compensation if the business is the sale or disposal of the produce of the land to be acquired although it is a loss of earnings. This lacuna has led to create glaring examples of stirring situations faced by the people who lost livelihood in acquiring private lands by the state for public purpose.

As revealed by the survey evidence, the Uma oya project has had a huge impact on the livelihood of the people. Some were displaced due to its direct impact, some due to insufficiency of water and another set of people were affected due to tunnelling which created an unsuitable environment to live in their property. The people were to be resettled in novel areas that were inappropriate for the livelihoods of affected people. Cases of loss of livelihood were also reported in relation to the Southern Expressway. Driving through the southern expressway any one would see the paddy fields, rubber estates and tea estates along the highway. This provides evidence to the loss of agricultural lands of cultivators which had an impact on the livelihood of these people.

The majority of lands acquired being agricultural lands and lands of commercial crops, the dilemma created by the LAA was not friendly to the land owners. The above examples suggest that disregard of livelihood in acquisition of lands has become a major issue in relation to the cultivating community in Sri Lanka. But six decades old LAA is silent on the consideration of livelihood in acquired lands.

B. The role of the judiciary

If the justice is not done by the legislature, judiciary has a crucial role in interpreting law as to reach justice. Disputes in relation to acquisition of lands are a very common phenomenon in Sri Lanka. However as far as the loss of lands which were used as agricultural and commercial crops are concerned, only a few cases have dealt with this matter.

In the case, *Bulankulama and Others v. Secretary, Minister of Industrial Development and others* (2000) questioned the Mineral Investment Agreement between Sri Lankan Government and the U.S Company named as Freeport Mac Moran to search and explore for phosphate and other minerals in the area. One of the main concerns was the danger to livelihood if the mining project is implemented. Residents of the relevant area engaged in cultivation and owning lands were the petitioners of this case and they argued their freedom to engage in any lawful occupation, profession, trade, business or enterprise guaranteed by Article 14 (1) (g) was violated. A remarkable judgement was given in this case, desisting the agreement between the Sri Lankan Government and the U.S Company due to the violation of fundamental rights of the petitioners.

Moreover, in the case, *Mundy vs. Central Environmental Authority and others* (2000), among other complaints, one major complaint is that the petitioner's rights of occupation and residence under Article 14 (1) (g) and (h) have been infringed. Hence loss of livelihood was one of the major concerns of the case. The court ordered to pay compensation, in addition to the compensation under the LAA.

Although important decisions were given in the above cases, the redress has been limited to those who sued. In addition to this, there are a huge number of people whose livelihood has been affected in numerous ways. They were the owners of lands, share-croppers, artisans, labourers and tenants. However, there is no specific law to restore the livelihood in acquisition of lands. Also deciding, whether a fundamental right is violated or not may vary from one case to another. Therefore much consideration of livelihood in much needed in the acquisition of lands.

IV. EXPERIENCE FROM INDIA

The government of India understood that the land acquisition issues were at an increasing level and land owners' and many other people's livelihood has been affected by land acquisition. The seventeenth amendment to the Constitution of India removed the right to property as a fundamental right. On this background India enacted the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 replacing the Land Acquisition Act of 1894. The new Act

regulates the procedure for land acquisition, granting compensation, rehabilitation and resettlement to the affected people.

A brief look at Section 28 of the Act reveals that the amount of compensation to be awarded for land acquired under the Act shall be determined in accordance with first and second schedules, where the second schedule outlines the resettlement and rehabilitation entitlements to land owners and livelihood losers. Further, this section elaborates that taking of any standing crops and trees which may be on the land at the time of the collector's taking possession of the land shall be considered in determining the amount of compensation. India has gone steps further in considering livelihood in acquisition of private lands for public purpose. Therefore it is clearly visible that the new Act has not forgotten the people who mainly depended on cultivation.

Unlike the LAA of Sri Lanka, Section 28 of the Indian Act further stipulates, in addition to the grounds specifically mentioned in the Act, the grounds which may be in the interest of equity, justice and beneficial to the affected families should also be considered. The definition for 'affected family' includes not only a family whose land or other immovable property has been acquired but also 'a family which does not own any land but a member or members of such family may be agricultural labourers, tenants, share-croppers or artisans or who may be working in the affected area'. This allowed for the recognition of a family whose primary source of livelihood was affected by the acquisition of lands.

In a country like India where livelihood based on land is more widespread than land ownerships, the new Act provides an important tool for the consideration of livelihood in the acquisition of lands in India.

V. RECOMMENDATIONS

It is most unfortunate that the Land Acquisition Act No. 9 of 1950, which is the main piece of legislation, does not recognize any compensation or resettlement mechanism for some people who lose their livelihood for the benefit of others. Disregarding the sale or disposal of the produce of the land to be acquired has created discrimination among the livelihood losers.

However in India, Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 is good example which has addressed the livelihood issue in a reasonable manner. Therefore it could be recommended that discrimination created among the livelihood losers should be abolished and the Sri Lankan

LAA should contain provisions which entitles the livelihood losers to restore the livelihood.

Either a compensation plan or resettlement mechanism should be implemented for people whose livelihood is dependent on the land they lose. In addition to that there are many people who do not own land but still depend on lands for their livelihood. Like the new Indian Act does, these people's interests must be taken into consideration in the acquisition of lands.

VI. Conclusion

When the economy of a country is moving forward, for many development projects there is no alternative than acquiring private lands. Hence, it is necessary for the human factors attached with the acquisition to be considered in this regard.

Although the present Land Acquisition Act No 09 of 1950 recognizes livelihood in acquisition of private lands to a certain extent, it clearly omits sale or disposal of the produce of the land to be acquired in paying compensation. This situation brings difficulties in the lives of many Sri Lankans. Nevertheless, taking into account of livelihood in acquisition of lands could be justified in many ways which have already been discussed in this paper. Due to policy considerations, the Sri Lankan state has several times considered the livelihood in paying compensation and resettlement. However, empirical evidence suggested that no consistency has been followed in such mechanisms.

Until today, it was not your land, but tomorrow what if it is your land and livelihood? Hence, it is time to take livelihood security into consideration in acquiring private lands by the state.

VI. REFERENCES

Legislations

Land Acquisition Act No. 9 of 1950

Land Acquisition, Rehabilitation and Resettlement Act, 2013

Cases

Bulankulama and Others v. Secretary, Minister of Industrial Development and others. (2000) 3 S.L.R 243

Heather Therese Mundy v Central Environmental Authority (SC Appeal 58/2003) (decided 20 January 2004)

Other

Epstein, R. A. (1985) *Takings: Private Property and the Power of Eminent Domain*. Harvard University Press. Cambridge MA.

Fernandes, W. (1998) *Land Acquisition (Amendment) Bill, 1998: Rights of Project-Affected People Ignored*. Economic and Political Weekly. 33 (42). p. 2703-2706.

Godamunne, N. (2012/2013) *Development and displacement: the national involuntary resettlement policy (NIRP) in practice*. Sri Lanka Journal of Social Sciences. 35 (1-2) p.37-50

Jayawardhana, S. (2011) *Right of Way A journey of resettlement*. [Online] Colombo: Center for Poverty Analysis. Available from. http://www.cepa.lk/content_images/publications/documents/fa7e85fd305243c8887b048740327416-Right-of-Way-English.pdf [Accessed: 9/6/2016]

Kumarasiri, M., (2009) *Southern Transport Development Project: Experiences and Lessons for Livelihood Restoration Assistance*, in Fernando, P., (et al) ed., *Forced to Move, Involuntary Displacement and Resettlement Policy and Practice*, Colombo: CEPA.

Kuruppu, S. & Ganepola, V., (2005) *Whose Right of Way?* In: CEPA Working Paper 10. Colombo: CEPA.

Lee, R.W. (1953) *An Introduction to Roman Dutch Law*. Clarendon Press: Oxford.

Peiris, G.L. (2005) *The Law of Property in Sri Lanka*. Colombo: Stamford Lake.

Rajapakshe, W. *The Law of Property*. Vol I. Colombo: W. Rakapakshe

Sri Lanka. Ministry of Mega polis and Western Development (2016) *Resettlement Policy Framework*. Colombo.

Sri Lanka. Road Development Authority (2008) *Sri Lanka: National Highways Sector Project*. Colombo

Sri Lanka. Road Development Authority. (2008) *Resettlement Planning Document*. Colombo.

BIOGRAPHY OF THE AUTHOR



Lihini M De Silva is a Lecturer at Faculty of Law, General Sir John Kotelawala Defence University. She is currently reading for MPhil/PhD at Faculty of Graduate Studies of University of Colombo in Intellectual Property Law. Lihini obtained her LL.B (Hons) from Faculty of Law, University of Colombo and she is an Attorney-at-Law in the Supreme Court. Her research interests include Intellectual Property and Land Law.