Rethinking Expropriation Law I: Public Interest in Expropriation
In September 2013, the Groningen Centre for Law and Governance at the University of Groningen, in co-operation with the University of Cape Town and the International Alliance on Land Tenure and Administration, hosted the colloquium ‘Rethinking Public Interest in Expropriation Law’. This colloquium focused on the public purpose/interest requirement for expropriation law in several jurisdictions around the world.

The aim of the colloquium was to facilitate a global discussion amongst a group of legal scholars as to shared issues in expropriation law pertaining to the public purpose/interest requirement, and to identify ways in which these problems can be addressed, in the broader interest of promoting standards of good governance where legal development takes place.

This volume contains a large number of papers that have been presented at this colloquium. The papers have gone through a double-blind peer review process.

Louie van Schalkwyk, PhD candidate from the University of Cape Town, assisted in administering the editorial process. Linlin Li, PhD researcher with the Department of Private Law and Notarial Law of the Faculty Law at the University of Groningen, Mark Beuker, Tiddo Bos, and Bas Legger, student assistants with the same Department, took care of the editing. We express our sincere gratitude to them for their work on this volume.

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1 RETHINKING PUBLIC INTEREST IN EXPROPRIATION LAW: INTRODUCTORY OBSERVATIONS

Leon Verstappen*

1.1 THE LAW, GOOD GOVERNANCE, AND EXPROPRIATION

A sustainable society requires that laws and legal procedures meet good governance standards. This is necessary for economic growth, democratic development, and the prevention of social conflict in general. One may argue that in such a society, the best ways to regulate a problem, be it environmental, economic, social, or otherwise, are through a combination of efficiency, democracy, transparency, accountability, along with respect for human rights and the rule of law. The Groningen Centre for Law and Governance of the University of Groningen wishes to contribute to sustainable societies – both in the Netherlands and abroad – by adopting this governance perspective.

This best model of governance advocated through the sustainable societies initiative should also be pursued when it comes to expropriation. Expropriation exemplifies an area of the law in which public interests meet and compete with private interests. Private law is based upon two principles of legal freedom: full legal capacity of every person to perform juristic acts and the private ownership of property. Limitation of these fundamental rights affects the individual’s drive towards self-fulfillment and prosperity. Nevertheless, expropriation encroaches on property rights for a good reason: a public purpose that is considered to be more important than the private interests of a property owner.

According to the legality principle, the action of any State authority must be based upon a statutory duty or provision. Expropriation constitutes an exercise of the State’s power of eminent domain¹ and is also subject to the principle of legality. The legality

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¹. Eminent domain refers to the authority of the sovereign to seize an individual’s private property without the consent of that individual, Kohl v. United States, 91 U.S. 367, 373-74 (1875). In Baltimore v. Valsamaki, 916 A. 2d, 324 (2007), Justice Catchell of the Court of Appeals of Maryland wrote: “Eminent domain is defined as the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking. The power of eminent domain adheres to sovereignty and requires no constitutional authority for its existence.”
principle is a fundamental part of the protection of rights because it limits the capacity of the State to act, especially when it concerns expropriation.2

Expropriation law can be regarded as a litmus test for fair balancing of private and public interests in regulatory systems. A governance perspective, which entails looking also at stakeholders, procedures and how the law works in practice, could provide useful criteria for this test.3 This introduction highlights some of the most basic questions with regard to expropriation, thereby explaining the relevance of scrutinizing the requirement of public interest or public purpose in expropriation law. At the end, it raises the question whether it is necessary to reconceptualize expropriation in light of the recent adoption of the Voluntary Guidelines on land tenure.4 In doing so, it also introduces the contributions to this volume.

1.2 The Basic Requirements and Interpretative Challenges

Historically, two requirements have been identified as constitutive for expropriation: the existence of a public purpose as justification for the State’s action, and the payment of just compensation to reward the owner for the loss.5 These two requirements, identified already centuries ago by Grotius, remain prevalent in legal systems all over the world. However, (legal) practice and legislation on expropriation have developed drastically since Grotius wrote his masterpiece on international law, as a consequence of many societal, technical, and environmental developments in modern times. First, there has been an increasing individualization of property over past centuries. Where

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2. For a comparative overview of expropriation systems, see also Rachelle Alterman e.a. Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights, ABA Press, 2010.
4. Hugo de Groot (Grotius), De jure belli ac pacis, Paris, 1625, was probably the first scholar to provide us with these basic elements of expropriation: “…The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.” Grotius distinguishes two requirements: a ‘public utility’ and ‘to make good the loss’. He distinguished also two main categories: expropriation in extreme or extraordinary circumstances; and ‘ordinary’ expropriation, in the absence of extraordinary circumstances.
land is held in common by local communities, changing the way land is used does not necessarily need to result in an expropriation of property. However, title to land is nowadays held by individuals or legal entities, rather than by local communities. Second, rapid population growth brings about an increasing need for land to use for housing and food production. Third, the rapid growth of population and industrialization have resulted in increased mobility of people and goods, which requires constantly improving infrastructure (airports, harbors, railways, roads, and other transportation networks), and this in turn requires land. These developments have made land a scarce commodity, especially in and around expanding cities, for example, cities in India and China. Change of land use in a densely populated area means dealing with many property owners. In many cases, expropriation seems to be, for that very reason, an important option, even if it often remains the last resort.

Ultimately, it may be necessary to rethink the two aforementioned ‘classical’ requirements because of the demands of modernity. The recent adoption of the Voluntary Guidelines provides a practical backdrop for reconsidering the scope of expropriation and deserves specific attention. First, however, it is necessary to consider the more general interpretative challenges that motivate a reconceptualization of expropriation law. These challenges may be classified roughly into questions dealing with the scope of the subject, and questions dealing with the context in which the law applies.

1.2.1 Questions of Scope

A set of basic questions relating to the scope of expropriation today signify its modern dilemmas: The question at the outset of any analysis about expropriation relates to the basic understanding of the scope of the term: ‘What is expropriation?’ Expropriation is generally understood as formally referring to the taking of private property by the State, under certain authorized circumstances. The term has synonyms: compulsory acquisition, constructive taking, condemnation, seizure of land, or deprivation. For present purposes, the term expropriation is preferred. It is often understood as being based on the eminent domain authority of the State, i.e. the power of the State to take away private property for public use against compensation for the person who is entitled to the property.

A mere definition of the term expropriation raises several issues of scope: ‘When does State action amount to expropriation?’ In most countries, the constitution and/or expropriation statutes determine the circumstances under which an interference with property rights amount to expropriation. Not all State action infringing on property necessarily amount to expropriations. Expropriation has to be distinguished from

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7. *Id.*, pp. 119, 354-376 and 384.
actions such as forced eviction or regulatory interferences with property. The difference between regulatory interferences with property and expropriation lies in the fact that, unlike expropriations, with regulatory interferences there is no intention on the part of the State to take the property away and pay compensation. The difference between expropriations and forced evictions is that forced evictions usually concern cases where the evicted persons have no (formal) title, while technically, only those entitled to property can be expropriated. So, there seems to be no overlap with expropriation, technically speaking, when we can assume that only entitled property can be expropriated. Interferences which amount to expropriation can be compensated, but where there is no formal title, there can be no question about expropriation. Likewise, where there is no intention to expropriate, provision will not be made for compensation of aggrieved individuals. Be that as it may, actions of the State not intended to be expropriations can nevertheless have as substantive an impact on property ownership as expropriation does. 

The term ‘expropriation’ should not be interpreted so broadly as to include government conduct that is clearly not intended to be expropriatory in nature, such as the levying of taxes. However, focusing only on expropriation in its formal sense might also be too narrow. Every governmental decision or regulation that affects the way landowners can use or alienate their land, also affects the value of the land. Expropriation constitutes the most extreme impact: it mostly deprives the owner of her property completely. There are numerous other interferences that have less severe effects on landowners, but are interferences nonetheless. These kinds of State action are generally referred to as ‘regulatory taking’, ‘constructive expropriation’, ‘material expropriation’, ‘inverse condemnation’, ‘indirect expropriation’, or ‘creeping expropriation’. In the Netherlands, regulatory deprivation is normally compensated.

Another question of scope arises from the study of international law rules dealing with investment. It is tempting to distinguish cases involving only domestic actors in expropriation matters, from expropriations involving foreign investors. To do so would be unwise, however, since the only difference from a legal point of view might be that in the latter bilateral investment treaties might apply. This adds a layer of meaning to a term that very often already has a particular scope and meaning in the domestic context. For instance, the UNCTAD Series on International Investment

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8. Id., pp. 343-344.
9. Forced evictions can be described as the permanent or temporary removal against their will of individuals, families, and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate form of legal or other protection, General Comment No. 7 (1997), adopted by the Committee on Economic, Social and Cultural Rights, HRI/GEN/1/Rev. 3, p. 94.
11. See Van der Walt, supra note 6, pp. 199, 354-384.
12. Article 6.1 Law on spatial planning (‘Wet ruimtelijke ordening’).
Agreements II,\(^{13}\) which distinguishes between two types of expropriation, refer to the following concepts: *direct expropriation*, being a mandatory legal transfer of title to the property or its outright physical seizure; and *indirect expropriation*, involving total or near-total deprivation of an investment, but without a formal transfer of title or outright seizure. Normally, a direct expropriation benefits the State itself or a State-mandated third party. Examples of direct expropriation include nationalization, physical seizure of assets, or legislated transfer of assets to the State. As concerns indirect expropriation, it is unclear whether intent not to compensate is a criterion for indirect expropriation. However, the other indicator – compensation – is not a useful criterion by which to distinguish direct expropriation from other kinds of property interferences (be they termed ‘indirect expropriations’ or ‘deprivations’). In my opinion, the obligation to offer compensation is a consequence of the State’s decision to expropriate. The distinguishing indicator in terms of the UNCTAD Series, and in many jurisdictions, seems to be the moving of the title or benefits of the property taken to the State or a State-designated third party, not paying compensation.\(^{14}\)

The question is to what extent a public purpose such as protecting the environment, health, and other welfare interests is relevant when considering whether regulatory measures may impinge on landownership without attracting an obligation on the State to compensate affected landowners.\(^{15}\) There is a tension between expropriation and these forms of regulation of property. Should we extend the safeguards of expropriation to these types of regulatory impositions on property, or should there be a clear demarcation and thus distinction between the two types of State interference?

Regulatory impositions (in the sense of deprivations, rather than expropriations of property) are usually based on the ‘police power’ of the State. Like eminent domain, the State’s ‘police power’ is a rather mysterious concept: it refers to the capacity of the State to regulate behavior and enforce order within its territory for the betterment of the health, safety, morals, and general welfare of its inhabitants.\(^{16}\) Where solid statute-based powers do not exist for a specific action of the State, the concept of police power justifies that action. If it is just the concept of police power that justifies the interference, this lack of clear statutory basis certainly is at odds with the legality principle.


\(^{14}\) Supra note 13, p. 6.


\(^{16}\) In US constitutional law, police power is the permissible scope of federal or state legislation so far as it may affect the rights of an individual when those rights conflict with the promotion and maintenance of the health, safety, morals, and general welfare of the public *(Encyclopaedia Britannica)*.
In general, ‘deprivation’ denotes a broader concept than ‘expropriation’. The former may include interferences with the use and enjoyment of property that do not amount to an expropriation. As mentioned already, the distinguishing element between expropriation and other types of deprivation might be that in cases of expropriation a specific person loses property rights involuntarily to the State or a third party due to a specific decision of the government, whereas in cases of other types of deprivation, generally applicable regulations affect a large class of property or owners, without people losing their property ownership as such and without acquisition of property ownership by the government or third parties.  

The reason why ‘indirect expropriation’, ‘regulatory imposition’, or ‘deprivation’ is prevalent is obvious: government seeks to avoid the difficulties of expropriation procedures, as well as the costs involved due to the obligation to compensate. This can be seen especially in the context of international investments. To return to the earlier example, the protection of a foreign citizen’s or company’s property in a host country against direct expropriation has long existed in the international arena. The aforementioned UNCTAD Series on International Investment Agreements II illustrate how important questions of indirect expropriation have become with regard to bilateral investment treaties. Nowadays, expropriation in an international context comes mainly in the form of ‘indirect expropriation’: acts and decisions taken by states that interfere with the use or enjoyment of property or diminish the value of the property. There is an increasing prevalence of indirect expropriations in the international system, in bilateral investment treaties and investment chapters of free trade agreements.

Such treaties, investment chapters and agreements often outline specifically the appropriate criteria for (i) determining whether an indirect taking has occurred and (ii) distinguishing indirect expropriation from a mere regulation in the public interest, which is non-compensable despite the economic impact on particular investments. The nature and characteristics of a specific measure of the State has emerged as a key factor in drawing a line between indirect expropriation and non-compensable regulation. A bona fide regulatory act (or its application to an individual investor) that genuinely pursues a legitimate public-policy objective (such as the protection of the environment and public health and safety) and complies with the requirements of non-discrimination,

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18. UNCTAD, supra note 13.
due process, and proportionality may not be designated as expropriatory, despite an adverse economic impact.\(^\text{20}\)

Another issue of scope has to do with the object of expropriation: ‘Must the entire property be taken away?’ Partial expropriation could be considered as a less encumbering alternative.\(^\text{21}\) Although a public purpose may not necessarily have to deprive an owner of the whole of her property, nor an owner of all his rights, the question remains whether in such cases expropriation law is applicable.

There certainly is a tension between expropriation and other forms of regulation of property. Wherein lies the difference? Does it lie in the severity of the infringement? Is there even a significant difference between an expropriation and an extraordinarily excessive or burdensome deprivation of property owners? What about regulations that restrict the use of land in a less severe way, for example, that it is not allowed to erect buildings on a plot that cover more than 30% of the surface of the plot or that it is not allowed to establish buildings with more than 10 stories. Why should landowners even be expected to bear the burden of a law that decreases the value of the property, even if it does not mean to expropriate? In this book, the contributors attempt to respond to some of these questions by focusing very specifically on scrutinizing the requirement that an expropriation must be in the public interest.

1.2.2 Questions of Context

Normally, the State would first acquire land needed to be repurposed for the abovementioned developments on a voluntary basis, on the free market.\(^\text{22}\) This approach is likely to be less costly and entails more guarantees for fair reward of the owner who voluntarily relinquishes her property. Some countries even recognize to a certain extent the role of the people themselves to realize these public goals.\(^\text{23}\) When compared with a voluntary, open-market approach, expropriation always seems to be a second-best solution, especially when considering the importance attached to individual

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21. See also Kriebaum 2007, supra note 20, at p. 69 et seq.


23. Id., at p. 17.
autonomy and freedom. Lund, Odgaard, and Sjaastad\textsuperscript{24} state that market-assisted reform basically means that the State, instead of expropriating and reallocating land itself, provides grants to eligible beneficiaries so that these can obtain land through existing markets. Less bureaucracy aside, market-assisted redistribution is believed to have many other benefits: relying on a willing-buyer, willing-seller approach avoids litigious legal disputes, which can be costly and time consuming, and which can take the property out of viable use for long times. Market-assisted redistribution is also much more likely to receive support generally, and thus more capable of avoiding damaging political confrontations. In addition, market-assisted redistribution will tend to ensure that inefficient, rather than efficient, farms are redistributed.\textsuperscript{25}

Expropriations necessitated by the modern developments mentioned above are often described as ‘ordinary’ and distinguished from so-called ‘extraordinary’ expropriation, which distinction even Grotius has made in the 17\textsuperscript{th} century.\textsuperscript{26} In the latter context, dramatic changes of circumstances, brought about by phenomena such as natural disasters or financial crises, have a profound impact on the two requirements and the process of expropriation. The usual procedures would, for instance, not apply in circumstances necessitating an extraordinary expropriation. An example of this is the nationalization of banks during the recent financial crisis. In 2013, the Dutch Government expropriated all shares and other participations in two legal entities of a bank (SNS Reaal NV and SNS Bank NV) on behalf of the State. The debts of the Bank were also ‘expropriated’ on behalf of a foundation that was assigned the task of settling these debts.\textsuperscript{27} The decision was taken almost overnight and with immediate effect. The only recourse was to appeal within 10 days. The public purpose at stake was the protection of the domestic banking industry and customers’ savings.\textsuperscript{28} Some of our contributors have picked up on these distinctions.

\textsuperscript{24.} Id.
\textsuperscript{25.} Id.
\textsuperscript{26.} See supra note 5.
\textsuperscript{27.} Decision of the Minister of Finance 1 February 2013, on the basis of Article 6:1, first paragraph, Article 6:2, first, fourth, and fifth paragraph, and Article 6:4, first and second paragraph, of the Law on financial supervision. The decision was also based on the so-called Intervention Law. The Law on financial supervision entails a compensation clause.
\textsuperscript{28.} An association for the interests of investors filed a complaint with regard to this nationalization to the European Court of Human Rights for violation of Article 1 of the first Protocol of the European Treaty on Human Rights. The complaints have been rejected in the decision of the European Court of Justice decision of 9 April 2015, applications 47315/13, 48490/13 and 49016/13, CEDH 119 (2015). The case concerned the accelerated proceedings allowing bond holders to challenge the lawfulness of the Netherlands Government’s expropriation of the assets they held in SNS Reaal, a banking and insurance conglomerate. SNS Reaal had run into trouble as a result of the financial crisis of 2008 and the Government decided to protect the domestic banking industry and customers’ savings by nationalizing the conglomerate. The Court found in particular that the time constraints imposed
The focus of this book is specifically on rethinking the public interest or public purpose requirement in expropriation law. Contributions can accordingly be grouped roughly into three themes relating to this objective: Firstly, some of the contributors focus specifically on issues of terminology and interpretation; secondly, others discuss issues around process and governance thereof; and thirdly, some contributors focus specifically on the impact of the public purpose requirement in determining fair compensation.

1.3.1 Terminology and Interpretation

The ‘public purpose’ requirement for expropriation may also be denoted by similar terms such as: public interest, public use, and public benefit. What does ‘public’ in these terms mean? The people of the State or some people living in a certain area? Or those who seek jobs, entertainment, fresh air, or just a decent home? Or does public purpose refer to purposes benefiting a large number of people, such as health, safety, environment, or economy? Several of our contributors engage with these questions. Sabrina Praduroux looks into the linguistic distinctions between the terms used in the French and Italian Constitutions and how the Constitutional Courts of these two countries interpret the concepts of ‘general interest’ and ‘public necessity’. She points out the shared approach to the definition of the requirements that must be observed to proceed to the compulsory transfer of private property and addresses the understanding of the public interest requirement developed by the Court of Strasbourg. Hanri Mostert’s contribution analyses judicial treatment of the two terms public interest and public purposes, before the onset of constitutional supremacy in South Africa and thereafter. She explores the difficulties caused by different interpretations – both broad and narrow – of the terminology.

There are numerous cases where the public purpose of a particular State action is quite clear: the building of bridges or railways, or creation of infrastructure for energy, gas, or water supply. Other purposes cannot, at first sight, be considered as classic public

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29. M. van Eerd & B. Banerjee, Working Paper I, Evictions, Acquisition, Expropriation and Compensation: Practices and Selected Case Studies, February 2013, UN Habitat/GLTN, p. 58: “GLTN stated in their latest working paper that ‘Broad agreement is needed among the different stakeholders on the working definition of legitimate ‘public interest’ projects that may justify expropriation and evictions. This can be achieved through international expert group meetings, roundtable discussions, and the involvement of society as a whole. Very important stakeholders are the vulnerable groups in society that are often most affected.”
purposes. For example: urban revitalization; prevention and elimination of unemplo-
yment; assistance for and retaining industrial or commercial enterprises; development of
economy; and big events (Olympic games, football world championship, etc.). The
question which has engaged some of our contributors is whether substantive criteria
can be developed to determine whether a purpose can be regarded as a public purpose.
In a world where almost any expropriation will satisfy even the nominally stricter pub-
lic-use requirement, it becomes more important than ever that courts use their discre-
tion to prevent constitutional property protections from being totally denuded of
meaningful content. This malleability is demonstrated well in John Lovett’s contribu-
tion. Focusing on the U.S. States of Michigan and Louisiana, he deals with the changing
nature of the public purpose requirement in cases of economic crisis and natural disas-
ter. He acknowledges that where expropriation plays a crucial role in responding to
economic crises or natural disasters, a legal system’s handling of expropriation can
demonstrate significant internal contradiction.

Within the more diversified context in which the public-purpose requirement
functions nowadays, it is important to note that a purpose is not intrinsically public
or private by nature. It all depends on the situation and the intentions in time and
place. In Ireland, Rachael Walsh explains, because of the drafting process followed
for the Irish Constitution, the concepts of public purpose and public interest in relation
to expropriation are omitted. It is largely through the exercise by owners of
their rights within administrative processes, and through debate within those
processes about the aims of expropriations, that the meaning of ‘public purpose’ is
determined in Irish law. Hence, the key test in Ireland nowadays is not public use,
nor even a narrowly construed public purpose, but rather a deferential assessment
of whether an expropriation pursues the common good and in the interests of social
justice.

Consider a situation where the State uses the power of eminent domain to seize land
on behalf of a private company who wants to build casinos on the land: would this
constitute a public purpose? Would it differ if this happened in downtown Manhattan
or in a declining industrial district of Detroit? Must we interpret ‘public purpose’ nar-
rowly or rather broadly? What can case law tell us?

More than three decades ago, in the landmark decision Poletown Neighbourhood Coun-
cil v. City of Detroit, the Michigan Supreme Court rejected the appeal against the tak-
ing of private property for the development of a General Motors plant. Poletown
opened the door for municipalities to take private land under its eminent domain

‘Economic Development as Public Use: Why Justice Ryan’s Poletown Dissent Provides a Better Way to
power and turn it over to private entities for economic development when it results in ‘alleviating unemployment and revitalizing the economic base of the community’.

The Poletown decision expanded the permissible reach of what constitutes a public purpose by allowing public-private takings, not only in Michigan, but also across the United States.

Another example is *Kelo v. City of New London*, heard by the U.S. Supreme Court. The City of New London, Connecticut, condemned privately owned real estate, so that it could be used as part of a ‘comprehensive redevelopment plan’. The Supreme Court of the United States decided in a 5:4 decision that the general benefits that a community enjoyed from economic growth made private redevelopment plans a permissible ‘public use’ under the Takings Clause of the Fifth Amendment. The State can thus use eminent domain to transfer land from one private owner to another private owner to further economic development. However, in this case the private developer was unable to obtain financing and abandoned the redevelopment project, leaving the land as an empty lot, which was eventually turned into a temporary dump.

These examples give some guidance in respect of the breadth of the public interest requirement, but raise several new questions. The U.S. Supreme Court ostensibly favors a broad interpretation of public purpose, and mostly simply defers to the legislature and executive on decisions as to whether a particular action is in the public interest. This is seemingly very different to the rather strict approach of the courts in, for instance, Germany, where courts allow administrative bodies much less leeway in seeking justification for expropriation.

The case examples above cast light on the implications of a broad interpretation of the public purposes requirement. Since such a broad understanding would allow many varied purposes to qualify as ‘public’ for expropriation purposes, there is a strong likelihood that the different purposes may be in competition: decisions about economic development of a certain region may for instance thwart the building of affordable housing. Do we have to prioritize or compromise? How does one decide on the gravity of each of these concurring interests?

Several of the contributions suggest that issues caused by the broad interpretation of the public purpose requirement may be addressed by implementing standards of good governance in expropriation law. The next section elaborates.

1.3.2 Public Purpose in the Context of Good Governance

One of the strongest incentives for expropriation is rent-seeking, which means obtaining benefits using the public domain. Often, the realization of certain public purposes coincides with new opportunities for government or the private sector to profit from newly developed businesses. For government, an increase in business means an increase in tax income. Many cities receive a significant portion of their budget through sales of land and property tax revenues that can be spent on, e.g. the building of roads or bridges and on social welfare. For business, developing a certain region means more contracts and thus more profit. The more possible benefits flow to government and business, the stronger the incentive is to push forward those projects that are most likely to bring in money. How does this influence prioritizing or compromising competing public purposes?33

Rent-seeking provides the context for several other related issues: the first is whether expropriation can legitimately be undertaken – can a purpose be ‘public’ – if a private third party stands to receive the benefit generated by the expropriation? This issue rears its head specifically where a planned development by government or a planned policy implementation is dependent on the expropriated property being in the hands of a third party – not the expropriated former owner – to achieve the stated purpose. It is referred to as third-party transfers. In many countries, especially the United States, such transfers have become a common method underlying processes of urban redevelopment. Heinz Klug deals with the illegitimate use of the power of eminent domain in cases of third party transfers. His paper explores the issue comparatively, focusing on the legitimacy, scope, and nature of specific forms of land redistribution as manifestations of the public interest.

The second issue is the non-fulfillment or change of the purpose for which the expropriation was undertaken. City of Los Angeles v. Superior Court34 presents an example: the matter concerned broken promises for the building of social housing on the part of government, made towards the poor dwellers of the Chavez Ravine area in Los Angeles. Instead of social housing, a stadium for the Brooklyn Dodgers was built.35 In the words of Parlow,36

33. See M.J. Parlow, ‘Unintended Consequences: Eminent Domain and Affordable Housing’, Santa Clara Law Review, Vol. 46, No. 2, 2006, p. 865: “This obvious dilemma raises the question of whether cities are open to the poor or whether cities are transforming into havens only for the rich or tax-revenue generating developments.”
34. City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 433-36 (1959); the court upheld the decision.
35. Parlow, supra note 33, at p. 846.
36. Parlow, supra note 33, at p. 865: “This obvious dilemma raises the question of whether cities are open to the poor or whether cities are transforming into havens only for the rich or tax-revenue generating developments.”
what started as the City’s crusade to reshape a run-down neighborhood into an exemplary public housing community turned into a quintessential example of how cities can use their power of eminent domain at the expense of poor, and often ethnic minority, communities for the interests of private developers or the city as a whole.

Jacques Sluysmans and Nikky van Triet compare a Dutch example with those in Belgium, France, Germany, and South Africa: they analyze the litigation emanating from article 61 of the Dutch Expropriation Law, which deals with a change of purpose or non-realization of the public purpose after expropriation: in those cases the former owner may reclaim his property or claim additional compensation.

A third issue is highlighted in the contribution of Eduardo Peñalver: he deals with exactions – burdens imposed as part of bargains between the State and landowners seeking development approval – and illustrate how scholars disagree about both the normative basis and the reach of the Court’s exactions test in the United States. Like the public use requirement in eminent domain, exactions scrutiny seems designed to root out situations of government favoritism towards particular private actors.

With issues such as these in mind, the governance perspective with which this book is introduced gains importance: many of the interpretative and theoretical issues with accompanying the public purpose requirement could be addressed satisfactorily if inclusive decision-making processes about expropriation are promoted. The more direct the influence of the people in the decision-making process, the stronger the indication will be that a particular purpose is indeed ‘public’ by nature, and not just a pretext for rent seeking. Björn Hoops analyzes the manners in which English, German, and South African laws ensure that the determination of the public purpose is democratically legitimate. His analysis shows that an act’s democratic legitimacy depends on the position in the State system of the entity that adopted the legal acts; the procedure that led to the legal act; the extent to which the legal act defines the public purpose; and how that entity is accountable to the electorate.

This ‘public participation’ approach is in accordance with conclusion I of GLTN’s Working Paper I on evictions, acquisition, expropriation, and compensation:38

‘Public interest’ should be defined at policy level. Broad agreement is needed among the different stakeholders on the working definition of legitimate ‘public interest’ projects that

37. An exaction is a condition imposed on the issuance of a development approval that requires the developer to dedicate land to the public, to allow the public access to his private land, or to pay a fee in lieu of such requirements, J.R. Nolon & J.A. Bacher, ‘Exacting Tests: Determining When a Taking is Unconstitutional’, *New York Law Journal*, 2003, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1691&context=lawfaculty>.

may justify expropriation and evictions. This can be achieved through international expert group meetings, roundtable discussions, and the involvement of society as a whole. Very important stakeholders are the vulnerable groups in society that are often most affected. The Guiding Principles on Internal Displacement state that the scope of the application of the prohibition of arbitrary displacement includes large-scale development projects that are not justified by compelling and overriding public interest. The question is which ultimate authority decides on the ‘arbitrary and compelling overriding public interest’, and whether states would contemplate giving up their role to an international body.

The working paper raises some key questions and issues for further discussion: How should legitimate ‘public interest’ be defined and by whom? How can more concrete practical guidelines to determine legitimate public interest be developed? How can the bargaining powers of the stakeholders be balanced to ensure that potentially affected populations can be meaningfully consulted? How can public interest be balanced with the interests of the affected communities? Michael Heller and Rick Hills use the specific example of inefficient fragmentation of land to consider whether land can be assembled in ways that do not harm the poor and powerless. He finds a possible solution in the so-called ‘Land Assembly Districts’, or ‘LADs’.

In some countries, such the Netherlands, the zoning plan plays an essential role in determining the public purpose that justifies expropriation. In the Netherlands, the most important requirement for expropriation set by the Expropriation Act\(^{39}\) is that each expropriation must be necessary to implement the specific zoning plan of the municipality. The zoning plan describes quite exhaustively the intended use of an area. Only if the intended use differs from the actual use, will the State be allowed to expropriate. In other words, the public purpose is enshrined in the zoning plan. Making or changing a zoning plan is only possible after an extensive technical and legal assessment procedure, in which the municipality is obliged to involve the people whose interests are at stake and to consider thoroughly their interests. Finally, the democratically elected council of the municipality takes the decision to adopt the (new) zoning plan. Such a procedure renders the plan more democratic. In addition, on several occasions, it is possible to have the judiciary review the process as well as the decision.

John Lovett’s contribution to this volume deals with the changing nature of the public purpose requirement in cases of economic crisis and natural disaster, especially in two US states, Michigan and Louisiana. He shows that in states in which expropriation can play a crucial role responding to economic crises or natural disasters, a legal system’s handling of expropriation can demonstrate significant internal contradiction. Public

use restrictions, third-party transfer prohibitions and compensation rules can prove to be highly malleable legal concepts.

As Magdalena Habdas points out in her contribution, public purpose is a fundamental requirement to expropriation, but also highly elusive, at once vague and intuitive. Good governance standards may be helpful here: clarity and predictability is necessary in defining the public purpose, and a reasonable, objectively suitable connection between the imposition on private property and the goal to be achieved thereby. The imposition must be the least restrictive means to achieve this goal, there must be no alternatives and just compensation must be paid. Bradley Slade pursues this aspect in his study of South African law on the question whether the availability of less invasive means, i.e. a way other than expropriation to achieve the same purpose, is a valid defense against an expropriation that is otherwise for a valid public purpose or in the public interest.

All the mentioned contributions underscore the need for a balance between the public purpose on the one hand and the private interests at stake whenever the state interferes with private property rights. In striking this balance, principles of good governance are served: There should be no arbitrariness, abuse, or wrong use of the power of eminent domain, and the interests at stake should be treated with care. Democratic legitimacy is necessary if the public purpose requirement is to serve as justification for interferences with private property; and meeting the requirements and following the procedures must be subject to judicial control. In short: a legitimate interference with property must meet the standards of good governance.

1.3.3 Public Purpose and the Determination of Fair Compensation

Payment of fair compensation to those affected – especially the landowner – is a key element of expropriation. The intrusion into the rights of the individual must be balanced against the authority of the State to undertake such intrusions. It is unfair for the individual to bear an unreasonable burden to provide a benefit to society. Where property is lost, the burden borne by the individual owner almost always seems to be unfair. Fairness is achieved through payment of just and equitable compensation. How the fairness can be achieved hence depends on the crucial question of whether the compensation is fair. This begets several other questions: Which losses must be compensated? Does compensation include damages, or only loss of value? How much compensation? How is compensation calculated? Must compensation be in money or can it be in kind? Do possible future developments influence the amount of compensation? Does the social

responsibility of property owners play a role in answering these questions? And importantly, for purposes of this book: does the public purpose for which the property is expropriated, and the social responsibility of property owners, play a role in answering these questions?

In this section, I consider the influence that the public purpose requirement may have on determination of fair compensation. In doing so, I ask whether a move towards a more contextualized calculation of the compensation is necessary.41

Hanoch Dagan argues that those who lose out in serving the interests of others should be fully compensated for their losses. Those who benefit should cover the costs of compensation. If the whole society benefits, then tax payers’ money can be spent to cover those costs. If future owners of houses in residential areas will benefit, they should pay. His statements are clear and it is hard to disagree. On balance, nobody needs to lose in cases of deprivation by the state, and nobody should profit from expropriation to the detriment of the former owner. The problem is how to calculate the loss: land can have different functions and, consequently, also different values. Other types of costs can be incurred. Dagan’s view is that compensation must be contextualized. To integrate social responsibility and distributive justice successfully into takings doctrine, and also other important property values such as autonomy, personhood and utility, Dagan proposes a regime of partial and differential compensation, drawing careful (and rule-based) distinctions between types of injured properties and types of benefited groups.42

In his contribution to this book, Hanoch Dagan gives possible justifications for providing less than full (fair market value) compensation for expropriation where redistribution is a desired public goal (as in South Africa and Eastern Europe); where partial compensation is justified by reference to the significance of the public interest; and as a means for adjusting the amount of the compensation to the specific circumstances of the case.

Using South Africa as an example, Elmien du Plessis then deals with the possible impact of the public purpose factor in determining compensation for expropriation, where land is expropriated for land reform purposes. She argues that the constitutional commitment to land reform motivates an expectation on an owner to accept

a lower price than where property is expropriated for non-land reform public purposes. This raises one of the most sensitive questions in legal theory on property and land ownership in particular: whether property has a social dimension. Do owners of property, by virtue of their ownership, bear a responsibility towards society? The German constitutional model incorporates social responsibility into the concept of property. A similar provision is found in the land law of Indonesia, and in many other jurisdictions: The holder is not only entitled to make use of the land; but is also expected to utilize it in such a way as to directly and indirectly serve the general welfare. This is in conformity with the relationship between the individual and the community. What do these social dimensions of property entail for expropriation? Does it mean that we have to tolerate encroachments to a certain level without expropriation or compensation?

There are two main approaches to these issues in legal thought. The libertarian view one the one hand, according to which compensation should be required each time that the taking’s impact on the owner is disproportionate to the burden, if any, carried by other beneficiaries of the intended public use of the state action at hand. And the liberal view on the other hand, according to which property should serve not only liberty but also such values as social responsibility and distributive justice, seek to restrict the range of takings law as much as possible. Brendan Edgeworth casts light on this topic. He examines the ambit of the Australian federal constitutional ‘just terms’ requirement in cases of compulsory acquisition by the state. He focuses on the boundary between those state actions that do trigger the payment of ‘just terms’ compensation, and those that do not, considering whether the Australian High Court appears to have adopted a less restrictive approach to government actions that regulate the environment, and advance public health, through its finds that compensation is not payable in these instances.

43. Article 14(2) of the German Basic Law (Grundgesetz) provides that “Ownership entails obligations. Its use shall also serve the public interest”.
44. In Article 6 of the Indonesian Agrarian Law of 1961, it is stated that all titles to land have a social function and that individual land rights include obligations as well.
45. C.M. Rose, ‘Property and Expropriation: Themes and Variations in American Law’, Faculty Scholarship Series, Paper 1800, 2000, pp. 5-6, distinguishes three different types of impositions on land that people must endure without compensation, depending on the nature and cause of the encroachment: Type I disruptions (‘housekeeping’ or ‘every day’ disruptions): those stemming from the management of property’s routine business-buying, selling, settling in, and neighbor disputes over property. Type II disruptions (‘regulatory’ disruptions): These are the alterations in property rights that occur when environmental, demographic, or technological changes necessitate readjustments of property rights, normally through regulation. Type III disruptions (‘extraordinary’ disruptions): These are the rights alterations that accompany revolutions and warfare or other upheavals that create massive overthrowing of existing property rights and resource uses.
46. Dagan, supra note 42.
In the Dutch system, full compensation of all damages directly and necessarily resulting from expropriation is the point of departure, a rule that was established not by the legislator, but by the Dutch Supreme Court, already in 1864.\textsuperscript{47} The Dutch system of compensation contains three elements: First, government grants full compensation in cases of expropriation, when an owner loses property for a public purpose. Secondly, government grants in certain cases and to a certain level compensation when land use plans change to the detriment of proprietors.\textsuperscript{48} This will be granted, for example, in cases where, according to the new plan, the owner of land is not allowed to build on the land that he bought (direct damages) but also where the new plan allows building of an apartment complex on neighboring land, or where the new plan allows building of a road that will cause nuisance because of noisy traffic and pollution (indirect damages). In both cases, however, foreseeable damages are not covered whereas a certain level of damage from changing of zoning plans is to be accepted as a normal societal risk.\textsuperscript{49} Thirdly, government grants in certain cases and to a certain level compensation in other cases of specific acts or decisions of government affecting peoples interests. The criterion is also whether the act or decision was not foreseeable and a certain level of damages from governmental acts and decisions are to be accepted as a normal societal risk.\textsuperscript{50}

Concerning the second element: if one gets compensation because the value of property decreases in case of a change of zoning plans to the detriment of owners, would the opposite also be valid? Indeed, in Belgium the opposite counts also: owners must pay a retribution to the government when the value of their property increases in case of change of zoning plans (the so-called ‘planbatenheffing’). Such a rule does not exist in the Netherlands. There is, however, a special form of tax, imposed on owners of real estate, when the owner profits from public works that have been initiated by the municipality (the so-called ‘baatbelasting’).

In some countries, such as China, the State adopted the general rule that the people (i.e. the State or local municipalities) own the land and that individuals only have the right to use the land. If the State expropriates the land of individuals, they therefore expropriate land use rights from them, not ownership, although ownership of land transfers from local municipalities to the State. There is a growing trend to substantiate land use rights. This may be observed in a number of countries, but especially in China. Because ownership of a piece of land and land use rights on that land

\textsuperscript{47} HR 7 March 1864, W. 2569 and later on HR 23 December 1864, W. 2652.
\textsuperscript{48} Article 6.1 Law on spatial planning (‘Wet ruimtelijke ordening’).
\textsuperscript{49} According to Article 6.2 of the Law on spatial planning, damages up to 2% owners must bear because it is considered as a normal societal risk that plans can change to the detriment of owners.
\textsuperscript{50} Between 20% to 40% of the damages will not be covered, and there is a possibility to have a threshold of 15% at max.
are more or less interconnected vessels there, (more) compensation should be paid to land use rights holders when land use rights become more substantive. This is the case in growing economies that increasingly rely on market economy, which needs breadth, duration, and security of land tenure. Expropriation law needs to keep pace with this development; more compensation should be offered if the land rights are of more significance.51

An important point is how to deal with the land value increments, i.e. the price difference from land values resulting in a change of land use or the likely extension of services. Rent seeking developers want to profit from it. Letting them pay would facilitate not only funding the costs of compensating former owners, but also the costs incurred for building infrastructure necessary to realize new functions of the land.

Conclusion 3 of GLTN’s Working Paper I on evictions, acquisition, expropriation and compensation deals with the issue of fair compensation. It states that:

[i]t is important to enhance the normative notion of compensation and its pragmatic application. International laws and guidelines have contributed to the ‘partial reduction of damages, costs, and losses incurred by some resettled peoples’. But the implementation of guidelines in borrower nations has been ‘consistently problematic’. Moreover, the capacity to enforce the implementation of guidelines on resettlement and compensation is typically weak, as is (in many cases) political will, such that adoption of formal policies by borrower nations ‘is no assurance of adequate implementation’. The cases cited here from Kenya, Nigeria and Cambodia illustrate the persistent gap between laws and development practice in many countries.52

The Working Paper I puts forward some key questions and issues for further discussion: First, local governments and other public authorities may find it difficult or impossible to comply with the requirements that are prescribed in international guidelines to compensate affected people fully. How can compensation be arranged that is both practical (i.e. affordable to public authorities) and fair (for affected persons)? What are effective strategies to ‘domesticate’ international laws and guidelines in the local context? Which institutions have a key role? Secondly, the question related to compensation is how material possessions and the social impact of displacement can be compensated for when affected people are displaced. Another question is

51. See V.J. Washburn, ‘Regular Takings or Regulatory Takings?’, Pacific Rim Law & Policy Journal, Vol. 20, No. 1, 2011, pp. 71-124, who argues that much discussion of this problem by American scholars to date has tended to conclude that the standards of American eminent domain law – fair market value compensation, public use requirements – are the most likely source of land expropriation solutions to this problem in rural China. She, in contrast, takes a different approach, one that is intended to be more sensitive to the Chinese legal background, political context, and system of landownership.

52. The cases cited here from Kenya, Nigeria, and Cambodia illustrate the persistent gap between laws and development practice in many countries; Van Eerd & Banerjee, supra note 29.
related to the acquisition, expropriation and valuation process, in which negotiation is an important tool. The outcome of the process depends upon stakeholders’ power. How can poor and vulnerable groups be empowered, or how can the process be improved to protect these groups from losing out?

Compensation is an issue that needs to be contextualized. The different systems of compensation and their underlying principles have to be disclosed. Standards of expropriation have to be developed. This is also an aspect of good governance of expropriation.

1.4 URGENT NEED TO RECONCEPTUALIZE EXPROPRIATION

From the afore going discussion and the questions raised the need to reconceptualize expropriation to include some more essential elements, especially with regard to the notion of good governance, seems clear. The urgency of this task is underscored by the latest global effort to establish good governance guidelines on land tenure: the FAO’s Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security of the Committee on World Food Security (CFS).53

The purpose of the Voluntary Guidelines is to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries, and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security. Part 4 contains guidelines on ‘Transfers and other changes to tenure rights and duties’, addressing the governance of tenure of land, fisheries, and forests when existing rights and associated duties are transferred or reallocated through voluntary and involuntary ways through markets, transactions in tenure rights as a result of investments, land consolidation and other readjustment approaches, restitution, redistributive reforms, or expropriation. There are sections on ‘Land consolidation and other readjustment approaches’ (Section 13), ‘Restitution’ (Section 14), and ‘Redistributive reforms’ (Section 15) as well as on ‘Expropriation and compensation’ (Section 16). All these sections touch upon deprivation and expropriation of land, especially the latter.

What makes these Voluntary Guidelines so interesting is that they were created from the bottom-up. They are based upon an inclusive process of regional consultations carried out during 2009-2010, which were held all over the World, mainly in developing countries. The Guidelines were endorsed by the CFS in a special session on 11

May 2012. If you read Section 16 of the Voluntary Guidelines on expropriation and compensation very closely, it appears that they reflect the most apparent problems—bottlenecks, lack of capacity, lack of transparency, malpractices, corruption, etc.—with regard to expropriation. Moreover, these Voluntary Guidelines speak specifically to the situation in developing countries, giving insight into the problems of the developing world, not only from a legality perspective, but also from a broad governance perspective. I doubt whether all countries that consider themselves to be developed would comply with the Voluntary Guidelines on expropriation.

There is also one important aspect that has not yet been made visible, but plays a very important role. In the introduction of Hanoch Dagan to his lecture ‘Inside property’,\textsuperscript{54} which reveals the role of property in society, he writes that if one is to take seriously the complexity and heterogeneity of property law, a proper conception of property must account for both governance and inclusion. Neglecting governance obscures the significance of the internal life of property, which is often structured by sophisticated mechanisms aiming to facilitate various forms of interpersonal relationships in ways that no contractual arrangement can. Ignoring inclusion improperly marginalizes non-owners’ rights to entry in categories of cases where inclusion is an indispensable feature of the property institution under examination. Dagan argues that looking inside property in these two senses requires abandoning the conception of property as an exclusive right and substituting it with a pluralist conception. This governance approach and the notion of inclusion sees property not (only) from the perspective of the owner who has an exclusive right, but as part of a system that aims to regulate interpersonal relations. This holistic approach to the function of property clearly influences expropriation as well.

1.5 Conclusion

Reconceptualization of expropriation means that expropriation systems not only have to fulfill the requirement of public purpose and fair compensation, but also other requirements: It must take into consideration proportionality and subsidiarity. Is expropriation necessary and the only way to realize the public purpose? Is it objectively suitable to obtain that public purpose? Moreover, the whole procedure must be democratically legitimized in one way or another, especially the way public purpose is determined. Further, the public should participate in the planning and process for expropriation. The expropriation process, as well as the public purpose and the compensation, must also be subject to judicial review with the right to appeal. Extra care must be taken of particular sensitivities, for instance, when cultural, religious, or

environmentally significant areas are involved, or when the livelihoods of the poor or vulnerable are at stake. In addition, state agencies need human, physical, financial, and other forms of capacity to perform their task, not only to offer fair compensation, but also to lead the expropriation process. The original owner must also be given the first opportunity to reacquire his lost land in case the land is not needed. In case third private parties have been allocated the expropriated land, impose consequences, like the obligation to retransfer the land to the original owner. New standards for compensation need to be developed to provide for a process by which the land is valued fairly, given all appropriate circumstances. Take into account that fair compensation might also imply compensation of other damages than the loss of the land itself. The Voluntary Guidelines show us that expropriation needs a new approach, comprising of developing new standards next to and within the two classical requirements public purpose and fair compensation.
INTRODUCTION

The idea that the state can interfere with, and even taken away, proprietary rights for public purposes existed under Roman law and has developed alongside the modern notion of the right of property.¹

Modern constitutions and bills of rights protect the right to private property by laying down limitations on states’ power to regulate and expropriate private property. One such limitation, the ‘public interest’ or ‘public purpose’ requirement for a proposed expropriation by the state, tasks legislators and courts with assessing whether and to what extent the interests of individual property owners should give way to the public or general interest.² As such, it is intended to prevent capricious and arbitrary takings of property by the state.

Article 42 of the Italian Constitution provides that private property is recognized and guaranteed by laws on its acquisition and enjoyment and its limits in order to ensure its social function (funzione sociale) and to make it accessible to all. Property can be expropriated where permitted by law, for reasons of public interest (motivi di interesse generale) and with compensation.³

On the other side of the Alps, the French Constitution provides that property is an inviolable and sacred right of which no-one may be deprived unless public necessity (la nécessité publique), legally ascertained, clearly demands it and where fair and prior

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2. As explained in this paper, there is in practice no difference between ‘public purpose’ and ‘public interest’, accordingly these terms are used interchangeably.

3. “La proprietà privata può essere, nei casi preveduti dalla legge, e salvo indennizzo, espropriata per motivi d’interesse generale.”
compensation is paid (Article 17 of the Declaration of the Rights of Man and the Citizen of 1789). However, the French Civil Code, which is seamlessly linked to the Declaration of 1789, provides that no-one may be compelled to give up property, unless for public purposes (pour cause d’utilité publique) and with fair and prior compensation (Article 545).

At supranational level, Article 1 of the First Protocol (‘Article P1-1’) to the European Convention on Human Rights (ECHR) recognizes that contracting states have the power to expropriate in the public interest provided that this complies with domestic and international law.

These provisions demonstrate that the notion of public interest plays a central role in setting the limits within which the state can use its power of expropriation.

This paper discusses whether, despite the different language of these constitutional texts, the approach adopted by courts in the interpretation of the concept of public interest leads to a shared approach to the assessment of the reasons that can justify a compulsory acquisition of private property by the state. The analysis of the relevant case law will highlight the role that courts play in ensuring that states use their power to expropriate only when some public benefit results.

Assuming that the dynamics underpinning the development of expropriation laws are affected by underlying legal and political traditions, I will start with a short introduction to constitutional property law in Italy and France as well as under the ECHR.

4. “La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité.”


6. “(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
2.2 The Right of Property at the Interface between National Legal Traditions and the ECHR

The Italian Constitution follows a social model of property rights, while the French follows a liberal model. Article P1-1 was born out of the tension between the two.

The Italian Constitution of 1948 broke with the liberal tradition that permeated its predecessor (the Constitution of the Kingdom of Italy or Statuto Albertino) and marked a paradigm shift in the constitutional definition of property rights. It gave constitutional status to the principle of the social function of property, replacing the principle of the inviolability of property under Article 29 of the Statuto Albertino. The provision in Article 42 of the Italian Constitution that restrictions to property rights may be imposed to achieve its social function illustrates the interplay between individual and general interests. Moreover, a general reference to compensation (indennizzo) for expropriations replaced the fair compensation (giusta indennità) requirement in the Statuto Albertino that granted compensation to the expropriated owner of the full economic loss suffered.

In France, the constitutional basis for the protection of the right of property is in Articles 2 and 17 of the Declaration of 1789. Article 2 lists the right of property alongside liberty as one of ‘the natural and imprescriptible rights of man’ that every political association aims to preserve; whereas Article 17 proclaims the inviolability and sacredness of property. Even so, the idea that property rights should have their share of social responsibility has not been neglected in French constitutional history. Indeed, on 19 April 1946, the French Constitutional Assembly approved a constitution that moved away from the principle of the sacredness of the right of property, subordinating it to social utility. However, this constitution was rejected by a referendum and never entered into force. Subsequently, during the drafting of the Constitution of 1958, the concept of social utility was revived in a proposal to include in the preamble a provision stating that restrictions to property rights could be imposed only for imperative reasons when required by the common good. In the end, however, this proposal was also rejected because the reference to common good as both the foundation of and limit to the regulatory power of the state was considered to be inappropriate and the concept too elusive.7

As stated above, the final text of Article P1-1 in the ECHR is a compromise between the liberal and socialist ideologies. The recognition of everyone’s right to the peaceful enjoyment of property expresses the individualistic function of property rights, while the reference to public and general interest as a requirement for every interference with the right of property reflects its social function.8

8. See supra note 6: the second paragraph of Article 1 refers to ‘general interest’.
Having briefly described the letter of the law, I now examine its spirit as illustrated in the case law of the Italian Constitutional Court, the French Constitutional Council and the European Court of Human Rights (ECtHR).

When the Italian Constitutional Court came into operation in 1956, it was asked to determine the constitutionality of laws imposing harsh restrictions on the exercise of property rights as well as substantial obligations on owners that had been adopted by the legislature of the early 20th century, despite the proclaimed inviolability of property rights under the Statuto Albertino. In its landmark judgment No. 6 of 1966,9 the Italian Constitutional Court held that Law No. 1849 of 1932, which allowed public authorities to impose predial servitudes that severely affected the exercise of property rights, was unconstitutional because it did not provide for any compensation for restrictions that amounted to a deprivation of property rights (i.e. that fell short of expropriation). The Constitutional Court thus confirmed that the expropriation provision in the Italian Constitution (Article 42) should also apply to restrictions that have the effect of taking away the content of property rights by affecting enjoyment of it so as to make it useless or to cause a significant loss in its market value. It follows that, where a servitude or other restriction on property rights considerably impairs the content of the property right, the legislation that imposes it cannot be regarded as a mere regulation of property.

This approach shows that, while the Italian Constitution embraces a socially oriented concept of property, the Italian Constitutional Court has been ready to declare unconstitutional laws that, although adopted at a time when property rights were declared inviolable, were nevertheless intended to give priority to the public interest. This may at first appear a paradox, but it illustrates the development of a new constitutional order in which the courts began to defend civil rights and thus limit parliamentary supremacy. However, subsequent case law shows that the Italian Constitutional Court has developed standards of judicial review that entail proportionality considerations and whose purpose is restricted to safeguarding the very essence or substance of the right of property, showing thus a deferential attitude towards the legislature with respect to laws interfering with property rights.10

The French Constitutional Council, ruling on the Nationalization Act 1982, which provided for the transfer to the state of the entire privately owned stock of nationalized companies,11 gave general consideration to the constitutional protection of property

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First, it affirmed the constitutional value of the principles of the Declaration of 1789, i.e. ‘public necessity’ as the only legitimate ground for deprivation of property protecting against arbitrary expropriations. Then it acknowledged that since 1789, the notion of property rights had undergone significant change, in particular because of the extension of its scope of application or, alternatively, repeated restrictions on its scope as required by the ‘public interest’. In this way, the Constitutional Council paved the way for the public or general interest as a requirement for the constitutional legitimacy of legislation interfering with property rights, despite there being no reference to it in the text of Article 17 of the Declaration of 1789.

So, despite the liberal matrix of the Declaration of 1789, the acknowledgment by the French Constitutional Council that the public interest limits property rights embraces an idea of property deeply intertwined with the social context and that opens the doors to the development of social policies that advance the general interest.

The ECtHR has developed its own concept of property and defined the scope of the protection afforded to it by the ECHR through an interpretative approach intended to reflect societal ideas and values of present-day European democratic societies. Given the different legal cultures co-existing among the contracting states, the ECtHR has never departed from the compromise in Article P1-1. Thus, even though the ECtHR seems to favor the liberal model of property rights, some of its judgments still contain strong elements of social-democratic thinking.

2.3 Putting the Public Interest Requirement into Context: Scope and Meaning of the Protection of Property Rights

Albeit at different points in history, the French Declaration of 1789 and the ECHR were adopted with the predominant aim to protect individuals from tyranny and the abuse of state power. It follows that the guarantee against arbitrary deprivation of property is at the very core of Article 17 and Article P1-1. In particular, the protection of property rights in the French Declaration of 1789 has a strong symbolic value: it marked the break with
the feudal system and the overcoming of the Ancien Régime. Private property was – and to some extent still is – seen as closely connected with individual liberty. Accordingly, under Article 17 of the Declaration of 1789 takings of property are allowed provided that legally ascertained public necessity so requires. However, at the beginning of the 19th century the drafters of the French Civil Code replaced the public necessity requirement by a ‘public purpose’ requirement. Under Article 545 of the French Civil Code: “[n]o-one may be compelled to give up property, unless for public purposes (pour cause d’utilité publique) and with fair and prior compensation”. The public necessity requirement enshrined in Article 17 of the Declaration has had a limited impact on the development of French expropriation law and indeed has rarely been applied since, throughout the 19th century and until the 1970s, the principle of parliamentary supremacy prevented the invalidation of legislation on the grounds that it infringed a fundamental right.

Starting from decision No. 89-256, the French Constitutional Council has consistently affirmed that, in order to comply with the public necessity constitutional requirement, the law may only authorize the expropriation of properties or real rights in order to carry out an initiative the public purpose (utilité publique) of which has been established by law.17

While Article 17 of the Declaration of 1789 has not changed, French expropriation law has evolved following two diametrically opposed ideologies. Until the beginning of the 20th century, laws on expropriation were organized in a way to protect private property rights. After World War I, the liberal model of the state was ousted by a dirigeiste state more prone to intervene in economic and social spheres and expropriation became a tool to advance the public interest to the detriment of proprietary interests. Moreover, 19th century socially oriented legal thinkers began to question the individualism that was to characterize society born from the French Revolution. The idea of social solidarity gained momentum favoring the adoption of social policies that advanced the general interest and the development of judicial doctrines that gave priority to public interests over private ones.

Under the ECHR, the protection of the right of property is intended to serve its main aim of maintaining justice and peace in the world by ensuring that certain civil and political rights are protected at the national level under the supervision of an

international court. So, after proclaiming that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions”, Article P1-1 states that “[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. Interpreting Article P1-1, the ECtHR has affirmed that the object and purpose of Article P1-1 “is primarily to guard against the arbitrary confiscation of property”.

By contrast, the Italian Constitution of 1948 was intended mainly to define the institutional structure of the new Republic. Marking the transition from a liberal to a social democracy, the Italian Constitution broke with the traditional idea that the foundation of and justification for the right of property is closely linked to the preservation of individual freedom through the appropriation of goods which the individual needs to live and flourish. Indeed, Article 42 is in Title III, which concerns economic relations. Moreover, giving constitutional status to the social function principle, it supports the idea that property is justified as an institution insofar as it is conducive to the realization of the public interest. Accordingly, Article 42(3) provides that: “[w]here provided for by the law and with provisions for compensation, private property may be expropriated for reasons of public interest”; and that: “[p]rivate property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all”.

2.4. Looking for the Meaning of Public Interest through the Lens of Courts

As stated above, the public interest requirement is a guarantee against the misuse of state power to expropriate. Since administrative authorities determine whether there is public interest in the private property to be acquired, judicial control lies with the administrative courts. The Italian Constitutional Court and the French Constitutional Council can hear challenges to legislative acts that lay down the terms and conditions under which the administrative authority can adopt a declaration of public purpose.

19. According the French version of Article P1-1, deprivations are permitted only ‘pour cause d’utilité publique’.
21. On the contrary, Art. 29 of the Statuto Albertino followed the pattern of Art. 17 of the Declaration of 1789, stating that compulsory transfer of property could occur when required by ‘legally established public interest’. As explained by the commentators of the Statuto Albertino, the state could not take private property for the sole purpose of economic profit, but it had to use its power of expropriation to realize the public interest, which did not necessarily correspond to the interest of the state as a whole since the satisfaction of the interest of a part of the population was sufficient. The public interest was to be understood broadly as to include the embellishment of public spaces or improvement of public comfort besides those of social conservation or amelioration. See, F. Racioppi & I. Brunelli, Commento allo Statuto del Regno, Vol. II, Unione Tipografico-Editrice Torinese, Torino, 1909, pp. 171-172.
Both administrative and constitutional courts are therefore involved in defining the scope of the notion of public purpose in expropriation litigation.

In its early case law, the Italian Constitutional Court distinguished between takings for public purposes under the law on expropriation (Law No. 2359 of 1865) and acquisitions of property under agrarian reform laws. Article 16 of Law No. 2359 of 1865 allowed takings in consideration of the intrinsic characteristics of the property and the public interest it was intended to serve. By contrast, agrarian reform laws aimed at the redistribution of land for a partial economic reorganization of land ownership. Accordingly, the latter affected owners in proportion to the size of their estates, not a property in view of a specific public interest. As the Constitutional Court emphasized, the aim of acquisitions under agrarian reform laws was not to transfer to the state or a public authority ownership of properties objectively suitable for achieving a goal of public interest but rather to suppress large-landed estates.

Laws on agrarian reform were thus adopted on the basis of social, economic, and legal considerations. By contrast, expropriations for public interest concern properties that are objectively suitable for the realization of a specific project of public interest. This rules out the possibility for public authorities to have recourse to the power of expropriation on the basis of general economic and social considerations.

Interpreting the expropriation clause in Article 42(3) of the Italian Constitution, the Constitutional Court does not distinguish between the notions of public interest and public purpose. Indeed, it has affirmed that the term ‘public interest’ (motivi di interesse generale) is synonymous with ‘public purpose’ (utilità pubblica) and both are to be interpreted as requiring the existence of important community interests (ragioni importanti per la collettività).

However, the Italian Constitutional Court places great emphasis on the public interest requirement that – according to its case law – expropriations must be necessarily and directly related to the satisfaction of actual and specific needs of the community. It follows that an expropriation intended to transfer to the state an asset for a future

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23. Constitutional Court, judgment No. 8, 9 March 1959.
25. Constitutional Court, judgment No. 30, 25 February 1975. The Constitutional Court was asked to decide on the constitutionality of legislation that imposed a compulsory extension of tenancy agreements. It denied that the provision could be considered as expropriation. In the Constitutional Court’s opinion, the restriction imposed on the landlord’s right of property met the social function requirement and was legitimate. This jurisprudence was held by the ECHR to be contrary to Art. 1-P1.
hypothetical use to serve a specific public interest will not meet the public purpose requirement. Expropriation cannot therefore be justified on the basis of the mere suitability of a property to be used to satisfy a community need. Following this logic, the Italian Constitutional Court has, for instance, declared contrary to Article 42(3) the renewal of zoning plans by a public authority without considering whether the interests of industrial development (which had justified the adoption of the plans at issue) were still present.

Although Article 42 refers to the broad notion of public interest, the main focus of expropriation of property in the Italian legal order is the realization of public works, which is interpreted extensively. Indeed, Article 1 of the Code on Expropriation provides that the Code applies to the transfers of immovable properties or rights in rem on immovable properties to the state or to a private party for the purpose of public works. Works necessary to grant to the community the use of a specific land or property are considered to be public works. It is not necessary that the property is radically and irreversibly altered, since a partial alteration to grant its public use is sufficient. As the administrative courts have acknowledged, the notion of public works is extremely broad and encompasses all public and social infrastructures, e.g. parks, gardens, and sports facilities, as well as works relating to public utilities services, e.g. plants for the production of wind energy.

The recognition that an expropriation for a public purpose could entail a private-to-private transfer implies that entrepreneurial interests could trigger a taking of property. A classic case concerns the building of new hotels or conversion or extension works on existing ones. This scenario was regulated by the Royal Decree No. 1473 of 1938, which was repealed by the Code on Expropriation.

27. Id. More precisely, the Constitutional Court declared the unconstitutionality of a provision of the law that fixed the purpose of the expropriation – namely, the construction of a public work – but did not set the deadline for its implementation, thereby allowing expropriations intended to meet community needs that no longer existed.


31. Regional administrative tribunal for Calabria, Sec. I, judgment No. 2876, 6 December 2010, Foro amm. TAR 2010, 12, 4040. The case concerned the arrangement of a park area that did not require the construction of buildings or the material transformation of the land.


34. The decree governed the procedures through which municipalities, other public authorities, and private parties could promote the expropriation of immovable property or other rights in rem in order to build new hotels or carry out extension works with regard to the existing ones.
However, according to the administrative courts, the repeal only related to the procedure to follow, and accordingly, the interests set out in the royal decree were still to be considered.\textsuperscript{35} The building or extension of a hotel complex cannot be considered \textit{ipso facto} a public purpose, but it is up to the administrative authority to declare the public purpose of the works on the basis of a comparative assessment of all the interests concerned. Thus, for instance, the regional administrative tribunal for Lazio ruled out a proposed extension of a hotel that was already oversized with respect to tourism demand.\textsuperscript{36}

In France, the scope of the notion of public purpose has continually evolved with the evolution of the role of the state. From the early 19\textsuperscript{th} century to the beginning of 20\textsuperscript{th} century, the tasks of the state were limited and the scope of the notion of public purpose covered the realization of public works. Accordingly, specific legislation allowed the expropriation of housing considered as irretrievably unhealthy\textsuperscript{37} or environmentally hazardous properties,\textsuperscript{38} for the prevention of technological risks,\textsuperscript{39} for implementing town planning schemes,\textsuperscript{40} for reforestation of mountains,\textsuperscript{41} for building tramlines,\textsuperscript{42} for installing telegraph wires or telephone lines,\textsuperscript{43} for building sports facilities,\textsuperscript{44} to protect historic buildings or natural sites,\textsuperscript{45} to constitute land reserve,\textsuperscript{46} and to realize a profit.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{35} Council of State, Sec. IV, judgment No. 795, 29 February 2008, \textit{Foro amm. CDS} 2008, 2, I, 425.
\item \textsuperscript{36} Regional administrative tribunal for Lazio, Sec. II, judgment No. 6453, 28 June 2013.
\item \textsuperscript{37} Law of 13 April 1850 on unhealthy housing. For comment, see A. Des Cilleuls, \textit{Commentaire de la loi du 13 avril 1850 sur les logements insalubres}, Imprimerie et Librairie Générale de Jurisprudence Cosse, Marchal, Paris, 1869.
\item \textsuperscript{38} Law No. 95-101 of 2 February 1995 on strengthening of environmental protection, \textit{Journal Officiel de la République Française} No. 29 of 3 February 1995, p. 1840. In particular, according to Art. 11, the state can expropriate properties prone to landslides, avalanches, or floods that seriously threaten human lives.
\item \textsuperscript{40} See, for instance, Decree of 26 March 1852 on Paris streets, \textit{Bulletin des Lois}, 10e S., B. 514, No. 3914.
\item \textsuperscript{42} Law of 11 June 1880 on local railways and trams, \textit{Journal Officiel de la République Française} of 12 June 1880, p. 17520.
\item \textsuperscript{43} Law of 28 July 1885 on the establishment, maintenance and operation of telegraph and telephone lines.
\item \textsuperscript{44} Law of 25 March 1925 on expropriation in the public interest for building sports fields.
\item \textsuperscript{45} Law of 30 March 1887. \textit{See}, Société française d’archéologie, \textit{Loi du 30 mars 1887 pour la conservation des monuments et objets d’art ayant un caractère historique et artistique}, Henri Delesques Imprimeur-Editeur, Caen, 1887.
\item \textsuperscript{46} Financial Act No. 67-1253 of 30 December 1967, \textit{Journal Officiel de la République Française} du 3 janvier 1968, p. 3.
\item \textsuperscript{47} Law of 6 November 1918 on expropriation on public utility, \textit{Journal Officiel de la République Française} of 12 November 1918, p. 9797. This allows municipalities to expropriate private properties that would benefit by an increase in value due to public works in order to resell them and keep the profit.
\end{itemize}
With the broadening of the tasks of the state, the notion of ‘public purpose’ (utilité publique) started to fade and blur with that of the public or general interest. Declaring the validity of an expropriation to build an amusement park, which was a purpose not specifically covered by existing legislation, the French Council of State affirmed that the concerned project could be declared to have public purpose by reason of its general interest.48

Following this logic, the administrative courts consider that the public purpose requirement is met when the pursued aim falls within the (wide) scope of the notion of general interest.

Even an expropriation that benefits a private party could meet the public purpose requirement if it also satisfies some public interest. In the 1970s, the French Council of State established the principle according to which expropriations that directly benefit the interests of a private company are in the public interest insofar as they favor economic regeneration.49 The leading case is Ville de Sochaux, where the Council of State found that an expropriation to modify the road network to directly favor a car company complied with the public purpose requirement since it satisfied the general interest of developing an industrial estate of relevant importance for the local economy.50

The French Council of State has thus overcome the traditional split between private and public interests; however, it has made it clear that an expropriation that benefits only the interests of a private party would be declared invalid.51

The existence of a public interest is an issue that can be raised before the ECtHR. As made clear by the European Commission on Human Rights (ECommHR),

Although there is no reference to ‘expropriation’ as such in the Article, its wording, especially the phrase ‘deprived of his possessions except in the public interest’ and the reference to the ‘general principles of international law’, shows clearly that it is intended to refer to

49. See, for instance, Council of State, judgment No. 97145, 23 May 1979, Rec. Lebon, concerning the building of a branch in a railway line that favored a manufacturer of marble; Council of State, judgment No. 09649, 7 November 1979, DA 1979, comm. No. 404, concerning an urban renewal project to build a shopping mall.
51. See for instance, Council of State, judgment No. 74438, 7 May 1969, concerning the construction of a helipad for a town councillor; Council of State, No. 21743, 20 November 1981, concerning the expropriation of a private road for the sole benefit of a private party; Council of State, No. 176174, 17 September 1999, AJDI 2000, p. 131, concerning the expropriation of private properties to build a road for the sole benefit of a single inhabitant of the town.
formal (or even *de facto*) expropriation, that is to say the action whereby the State lays hand – or authorizes a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest. This interpretation is confirmed by the *Travaux préparatoires* for Article I of the First Protocol.52

Accordingly, the ECommHR stated that Swedish legislation, which empowered majority shareholders in a company to acquire the shares of minority shareholders, did not amount to a deprivation of property within the meaning of Article P1-1. More specifically, the Commission considered that the legislation at issue was, the practical expression of a general legislative policy towards private companies and concern[ed] principally relations between shareholders. The general intention of this type of legislation is naturally to favor whatever interests are considered most worthy of protection, which has nothing to do with the notion of ‘public interest’ as it arises in the context of expropriation.53

However, according to ECtHR case law, it is not necessary that an expropriation benefits the community at large, provided that its purpose is other than to confer a private benefit on a private party. Indeed, a compulsory transfer of property from one individual to another may in principle be considered to be in the public interest if the acquisition pursues legitimate social policies. Thus, in the *James* case the ECtHR found that English legislation that conferred on certain tenants the right to compulsorily purchase the freehold from the landlord on certain terms and conditions constituted a legitimate means for promoting the public interest.54 In general terms, the ECtHR stated that, a taking of property effected in pursuance of legitimate social, economic or other policies may be ‘in the public interest’, even if the community at large has no direct use or enjoyment of the property taken.55

ECommHR and ECtHR case law follows the principles stated in the *James* case and acknowledges that certain aims can legitimize compulsory transfers of property between private persons, such as the rationalization of agriculture,56 the execution a slum clearance plan,57 and the restitution of property that had been expropriated contrary to the rule of law58 or that was intended to redress infringements of human rights under communist governments.59

53. *Id*.
55. *Id.*, para. 45.
Finally, according to the ECtHR, there is no real distinction between the notion of public interest and that of general interest in the second paragraph of Article P1-1 to define the state’s discretion in regulating the use of someone’s property; both should be given an extensive meaning. Examples of cases where the ECtHR found that deprivations of property were supported by a public interest include the following: nationalization of certain industries, building a Freeport zone, building social housing, to ensure ecological conservation, and to manage road traffic in a more efficient way.

2.5 Questioning the Public Interest of Takings: Which Standard of Judicial Review?

Judicial review of the public interest of an expropriation is a particularly difficult task because it entails public welfare considerations with respect to which the executive and legislative powers have more knowledge than judges. The courts considered in this paper tend to grant to the legislature and the executive broad leeway to decide when an expropriation is in the public interest.

In view of this, the French Constitutional Council carries out a narrow review of the public purpose of a deprivation of property. Considering that the assessment of public interest lies with the legislature, the French Constitutional Council, as a rule, requires the legislature to be precise about the public interest aims pursued by legislation referred to it; but it does not carry out a far-reaching review of their actual suitability to achieve the stated public interest.

A more penetrating review of the public interest in expropriation cases is conducted by French administrative courts. Until the early 1970s, the administrative courts did not inquire into the circumstances surrounding expropriations, thus avoiding

60. See note 7.
61. App. No. 9006/80, 9262, 9263, 9265, 9266, 9313 and 9405/81, Lithgow and others v. The United Kingdom, ECtHR (1986).
66. See, Constitutional Council, 16 January 1982, Dec. No. 81-132 DC, especially paras. 19-20, Rec. 18. Declaring the constitutionality of the Nationalization Act of 1982 the Constitutional Council considered, on the one hand, that nationalizations respond to a public necessity insofar as they were intended to give the government means to cope with the economic crisis, to promote economic growth, and to fight unemployment, and, on the other, it limited itself to remark that the assessment made by the Parliament on the need for nationalizations was not flawed by any manifest error, without considering the actual suitability of nationalization measures to respond to the stated public necessity.
referring to the suitability of the use of the power to expropriate made by public authorities. In 1971, the French Council of State broke fresh ground by stating that an expropriation can be said to meet the public purpose requirement only if the prejudice to private property, the financial cost, and the social disadvantages do not outweigh the public interests related to the expropriation.67 Asked to rule on the legality of a project entailing the expropriation and demolition of about a hundred houses to build a new urban area including university campus and residences, the Council of State affirmed that given the importance of the project, it had a public interest despite its costs and the impairment to property rights.

The Council of State went further than checking the legality of the expropriation with regard to compliance with substantive and procedural rules and considered its economic and social efficiency. In other words, it pronounced on the suitability in concreto of the expropriation.

A year later, the Council of State referred to other public interests liable to be affected by the realization of the works for which the expropriation is required as among the factors to be considered when assessing the suitability of an expropriation.68 Among these, for instance, is the protection of the environment69 or monuments.70

This ‘cost-benefit analysis’ as developed by the Council of State gives it a broad discretion to review the public interest of a project since it covers all potential drawbacks, including any prejudice to private property rights.

The case law of the Council of State shows however that it is cautious when it comes to annul a declaration of public interest. In principle, the Council of State is more prone to set aside a declaration of public interest when it finds that various interests are adversely affected by the project. Moreover, only in a few cases has the cost-benefit analysis led the Council of State to conclude that the public interest of a given project could not justify a taking of property because it excessively impaired private property rights. The case of Epoux X decided on 25 November 1988 is one example in point. The expropriation was planned to implement a project of reforestation of an area belonging to a small

69. Ex plurimis, Council of State, judgment No. 01859, 9 December 1977, Rec. Lebon, the Council stated that concerns for environmental protection opposed a project of parceling out a picturesque place; Council of State, judgment No. 01554, 26 March 1980, Rec. Lebon, the Council stated that the declaration of public purpose of a project of building a seaside resort was unlawful because it would have seriously deterio-rated the natural site.
70. Council of State, judgment No. 115073, 3 March 1993, Rec. Lebon, concerning the building of a new route to Paris. The Council found that the harmful effects on historic buildings were not severe enough to invalidate the declaration of the public purpose of the project.
municipality that already had several parks and gardens. According to the Council of State, the project had a limited public interest, considering the heavy burden imposed on the claimant’s property. The concern for the protection of property rights thus prevailed over the public interest because the reforestation project lacked a relevant economic and social interest. Under the cost-benefit analysis, the weight of property rights is thus inversely proportional to the economic and social interest of the project concerned. However, the Council of State attaches great weight to property rights when they contribute to the realization of a public interest. Thus, for instance, in a case concerning the taking of a piece of land to realize a public housing project, the Council of State found that the project pursued an aim of public interest, but it then considered the drawbacks of the expropriation. In particular, the Council of State stressed that the expropriation would have prevented the expropriated owners from carrying out extension works on their hotel, which entailed economic and tourism interests. Accordingly, the Council held that the impairment to private property rights and to the public (economic and tourism) interest linked to them was not justified by the public interest, despite the social interest of the planned work.

A final scenario in which the concern for the protection of private property rights would lead the administrative courts to question the legality of the act declaring the public interest of an expropriation is where the public authority had already at its disposal a piece of land enabling the realization of the project.

In conclusion, ruling on the public interest of an expropriation, the French Council of State has overstepped the boundaries of the review of legality to rule on the suitability of the project. However, the Council of State has made a cautious use of the discretion implicit in the cost-benefit analysis to appraise the public interest of a project. The cases in which the declaration of public interest is set aside are rare and mostly related to projects of interests concerning small communities. Indeed, the Council of State has never denied the public interest of projects concerning public works of national interest, even when serious doubt had been cast on the economic efficiency of a project.

73. Council of State, judgment No. 343070, 19 October 2012, concerning a taking of private property to build social housing despite the fact that the municipality owned several pieces of land that could have been used to carry out the social housing development plan.
74. See Council of State, judgment No. 83261, 26 October 1973, where it denied the public utility of a project to build an aerodrome since the project was insufficient to meet the need of business aviation and benefit the small number of inhabitants of the municipality who did aerial sports.
75. For instance, the State Auditors’ Department questioned the profitability of the high-speed Paris-Lyon railway line, but the Council of State considered that the project was in the public interest despite its costs and the uncertainty of its profitability. See Council of State, judgment No. 02910, 03109, 03128, 21 January 1977, Rec. Lebon, p. 30. More generally, it has been observed that, with regard to projects that
Similarly to the French Constitutional Council, the ECtHR applies a low level of scrutiny on the public interest issue. Considering that “national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’, and that ‘the decision to enact laws expropriating property will commonly involve consideration of political, economic, and social issues on which opinions within a democratic society may reasonably differ widely’”, the ECtHR has affirmed that it “will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation”. Since it cannot substitute its own assessment for that of the national authorities, its role should be limited “to make an inquiry into the facts with reference to which the national authorities acted”.

Once the ECtHR has established that the taking of property is in the public interest, it considers whether the expropriated property has actually been used to serve the stated public purpose. However, cases where the ECtHR found that property that had been lawfully expropriated but not used in accordance with the stated public interest are rare. The first case where the ECtHR considered that the non-use of the expropriated property raised an issue in respect of the public interest requirement is *Motais de Narbonne v. France*. The case concerned a property that had been expropriated under French legislation that allowed certain public authorities to expropriate to obtain a land reserve for future development. The property was intended to be used to build social housing but the expropriated land lay unused for 19 years. The ECtHR affirmed that the public interest requirement in Article P1-1 entails the assessment *in concreto* of the public interest, namely, the actual realization of the project. However, the ECtHR affirmed that the placing in reserve of expropriated property, even for a long period of time, does not necessarily entail a breach of Article P1-1. It found that Article P1-1 was contravened because the applicants had been deprived of the significant increase in value of the expropriated land.

The ECtHR adopted the same approach in the case of *Vassallo v. Malta*, concerning an expropriation for building a social housing project that had not been started for almost 30 years. Also in this case, the ECtHR found a breach of Article P1-1 on the ground of the general principle of proportionality. However, it considered that the requisite balance had not been struck because the applicant had not received any compensation.

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76. James and others, cit. supra note 40, para. 46.
77. Id.
This approach reveals that the public interest requirement as applied by the ECtHR offers a weak protection to private owners against misuse of the state’s power to expropriate. In fact, the ECtHR has never found a breach on the basis that an interference was not in the public interest, although in some cases it cast doubt on the reasons of public interest raised by the respondent governments. An example of this is the Lecarpentier case, where the applicants complained about the retroactive application of legislation governing loans that had the effect of depriving them of their legitimate expectation of being able to recover a certain sum. The ECtHR was in doubt as to whether the interference was in the public interest insofar as the legislation at issue was not plainly supported by overriding reasons of general interest. Nevertheless, the ECtHR maintained that there had been a violation of Article P1-1 on the grounds that the measure had placed an abnormal and excessive burden on the applicants and that interference with their possessions had been disproportionate.

Thus, the ECtHR’s test in expropriation cases is a fair balance test, under which the availability and amount of compensation, as well as the existence of adequate procedural protection for the right of property, carry more weight than the public interest.

Finally, in Italy, the public purpose requirement does not play a significant role in expropriation litigation. Despite the plain language of the Italian Constitution that distinguishes social function (which pertains to the exercise of property rights) and public interest justifying the exercise of the state’s power of expropriation, the distinction has become blurred over time. Indeed, the Italian Constitutional Court does not consistently distinguish between regulation of property and expropriation, avoiding a rigorous application of the second and third paragraph of Article 42. As stated above, the Italian Constitutional Court has found a breach of the constitutional protection of property where the right to property is extinguished or diminished without compensation, even though the owner has not been deprived of actual ownership. Thus, in certain circumstances, the Italian Constitutional Court equates regulation to expropriation, with consequent implications in terms of compensation. This is the case, for instance, of restrictions to the owner’s right to build directed to implement town planning. According to the case law of the Constitutional Court, these restrictions must end after a reasonable time, or the owner must be compensated.

On the other hand, the Italian Constitutional Court has referred to the social function principle in order to declare the constitutionality of the so-called occupazione acquisitiva. The occupazione acquisitiva rule has been developed by the Italian courts since the late 1970s to resolve disputes concerning the occupancy of a private property by public authorities for a longer time than allowed by law and without completing the expropriation procedure. Confronted with cases in which the landowner had lost de facto use of the land since local authorities had taken possession of it and a public works project had been undertaken, the Italian courts had to decide whether the landowner had lost title to the land as a consequence of the mere fact that the work had been carried out. The Italian Court of Cassation has developed different lines of case law on this. The prevailing solution is that public authorities acquire title to the land from the outset, even though an expropriation procedure is not initiated or completed, provided that public works on the land are completed after the land was occupied (and irrespective of whether such occupation was lawful in the first place). In similar cases, the expropriated private owner is entitled to compensation under tort law. Addressing the specific issue of the constitutionality of this principle, which, as developed by case law, linked the transfer of ownership to the unlawful action of public authorities, the Italian Constitutional Court held that occupazione acquisitiva amounted to a mode of acquiring property whose rationale lay in the balance between public and private interests. Its regulation was held to be a concrete manifestation of the social function of property. Considering that the realization of public works on the land transformed the soil to the point that there was no more an identity between the land acquired by the public authority and that taken from the private owner, the Italian Constitutional Court ruled that occupazione acquisitiva was outside the scope of Article 42(3) and was instead a case of original acquisition of property. This theory of occupazione acquisitiva as a mode of acquiring property was then codified in Article 43 of the Code on Expropriation. Under this article, in the absence of an expropriation order, or a declaration stating that the expropriation is in the public interest, the land that had been altered following the construction of public works is transferred, by means of an act of acquisition adopted ex post, into the ownership of the authority that had altered it. The former owner of the land is entitled to damages. This mode of acquisition is admitted even where town planning measures, or the declaration that the expropriation was in the public interest, is set aside.

Even though Article 43 of the Code on Expropriation requires the public authority to use the illegally occupied property for public interest purposes, this form of

forms of compensation including, for instance, the allocation to the owner of other areas suitable for his needs.

Expropriation empties the public interest requirement set down in Article 42(2) of all meaning. Indeed, to provide for an effective guarantee against arbitrary actions of public authorities, the declaration of public interest should be issued before the actual expropriation of the private property, to make sure that the taking of property responds to real and actual needs of the community. To allow the public authority to issue the declaration of public interest after taking possession of the property raises the risk that the public interest is made out *ex post* to justify the use and the acquisition by the public authority of an unlawfully occupied property.

Eventually, the Italian Constitutional Court declared that Article 43 of the Code on Expropriation is unconstitutional in its judgment No. 293 of October 8, 2010. The Court held that provision to contrary to Article 76 of the Italian Constitution, which governs the exercise of delegated legislative powers by the government. The matter is now regulated by Article 42- *bis* of the Code on Expropriation. According to this new text, the act declaring the transfer of property must specifically state the exceptional reasons of public interest that justify the taking of property, after due consideration of the owner’s interest, and where there is no reasonable alternative.

2.6 Conclusion

The above comparisons show that, in the field of the protection of private property, underlying cultural and political aspects can play a greater role than specific constitutional language. Indeed, although the French Constitution does not provide for social obligations with respect to property rights, French governments have been more active than Italian ones in enacting social policies, and the French Constitutional Council has proved to be willing to sanction social limitations on property rights.

Even though the Italian Constitution clearly establishes that expropriation in the public interest can only take place in the cases permitted by law and with compensation, the Italian Constitutional Court has recognized, to some extent, expropriations that did not follow procedures laid down by law. For example, the Italian Constitutional Court’s judgment No. 6 of 1966 interpreted the concept of expropriation to include the extinction or diminishment of the right of property without compensation, even though the owner had not been deprived of actual ownership. Even more telling is the fact that the Italian Constitutional Court held that constructive expropriations carried outside the framework of lawful procedures could be considered as a way

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85. Constitutional Court, judgment No. 293, 8 October 2010, *Foro it.* 2010, 12, I, 3237.
of acquiring property in keeping with the social function clause of the Italian constitution.86

In Italy, the public purpose requirement does not play a significant role in expropriations litigation. The Italian Constitutional Court has however made clear that for an expropriation to be in the public interest, the expropriated property must be used to satisfy an actual and specific need of the community.

French courts and scholars have paid more attention to the public interest requirement than their Italian counterparts. In particular, French administrative courts have developed cost-benefit analysis criteria that, at first sight, may seem to introduce the principle of proportionality in expropriations litigation. However, a closer analysis of this jurisprudence reveals that such analysis serves a function which is different from that of the proportionality test. The latter protects individuals against misuse of state discretion, condemning state acts that place on the individual an excessive burden compared to the public interest concerned. On the contrary, the cost-benefit analysis carried out by French administrative courts assesses the socio-economic efficiency of a project. In other words, French administrative courts ensure that expropriations serve public interests that are relevant and real, by assessing in concreto the appropriateness of the contested expropriation and by taking into consideration all conflicting private and public interests affected by the realization of the project already declared of public interest. However, from the case law of these Courts, it is impossible to extrapolate objective criteria to use for ranking the various public interests. The Council of State seems to apply a sliding scale balancing the scope and degree of importance of the project against the nature of the other public interests involved. Among them, economic interests carry significant weight.

Having a different institutional role, the ECtHR has adopted an extensive interpretation of the concept of deprivation of property to offer a far reaching protection to individuals against arbitrary takings of property. The ECtHR allows contracting states a wide margin of appreciation in determining whether expropriations further the public interest. Only in a few cases the ECHR checked in concreto the actual existence of the general interest invoked by the respondent government. This approach can easily be

86. A prototype of the constructive expropriation doctrine can be found under French law. Relying on the principle of intangibility of public works, courts at first rejected claims for the restitution of land that public authorities had irregularly occupied and on which a public work had been built. However, the Court of Cassation condemned this approach, holding that a compulsory transfer of property must take place only in conformity with expropriation proceeding rules. See, Court of Cassation, Plenary Session, 6 January 1994, App. No. 89-17049, Bull 1994, I, p. 1. On this subject, see J.-F. Strillou, Protection de la propriété privée immobilière et prérogatives de puissance publique: contribution à l’étude de l’évolution du droit français au regard des principes dégagés par le Conseil constitutionnel et par la Cour européenne des droits de l’homme, L’Harmanattan, Paris, 1996, pp. 69 et seq.
understood if one considers that there is no European legal consensus on a specific model of property. Furthermore, the notion of public interest is a symbolic representation of the values that a given society considers to be of overriding importance with regard to the owner’s interests. To a degree, this is bound to be different for different polities. Moreover, there is a direct link between the scope of the public purpose requirement and the tasks of the state in a given society. The deference showed by the ECtHR towards national decision-makers about what is in the public interest is thus an expression of ECtHR’s willingness to provide individual justice while respecting national legal traditions and cultures.

However, the ECtHR the weak control on the actual public interest of expropriations is counterbalanced by a strict scrutiny of compensation under the fair balance test. Requiring – as a rule – the state to pay full compensation corresponding to the market value of the expropriated property should discourage self-interested acts of public authorities.

In conclusion, from the perspective of the protection of the right to private property, the suitability of the public interest requirement in terms of effective protection given to private owners against arbitrary takings of property rights can be questioned considering the vagueness of the notion of public interest itself. On the contrary, the fair balance test developed by the ECtHR by giving property rights greater weight than competing public interests offers a strong protection to property rights. The right of property prevails unless the state demonstrates that the interference with it is proportionate.
The South African Constitution renders expropriation of property unconstitutional unless it meets two requirements: section 25(2)(a) states that an expropriation must be “for a public purpose or in the public interest”; and section 25(2)(b) requires it to occur against payment of just and equitable compensation. The latter requirement describes the necessary consequence of a valid expropriation. The former provides the acceptable justification for expropriation, guards against unjustifiable, compulsory loss of private property, and keeps fraudulent or capricious exercise of the state’s powers in check. The binary formulation of this justificatory requirement in section 25(2)(a) – that expropriation must be either ‘for a public purpose’ or ‘in the public interest’ – is a peculiarity. What do these phrases mean? Why is it necessary to distinguish between a public purpose and the public interest? Are the phrases tautologous? Is it even likely that the Constitution – a document representing supreme law – would contain such tautologies?
In this contribution, for ease of reference, the requirement that an expropriation must be for a public purpose or in the public interest is labelled the ‘public purpose requirement’, but that should not be taken to suggest that the public interest aspect of the requirement is subordinate. In fact, the purpose of this contribution is to attempt to make sense of the binary formulation of the requirement. Accordingly, I attempt to identify the relationship between the terms ‘public purpose’ and ‘public interest’.

The analysis depends on case law to establish the role and application of the binary public purpose requirement in South African expropriation law since the introduction of the new constitutional order, but it also examines case law which has considered the terms outside the expropriation context. It finds that previous scholarly work, my own included, is mistaken: if not about the reason for the binary requirement, then about its implications. My argument here is that the requirement is fundamentally conflicted in South African law and needs to be reconceptualized.

The analysis takes particular heed of the function of expropriation as a tool of social (re)structuring and transformation. Even the most cursory of looks at South African expropriation law highlights the role of expropriation in manipulating social change. This underscores the relevance of engaging with the public purpose requirement.

4. While some of this work was done in the context of my doctoral studies (see H. Mostert, The Constitutional Protection and Regulation of Property and Its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis, 1st edn, Springer, Heidelberg, 2002), I had the benefit of relying on several more recent scholarly analyses, of which Slade 2012, supra note 1 and X.H. Nginase, The Meaning of ‘Public Purpose’ and ‘Public Interest’ in Section 25 of the Constitution, LLM, Stellenbosch University, 2009 deserve special mention.

South Africa is currently rewriting its expropriation law; an exercise which is long overdue. A proper conceptualization of public purpose and public interest could be useful in clarifying a part of our law in which uncertainty abounds. This uncertainty has implications for at least three practical questions. The first is whether the public purpose requirement can be satisfied where property is expropriated to benefit (or be transferred to) another private person (hereafter referred to as the ‘third-party transfer’ issue). The second is what happens when the purpose for which property was expropriated changes, or is abandoned: what are the rights of the former owner? (This is hereafter referred to as the ‘change-of-purpose’ issue.) The third is whether an expropriation would be legitimate if the public purpose could be served equally well by a less invasive course of action. Another approach to this question is observable in situations where it is argued that the state is expropriating more than the public purpose would justify. (This is hereafter referred to as the ‘intrusiveness’ issue.)

### Background

To support the argument that the South African public purpose requirement is fundamentally conflicted and needs to be rethought, the clumsiness of the South African formulation of the requirement needs to be explained. This requires a brief look at the origins of the binary formulation. It also begs some explanation of the deliberate obfuscation – the ‘fudging’ – of basic concepts in the law pertaining to expropriation. The anomalies of the context in which the requirement must be applied also desire exposition.

#### Anomalous Relationship between Statute and Constitution

In one of the greatest anomalies of South African property law and constitutional law, the constitutional provisions on expropriation are given effect by a statute that was enacted in 1975, during the heydays of Apartheid and long before the Constitution came into force. The South African state’s power to expropriate was originally derived from various statutes and later consolidated considerably in the Expropriation Act 55 of 1965 (‘the 1965 Expropriation Act’) and its successor, the current Expropriation Act 63 of 1975 (‘the 1975 Expropriation Act’). Section 2 of the 1975 Expropriation Act allows expropriation of property for a public purpose against payment of compensation.

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9. *Id.*, at p. 101, n. 22.
Neither the Interim Constitution of 1993, nor the Final Constitution of 1996 repealed pre-existing legislation. In fact, in so far as pre-existing legislation does not contradict the Constitution, it remains in force.10

Pre-existing legislation may be ‘read down’ to align with constitutional goals.11 Where this legislation contains discrepant provisions, they may be severed from the statute that is otherwise reconcilable with the Constitution;12 or otherwise such discrepant provisions may simply not be applied.13 Substance can also be ‘read into’14 such pre-existing statutes to achieve constitutional alignment.15 For as long as the 1975 Expropriation Act continues in force, these interpretative mechanisms will assist in applying it in ways that make up for its lack of transformative intent.

Gildenhuys’ authoritative source on South African expropriation law16 – last updated 14 years ago – suggests that the provisions of the constitutional property clause supplement those of the Expropriation Act.17 This position is incorrect, in that it fails to acknowledge the supremacy of the constitutional provisions, and instead subordinates them to those of the Expropriation Act. However, the position is borne out of the challenge of having to reconcile the substantive and procedural statutory provisions dealing with expropriation with the constitutional ideal of transformation as expressed in the property clause. Current scholarship, particularly that of Van der Walt,18 rejects this view regarding the subordination of the constitutional meaning, but indicates that interpretative problems are unlikely to arise because of the lenient...
interpretative approach South African courts follow, even when faced with the rather complicated binary public purpose requirement in section 25(2). The closer look below at expropriation issues decided in the constitutional era suggests that the latter view is also mistaken, and that in the absence of clearer guidance from the Constitution, the interpretative problem will remain. This renders the revision of South African expropriation law all the more urgent.

Attempts to rewrite South Africa’s statute on expropriation after 1996 have failed so far. After several years of work, the Expropriation Bill was shelved in 2008. In a renewed attempt to achieve clarity, a draft bill was released for comment in 2013, and after a round of comments and further drafting attempts, another draft bill was published early in 2015. The important point for present purposes is that, until the legislature actually enacts an expropriation law that is in line with the constitutional provisions, the 1975 Expropriation Act remains in force, and will be accompanied by interpretative difficulties. Even if a new law enters into force, the power of existing precedent may influence understanding of new and adapted provisions.

3.2.2 Origins of the Binary Formulation

The inclusion of the term ‘public interest’ in the constitutional provision was a contemplated response to existing law. The 1975 Expropriation Act provides only for expropriation ‘for public purposes’. There is no explicit provision that expropriation must be in the public interest. Section 28(3) of the Interim Constitution (the interim property clause) contained no reference to public interest either, but simply

19. See section 3.3.2 below.
22. Van der Walt 2011, supra note 2, at p. 244; X.H. Nginase, 2009, supra note 4, at p. 20; M. Chaskalson & C. Lewis, ‘Property’ in M. Chaskalson et al. (eds.), Constitutional Law of South Africa, 1st edn, Juta, Cape Town, 1996, Ch. 31, p. 22 attributed the inclusion of this term in s 25(2) of the Constitution of the Republic of South Africa of 1996 to an attempt to warn the courts to respect the legislative and administrative policy choices.
23. Note the use of the plural in s. 2, Expropriation Act 63 of 1975: “Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.” (Emphasis added). See further ss. 3, 6, 9(4). For the sake of consistency I prefer to use the singular in the discussion.
24. The term public interest is used in the Expropriation Act 63 of 1975 only in connection with a ministerial decision to withdraw an expropriation. S. 23(1), Expropriation Act 63 of 1975: “Notwithstanding anything to the contrary contained in any law, if the Minister is of the opinion that it is in the public interest or otherwise expedient to withdraw an expropriation of property, he may withdraw such expropriation ...”
demanded – very generally – that expropriation had to be for ‘public purposes’.25 This raised the question of whether expropriation for land reform purposes would meet that requirement.26

At the heart of this debate was the issue of whether the public purpose requirement could be satisfied where property was expropriated to enable a transfer thereof to another private party. Where land is expropriated within the parameters of a land reform initiative, none of the advantages that would conventionally be encompassed by a public purpose are prevalent:27 infrastructure is not built or improved; and the country’s administration or security is not enhanced or assisted. Instead, land is taken from an owner and transferred to a third party or parties for their exclusive use. Expropriation for land reform purposes is expropriation for the benefit of another private person or a group of persons. Unless such expropriations are explicitly permitted,28 they would be invalid.29 The Constitution itself provides the justification for this kind of expropriation. That land reform is constitutionally mandated and stated to be in the public interest30 relieves the theoretical inconsistency.

Although neither the Interim nor the 1996 Constitution advanced an extensive definition of the terms public purpose or public interest, section 25(4) of the 1996 Constitution contains a partial definition which determines that, for the purposes of the property clause, the public interest “includes the nation’s commitment to land reform”. This definition banishes any doubts as to whether land reform is a constitutionally endorsed goal. Even so, this essay posits, the reasons for including the term ‘public interest’ and the degree to which this inclusion serves its intended purpose remain questionable, especially in view of the Constitutional Court’s most recent jurisprudence on expropriation, set out below. To understand the difficulties in this regard, it is necessary to recall the meaning of this term (‘public purpose’) as it was understood before the transformative intent of the Constitution created a new lens through which to examine it. Of course, the public purpose requirement in

25. S 28(3), Constitution of the Republic of South Africa Act 200 of 1993: “Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only …” (Emphasis added).
27. Slade 2012, supra note 1, at p. 53.
29. Slade 2012, supra note 1, at p. 53.
preconstitutional case law was not binary in as literal a sense as it has been since the 1996 Constitution was introduced. Public interest as a stated element of the requirement featured for the first time immediately before the introduction of the Interim Constitution.31

3.2.3 Deliberate Vagueness of the Definition

The Constitution’s lack of a definition for the term public purpose and its partial definition of public interest deserves further scrutiny. That the public interest ‘includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources’ in terms of section 25(4) of the Constitution, only makes it clear that the constitutional property clause will not preserve private property in the face of attempts to transform land-holding patterns in South Africa. But otherwise, it is not particularly helpful in determining what types of actions would be permissible because of being in the public interest or for public purposes.

Beyond the narrower confines of expropriation law, the South African courts historically vacillated between broad and narrow meanings attributed to the term public purpose, apparently because the different contexts in which the term was used demanded varying meanings to be attached to the modifier ‘public’.32 As an adjective in terms like public purposes, public use, and public interest, the reference was to matters that pertain to or affect the people of a country or a local community. Nevertheless the modifier ‘public’ was as frequently employed in a more restricted sense to denote matters that pertain not to the people directly, but to the State or the Government representing the people.

The disparate meanings of terms such as public purpose and public interest in the broader legal context aside, the interpretation of the term public purpose as a requirement in pre-1994 expropriation law in itself proved problematic. Early case law tended to contrast public purpose and public use on the one hand, with public interest on the other.33 In early precedent, public purpose originally denoted a specific advantage, as opposed to actual physical use required by public use.34 In later cases, the

32. J. Innes in the case of Rondebosch Municipal Council v. Trustees of the Western Province Agricultural Society 1911 AD 271, p. 283: “[t]he word public is one of wide significance, and it may have several meanings, between some of which, in spite of their common origin, there are very real differences.”
34. Previously been defined narrowly in the USA and India (see Karesh v. City Council of City of Charleston 1978 (247) S.E.2d 342 (S.C.); City of Owensboro v. McCormick 1979 (581) SW 2d 3 (Ky.); State of Bihar v. Kameshwar Singh AIR 1952 252 (S.C.); Poletown Neighbourhood City Council v. City of Detroit 1981 (304)
distinction became obsolete, as public use was understood more broadly to entail an advantage for the public, not necessarily linked to actual physical use of the property. However, both public use and public purpose anticipated a direct public advantage as a requirement for expropriation, through either actual use of, or access to the property.35 By contrast, public interest particularly in the context of limitations on property rights required only that the public derive at least some indirect benefit.36 Until almost immediately before the introduction of a new constitutional dispensation, however, the term public interest did not appear in expropriation-related case law.

3.3 Public Purpose/Public Interest in South African Expropriation Law

The terms public interest and public purpose have been subject to varying interpretations.37 Most foreign jurisdictions attribute a broad meaning to the term public purpose.38 The 1975 Expropriation Act39 also defines public purpose broadly, to include any purpose connected with the administration of any law by an organ of state. However, the meanings attached to public interest, public purpose, and other similar terms could still depend on the context in which they are used. It is thus possible that the meanings of these terms may vary from one situation to another. It seems, however, that in pre-constitutional property and administrative law the terminology was not particularly contentious.40 The following paragraphs consider the different applications of the term public purpose in expropriation cases and other cases outside the expropriation context. Attention is then specifically paid to how the policies of apartheid influenced precedent on the meaning of public purpose, before some remarks are ventured about the poverty of pre-constitutional precedent.

N.W.2d 455 (Mich.)), public use indicated benefit through the actual physical use by the public of the property. Recently this term has rather been employed in a broader sense as requiring some public advantage without actual physical use of the property. Id., at p. 208, n. 9.

35. Id. (Eisenberg 1995), at pp. 218-220 provides a discussion of Rondebosch Municipal Council v. Trustees of the Western Province Agricultural Society 1911 AD 271; Minister of Lands v. Rudolph 1940 SR 126; Slabbert v. Minister van Lande 1963 (3) SA 620 (T); Fourie v. Minister van Lande en ’n Ander 1970 (4) SA 165 (O); White Rocks Farm (Pty) Ltd. and Others v. Minister of Community Development 1984 (3) SA 785 (N).

36. Id. (Eisenberg 1995), at p. 209.

37. See Rondebosch Municipal Council v. Trustees of the Western Province Agricultural Society 1911 AD 271; Fourie v. Minister van Lande en ’n Ander 1970 (4) SA 165 (O); White Rocks Farm (Pty) Ltd. and Others v. Minister of Community Development 1984 (3) SA 785 (N).

38. Eisenberg 1995, supra note 3, at p. 216 et seq.


3.3.1 Precedent under the Expropriation Act and Its Predecessors

The 1975 Expropriation Act, which applies to almost all expropriations, contains a partial definition of the term public purpose, in that it states that the term “includes any purpose connected to the administration of the provisions of any law by an organ of state”. That the term ‘includes’ these purposes, means that it is not limited to those stated purposes only. The full extent of the term public purpose has become clear through judicial engagement with it.

This section reviews case law of the pre-constitutional period to determine how the term public purpose was understood. By way of introduction, it can be stated that pre-constitutional case law may be categorized historically by distinguishing between cases decided before the enactment of the first statute consolidating all powers of expropriation in the state, i.e. the 1965 Expropriation Act; cases decided under the 1965 Expropriation Act, and cases decided under its successor, the 1975 Expropriation Act, but before the introduction of constitutional supremacy in 1994. The trend in all three of these periods was to interpret the term public purpose as it pertained to expropriation leniently, specifically where such an interpretation was supported by the wording of the legislation authorizing the expropriation. Given the general trend, a categorization into pre-1965, post-1965, and post-1975 cases is not overly significant, but as a descriptive tool, the categorization is useful, as it eliminates the need to explain the context of each case specifically. In particular, cases decided before 1965 seem disparate in their accounts of where the power to expropriate originated, simply because the law on expropriation had not yet been consolidated before this date. Unlike the situation in common law, the power to expropriate in South Africa originates from statute, not from the sovereign’s inherent power of eminent domain, and hence the statutory origins of the power will necessarily be a component of any judicial consideration of the validity of a given expropriation.

3.3.1.1 Public Purposes: Different Applications

It is useful to contrast the meaning attached to public purpose in the expropriation context with how this term was understood in other contexts, beyond expropriation. In the non-expropriation setting, exemplified by Rondebosch Municipal Council v. Trustees of the

41. Gildenhuys 2001, supra note 16, at p. 75 points out that the only exceptions are for statutes enacted after 1992.
42. S 1, Expropriation Act 63 of 1975.
43. Slade 2012, supra note 1, at pp. 18-36.
Western Province Agricultural Society, the term was interpreted narrowly. More specifically, the case indicated that when pertaining to the question whether land qualifies as ‘rateable property’, the term ‘public purposes’ in legislation refers to ‘governmental purposes’, i.e. matters pertaining to the state or government.

In decisions involving expropriation, the meaning attributed to the term public purpose was notably broader. In Slabbert v. Minister van Lande, decided before 1965, it was held that the legislative intention in section 20 of the Expropriation of Lands and Arbitration Clauses Proclamation was that the words ‘public purposes’ had to be understood in their unrestricted sense. The court had to determine whether an expropriation of private land adjoining the official residence of the head of state (then called the ‘Prime Minister’) was ‘for public purposes’ in terms of the mentioned Proclamation. The expropriation was necessary apparently to enlarge the premises, to provide more security and privacy for the Prime Minister. The court reasoned that the proclamation was phrased in such wide terms that ‘public purposes’ could refer to purposes serving much more than merely governmental goals, and could include purposes serving the interests of the community in general. The court contrasted the phrase ‘public purposes’ with ‘private’ and/or ‘personal’ purposes, and thus indicated that an expropriation would be for a public purpose as long as it is not for a private and/or personal purpose. This reasoning is not helpful if one attempts to distinguish the narrow meaning (i.e. public purpose refers to governmental purposes only) from the broader understanding of the term, which would refer to the public interest more generally. To confuse matters, the Slabbert judgment stated that expropriating private lands under the circumstances served the purpose of improving state administration (in other words it had a governmental purpose), by improving the security and privacy of the Prime Minister, which was of general public interest. The judgment accordingly does not provide a satisfactory justification for attaching a broad meaning to the term public purpose, and it is not helpful in

46. In the context of section 115 of the Municipal Act 45 of 1882.
47. In Rondebosch Municipal Council De Villiers CJ, at p. 280, Innes J, at p. 286 and Laurence J, at p. 292 also indicated that “it is not sufficient, to make purposes public, that they should be altruistic, neither must the object in view be merely sectional, however large or important the section concerned” and confirmed the strict interpretation of the term.
51. Slabbert v. Minister van Lande 1963 (3) SA 620 (T), p. 621H.
52. Referring to public purposes in the narrow sense.
attempting to clarify the possible distinction between public purpose in the broader sense and public interest. Nevertheless, the judgment reflected the trend in pre-1965 law on expropriation, in favor of a generous understanding of the term public purpose, which was carried into the next phase of expropriation law.\textsuperscript{54}

The generous understanding of the term public purpose in expropriation matters was traditionally taken to denote issues whereby the whole population or the local public is affected, and not merely matters pertaining to the state or the government.\textsuperscript{55} This is explained in \textit{Fourie v. Minister van Lande},\textsuperscript{56} a case decided in terms of the 1965 Expropriation Act, in which the court distinguished between usage of the term in expropriation matters and matters not concerned with expropriation. The matter concerned an expropriation of land to maintain and extend the national telecommunication system; a purpose which was contested by the expropriatee. The judgment indicated that to determine the meaning of the phrase in a given context, the historical use of the term \textit{in that context} must be established. Then it can be presumed that subsequent use of such a term in an act which is \textit{in pari materia} with previous legislation would not deviate from the established meaning.\textsuperscript{57} The court stressed the broad meaning of the term public purpose established by a long line of earlier decisions, to which it saw itself bound, because the same term was used in subsequent enactments without further qualification by the legislature.\textsuperscript{58} The approach in \textit{Fourie} was endorsed in the later decision of \textit{White Rocks Farm v. Minister of Community Development}.\textsuperscript{59}

Whereas decisions such as \textit{Fourie} and \textit{White Rocks} endorse a generous interpretation of the term public purpose, the type of expropriations involved there (to extend or maintain the country’s infrastructure) do not assist much in gaining further insight into solutions for the three practical problems mentioned above, namely third-party transfers, change of purpose and intrusiveness issues. For further clues, one would need to look at other decisions, such as the pre-1965 case of \textit{African Farms and Townships Ltd v. Cape Town Municipality},\textsuperscript{60} which indicated that a public purpose did not necessarily require that the expropriator actually had to use the land; or \textit{Administrator, Transvaal v. J van Streepen (Kempton Park) (Pty) Ltd}\textsuperscript{61} which did not regard the expropriation for the sake of a third-party transfer as compliant with the requirement of public purpose. Pre-constitutional precedent in this regard appears to be inconsistent and confusing.

\textsuperscript{54} E.g. \textit{Fourie v. Minister van Lande en ’n Ander} 1970 (4) SA 165 (O), p. 174C-D.
\textsuperscript{55} \textit{White Rocks Farm (Pty) Ltd and Others v. Minister of Community Development} 1984 (3) SA 785 (N), p. 793I.
\textsuperscript{56} \textit{Fourie v. Minister van Lande en ’n Ander} 1970 (4) SA 165 (O), p. 170D.
\textsuperscript{57} Id., at p. 170G-H, 174H-175A.
\textsuperscript{58} Id., at p. 170F-G.
\textsuperscript{59} \textit{White Rocks Farm (Pty) Ltd and Others v. Minister of Community Development} 1984 (3) SA 785 (N), p. 793I.
\textsuperscript{60} E.g. \textit{African Farms and Townships Ltd v. Cape Town Municipality} 1961 (3) SA 392 (C), p. 396H.
\textsuperscript{61} \textit{Administrator, Transvaal, and Another v. J van Streepen (Kempton Park) (Pty) Ltd}. 1990 (4) SA 644 (A).
Van Streepen was a landmark expropriation judgment in the pre-constitutional period. The Appellate Division of the Supreme Court (as it was then called) here interpreted the phrase “any purpose in connection with the construction or maintenance of a road” in section 7(1) of the Transvaal Roads Ordinance very generously. In the first traceable reference to the public interest in expropriation prior to the entering of the constitutional order, the court here held that an expropriation must ‘generally speaking’ be ‘for a public purpose or in the public interest’. The court further held that whether an expropriation was for a public purpose or in the public interest was to be determined by considering the “practical and economic implications of the project as a whole.” The decision resulted directly in an interpretation of the public purpose provision that included any purpose reasonably expedient to the main purpose for the specific expropriation in terms of the ordinance (namely, the building of roads). At first, this decision was understood as signaling that expropriation to achieve a third-party transfer could be for a public purpose or in the public interest, but subsequent decisions tend to tread cautiously around this aspect of the judgment. More recent scholarly treatment of the Van Streepen judgment tends to highlight its relevance for the distinction between public purpose and public interest, indicating that “the distinction has lost most of its meaning in the constitutional era”. This statement is contested in the analysis below.

3.3.1.2 Apartheid as a Public Purpose
Undeniably, expropriation was an important tool in achieving spatial segregation along racial lines. The Expropriation Act and its predecessors were used to expropriate white-owned property for the purposes of homeland consolidation and black-owned property for the removal of so-called ‘black spots’. Legislation aimed at giving effect to the segregation policy under apartheid also frequently made specific reference to public purpose. The courts would uphold racially discriminatory legislation which permitted expropriation for the sake of social

62. Id.
63. Transvaal Roads Ordinance 22 of 1957.
65. Id., at p. 661.
66. Van der Walt 1999, supra note 26, at p. 343.
67. Van der Walt 2011, supra note 2, at p. 462.
68. The state’s broad powers to expropriate for ‘public purposes’ also included purposes aimed at social engineering, e.g. by implementing the then government’s racially discriminatory policies such as the Group Areas legislation.
70. See Gildenhuys, supra note 16, at pp. 43-47.
71. See examples mentioned in Eisenberg 1995, supra note 3, at p. 219, n. 74.
restructuring, because of the supposed importance of this purpose. Alternatively, racially discriminatory actions by the state were not questioned by the courts on the basis of public purpose served. The case of *Minister of the Interior v. Lockhat and Others* is a telling example of this attitude.

*Lockhat* demonstrates how the law on expropriation was (ab)used to achieve the social restructuring that was envisaged by the apartheid policy. The matter called for an evaluation of an expropriation for purposes of effecting the policy of racial segregation around 1961. The court simply avoided becoming embroiled in considering the virtues of the social transformation envisaged by Parliament in enacting the Group Areas Act, and remarked that it did not have the power to determine whether the legislation was for the ultimate *common weal* of all South Africans. In this sense, *Lockhat* is a striking example of the extent to which the judiciary under apartheid was ready to defer to Parliament when dealing with policy choices, even where these lead to extreme injustice. By now it is trite that apartheid and injustices associated with it were rarely questioned by the judiciary, despite the massive poverty, degradation and suffering it caused. The laws implementing apartheid were treated as ‘normal’ law, with judicial officers rarely remarking on its racist and unacceptable character.

### 3.3.1.3 The Poverty of Pre-Constitutional Precedent

The analysis above confirms the views of the authoritative sources on South African expropriation law that pre-constitutional precedent interpreted the public purpose requirement generously to the extent that the authorizing statutes permitted it. According to pre-constitutional case law, anything done by an organ of state which benefits the public at large will be for a public purpose. Hence, public purpose has obviously not been interpreted literally as meaning ‘public use’ only. It was understood in a broader sense. Instead of facilitating direct public use and access to the property only, the broad pre-constitutional public purpose standard rather required that the

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75. Group Areas Act 77 of 1957.
77. Even where legislation could not, as a matter of law, be ignored, judges should have acknowledged situations where law and justice diverged. The divergence between law and justice was only rarely acknowledged by judges. “Anonymous, ‘The law created apartheid, but apartheid didn’t quite destroy the law’, *The Sunday Independent*, p. 11 (edited version of the submission made to the Truth and Reconciliation Commission by Mohamed, Chaskalson, Corbett, Van Heerden & Langa).”
expropriation generate some particular advantage for the public in general. It included expropriations whereby the entire population or a local community was affected and not only matters pertaining to the state or government.

Pre-constitutional case law adopted no conclusive stance on the matter of third-party transfers, which was thought to present problems of justification for expropriations to be undertaken pursuant to the constitutional mandate for land reform. To overcome such difficulties, early constitutional-era scholarship relied on the existing broad meaning attached to public purpose to assume that land reform would be a public purpose, even if it meant that land would be taken from some and transferred to other private parties. The opportunity to test these views only arose much later, however. The fact that the ‘public interest’ element was added to the requirement in the 1996 Constitution suggests that the constitutional drafters were not prepared to hedge their bets on pre-constitutional precedent of a continued generous interpretation of the term public purpose alone.

The public purpose requirement in its pre-constitutional form was directed at making the expropriation benefit the community as a whole, not just one particular individual or group. Even so, cases in which the courts did attempt to interpret the term public purpose can – at best – only provide rather vague guidelines for interpretation of binary public purpose requirement under the new constitutional order. As mentioned, some controversy accompanied the possible extension of the meaning of public purpose as it related to the land-redistribution objectives of the government. A restrictive definition of public purpose (or even public interest for that matter) would preclude the possibility of third-party transfers and thereby render the land redistribution program ineffective. A too liberal definition of either terms might, by contrast, leave the legislature with unlimited capacity to control private property at a whim, leaving the courts with too weak control over the normative limits of this legislative capacity. Either way, the preventative and control functions of the public purpose requirement would be compromised.

In Administrator, Transvaal and Another v. J van Streepen (Kempton Park) (Pty) Ltd, for instance, the court was at pains to distinguish between public purpose and public interest on the basis of whether it would permit third-party transfers. The Court

81. White Rocks Farm (Pty) Ltd and Others v. Minister of Community Development 1984 (3) SA 785 (N), p. 793l.
82. Eisenberg 1995, supra note 3, at p. 221.
83. See Section 3.3.2.1 below.
84. Mostert 2002, supra note 4, at p. 331.
indicated that the meaning of public purpose, even if taken generously, cannot justify third-party transfers. Public interest, however, could justify third-party transfers if the circumstances permitted. The decision was criticized in subsequent case law for not motivating its distinction better. In *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corp (Pty) Ltd and Others*, a post-1996 judgment, the SCA attempted to explain the Van Streepen stance, by musing that it must have “flowed from [an out-dated] perception of the role of the State and private participants in the public arena.” It stressed that nowadays “many functions hitherto regarded as public are carried out by private concerns in co-operation with state authorities.” A mere twenty years had passed between the Van Streepen judgment and Offit’s case.

Moreover, pre-constitutional precedent begs the question of how governmental manipulation of the law for purposes of social restructuring should be handled by the courts. In this regard, the choice of terminology and interpretation thereof poses problems. The inclusion of both public purpose and public interest in the binary, post-constitutional requirement suggests that the terms are not synonymous. Yet, the generous interpretation of the term public purpose in pre-constitutional expropriation cases leaves very little scope for attributing a non-synonymous meaning to the term public interest in the constitutional context. In fact, the only aspect of meaning where there seems to be no overlap, is in relation to whether third-party transfers are permitted. The supposition is that even the broad pre-constitutional meaning attached to public purpose could not include such action, based on the Van Streepen reasoning (mentioned above), despite scholarly arguments to the contrary. One could speculate whether the inclusion of the public interest element in the post-constitutional, binary requirement meant that the term public purpose under the constitutional provisions would have a narrower meaning than it had before. The inclusion of the public interest element into the constitutional provisions must support such a view. However, the next section shows that courts in the post-apartheid era continued to attribute a broad meaning to public purpose.

Pre-constitutional case law is often inadequate for application in the constitutional context. But lessons can still be learned from it. Past experience with the interpretation of the public purpose requirement in expropriation law continues to caution the

86. *Id.*, at para. 48.
87. *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corp (Pty) Ltd and Others* [2010] (2) All SA 545 (SCA), paras. 15-16.
88. *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation and Others* 2010 (4) SA 242 (SCA), para. 15.
89. *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation and Others* 2010 (4) SA 242 (SCA), para. 15.
judiciary not simply to accept that the manipulation of the law by the government for purposes of social (re)structuring will necessarily be in the public interest or for a public purpose. South Africa’s experience with expropriation for racially discriminatory and social structuring purposes – and the mentioned judicial responses thereto – shows that, no matter how honorable the intentions of the legislature or the expropriator might be, a constitutional standard should still apply to avoid injustices in cases of interference with existing property rights. The crucial question now is what this constitutional standard represented by the binary requirement means.

In earlier work,91 I argued that the binary constitutional requirement had an even wider import than that of the pre-constitutional public purpose requirement under ordinary statute. I based this argument on the partial definition of public interest in section 25(4)(a). It legitimized expropriations that might not have passed muster in terms of the narrower public purpose concept of the Interim Constitution92 or the Expropriation Act. I did not support the view of Chaskalson and Lewis93 that the inclusion of the public interest element into the requirement was a signal to the judiciary to follow a hands-off approach when it came to legislative or executive choices. Lockhat’s case had shown that South Africa went down that road before, and ended up in a dead-end street, with the deplorable policy of apartheid.

So, pointing to the need to avoid judicial deference and the abuses of legislative and executive powers, my argument was that the judiciary should be entrusted with ensuring that the transformative intent of the Constitution pervaded the understanding of the terms public interest and public purposes.94 Section 25(4)(a) of the Constitution supports this view, because it wants the public interest to include the “nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources”. This, I thought, signaled an additional mechanism to ensure that terms such as public purpose or public interest are not misconstrued.95 At the time, there was almost no post-constitutional precedent to analyze. This has changed.

3.3.2 Precedent from the Constitutional Era

The following section considers cases decided after the enactment of the Interim and Final Constitutions (1994 and 1996, respectively); to establish the extent to which pre-constitutional precedent survived the transition to constitutional supremacy.

92. See Van der Walt 1999, supra note 26, at p. 341.
95. Id., at pp. 394-395.
It attends specifically to how the public interest is employed in cases pertaining to land reform (which do not necessarily have an expropriation angle), before commenting on the current status of precedent relating to the public purpose requirement.

3.3.2.1 Public Purposes/Public Interest in the Expropriation Context Since 1996
With the introduction of a constitutional provision reshaping the parameters within which expropriation is to occur, it was to be expected that the tenor of judgments on expropriation would change. Whereas the public interest element did not feature in pre-constitutional precedent (with the exception of *Van Streepen*, the last in a long line of judgments handed down before the constitutional provisions were introduced) expropriation-related cases sported generous interpretations of the public purpose requirement. In other contexts, the interpretations tended to be more restrictive.

In the already mentioned case of *Offit Enterprises*, the Supreme Court of Appeal (SCA) endorsed the generous pre-constitutional interpretation of the public purposes requirement, quoting from the *Van Streepen* judgment. In particular, the SCA highlighted that according to *Van Streepen* a third-party transfer cannot be for public purposes, but the circumstances will dictate whether it is nevertheless in the public interest.96 The SCA criticizes this distinction, indicating that nowadays major development initiatives are frequently undertaken through public-private partnerships. This court pointed out that “there is no apparent reason why the identity of the party undertaking the relevant development, as opposed to the character and purpose of the development, should determine whether it is undertaken for a public purpose” 97 It then mentioned the example of expropriation to enable private development of low-cost housing to hold that third-party transfers can be for a public purpose. It is notable that the SCA chose to continue using the term public purpose, rather than to take its cue from the Constitution and justify the particular expropriation as being in the public interest. In doing so, it creates the possibility of continuity between pre-constitutional and post-constitutional meaning of the term public purpose, thereby relieving the pressure on the conflicted relationship between the Expropriation Act and the Constitution. The ruling was that an expropriation in the circumstances of that case (to establish a Deepwater Port at Coega and a surrounding industrial area in the Eastern Cape, one of the poorest regions in South Africa) would be for a public purpose.98 In the particular case, the expropriation eventually did not proceed, for various reasons documented in the subsequent CC decision.99 These reasons are not relevant for present purposes.

96. *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation and Others* 2010 (4) SA 242 (SCA), para. 15.
97. *Id.*, at para. 15.
98. *Id.*, at para. 17.
99. *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corp (Pty) Ltd and Others* 2011 (1) SA 293 (CC).
Bartsch Consult (Pty) Ltd v. Mayoral Committee of the Maluti-A-Phofung Municipality100 (Bartsch) concerned a dispute arising from the respondent municipality’s attempt to expropriate the applicant’s land. The purpose of the expropriation was to construct a road and ‘undertake ancillary actions’. More specifically, a part of the expropriated property would be transferred to a private party for the construction of a shopping mall. The expropriatee-applicant (Bartsch) questioned whether the public purpose requirement as expounded in section 2 of the Expropriation Act was met. Arguing that the municipality needed only a portion of the land to construct the road, the expropriatee asked the court to find that the expropriation of the whole of the property was unlawful in that the stated purpose for the expropriation, to build a shopping mall, was unreasonable and “could not be said to be for a public purpose”.101

Bartsch’s case accordingly is an example of both the ‘third-party transfer’ and the ‘intrusiveness’ conundrum.102 It deals with the question whether the public purpose requirement is met where more property is expropriated than what is strictly necessary for a stated purpose, in particular where that purpose involves the transferring of the property to a third party. The Free State High Court held that the expropriation for the construction of a road was a valid public purpose, and that the broad description of the purpose in the expropriation notice (to do all things necessary in connection with building the road) sufficiently included the purpose of erecting the shopping mall.103

The court considered the meaning of the term public purposes as established in pre-constitutional case law.104 It indicated that the established understanding of the phrase is that it refers, in the broad sense, “to things affecting the entire population of the local public and not only to things concerning the State or the Government”.105 Dealing with the difficulty of whether a third-party transfer could meet the public purpose requirement, the court indicated106 that dispossessing an owner for the benefit of a third party “can never be characterized as a public purpose”.107 It promptly

101. Id., at paras. 1 and 5.
104. Id., at para. 4.
107. Id., at para. 5.2.
added, however, that such an expropriation could nevertheless be valid “if it could be brought within the realms of an act performed in the public interest”. The court was open to the economic opportunities presented by establishing a shopping mall, mentioning increased financial returns, health and wealth. Accordingly, it found that the expropriation was valid and in the public interest, even though it was made available to a third party.108

The court dismissed the ‘intrusiveness’ argument, i.e. that the expropriation of the entire property was unlawful since only part of the property was needed for an apparent lawful purpose. It held that the expropriatee confused motive with purpose in this respect, by attempting to argue that “the true reason for the expropriation was a financial one, namely, the generation of income for the [developers of the shopping mall] by utilizing the applicant’s land”.109 What seemed to save the day was that the municipality’s bona fides was beyond doubt.110 This enabled the court to view the purpose of the expropriation as being unequivocally public, even though the motive might have been financial:111 the overall reason for the expropriation was to benefit the public.

Three points are worth noting: First, the court’s point of departure, that third-party transfers can never be for a public purpose, gets turned around quite abruptly when the term public interest is thrown into the mix. Public interest is not, however, conceptualized to the same extent as public purposes. The assumption that a court will recognize what is in the public interest when confronted with the question seems to be regarded as good enough. Second, as Slade112 clearly points out, the Van Streepen model of distinguishing between the primary and secondary purpose of the expropriation obviously influenced the court. The difference between the two cases, however, is that the secondary purpose in Van Streepen was clearly linked to the primary purpose. The same cannot be said of the Bartsch scenario: the development of a shopping mall had very little – if anything at all – to do with the construction of a road. Third, the court’s distinction between the motive for an expropriation and the public purpose requirement needs further scrutiny. Earlier case law did not draw such a clear line between the reasons and the justification for an expropriation. In post-constitutional case law, however, this distinction is rearing its head. Apparently, “when it is clear that the expropriation is for a valid public purpose and exercised in good faith, the motive to expropriate the property is irrelevant in the face of additional options other than expropriation”.113

108. Id., at para. 5.3.
110. Id., at para. 6.
111. Id., at para. 6.
112. Slade 2011, supra note 1, at p. 111.
113. Id., at p. 1.
In Harvey v. Umhlatuze Municipality\textsuperscript{114} the good-faith argument surfaced yet again. The facts render it a typical ‘change of purpose’ case. The court had to decide whether to grant an order for the re-transfer of residential property to its former owner in a scenario where the original purpose for which the property was expropriated was no longer possible. In this case the property was expropriated to create recreational, green space. Several intervening factors rendered the expropriating municipality’s original goal infeasible, and so it wanted to use the land already expropriated for a medium-density housing development. The court rejected the former owner’s claim to have the property retransferred, holding that the claim is unfounded in South African law.\textsuperscript{115} The implication is that once an expropriation is completed, it is irrelevant whether the purpose for which property was expropriated materializes. Furthermore, the court in Harvey did not investigate whether the new purpose for which the property was to be used met the public purpose requirement. It merely relied on the expropriator’s good faith at the time of the initial expropriation.\textsuperscript{116}

Arguing that public purpose must be understood in contradistinction to private purpose, the court explained that if the state were to expropriate property to build a road or a hospital, the purpose would be public and the expropriation would be valid. If, however, the expropriation specifically were to benefit an individual or if it were to increase the state’s wealth, it would not be for a valid public purpose and would therefore be unlawful.\textsuperscript{117} Dealing with the ‘third-party transfer’ stumbling block, the court acknowledged that the ‘jurisprudential principles applicable’ did not support expropriation in such circumstances to be valid,\textsuperscript{118} although incidental benefits to third parties would not exclude the possibility of a valid expropriation altogether. Relying on Offit,\textsuperscript{119} the court acknowledged that even outside the land reform context an expropriation could be valid, although private persons ultimately benefitted from it.\textsuperscript{120} It cautioned, however, against expropriators disguising a true motive such as increasing the wealth of the state or achieving exclusive benefit for a third party by masking it as a public purpose.\textsuperscript{121} If a third party is to benefit from an expropriation, it must require the property to perform a public function.\textsuperscript{122}

\textsuperscript{114} Harvey v. Umhlatuze Municipality and Others 2011 (1) SA 601 (KZP).
\textsuperscript{115} Para. 1.
\textsuperscript{117} Harvey v. Umhlatuze Municipality and Others 2011 (1) SA 601 (KZP), paras. 124-125 as discussed in Slade 2012, supra note 1, at p. 115.
\textsuperscript{118} Id., at para. 125.
\textsuperscript{119} Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation and Others 2010 (4) SA 242 (SCA).
\textsuperscript{120} Harvey v. Umhlatuze Municipality and Others 2011 (1) SA 601 (KZP), para. 125.
\textsuperscript{121} Id., at para. 125.
\textsuperscript{122} Slade 2012, supra note 1, at p. 116; Van der Walt 2011, supra note 2, at pp. 462, 491; E. du Plessis, ‘Restitution of expropriated property upon non-realisation of the public purpose’, TSAR, 2011, 579.
Two further cases illustrate the same line of reasoning in relation to the intrusiveness issue identified above. *Erf 16 Bryntirion v. The Minister of Public Works* involved an expropriation motivated by the need to secure government premises containing the official residence of the President and some Ministers. *Ethekwini Municipality v. Spetsiotis* involved an expropriation of a lease of beachfront restaurant premises, for purposes of developments necessitated by the hosting of the 2010 FIFA World Cup Soccer tournament. In both cases, the argument that the public purpose could be achieved through less invasive means was raised. The judgments in both decisions illustrate the courts’ readiness to defer choices about the need for an expropriation to the relevant organ of state involved. The courts are criticized in this regard by scholars such as Slade and Van der Walt who opine – correctly, in my view – that scrutinizing an expropriation for its invasiveness is required by the constitutional property clause, in particular section 25(1), which contains the requirements that must be met by all interferences with property, also those amounting to expropriation.

It seems that the meaning of the term public purpose is now more-or-less settled in so far as it pertains to the control and preventative functions of the public purpose requirement. Van der Walt remarks:

In view of the formal, normative and interpretive superiority of the Constitution and the obvious effort to frame the constitutional requirement purposefully to leave room for land reform related expropriation, the lenient approach should now always prevail when a statute authorizes expropriation in terms of either ‘public purpose’ or ‘public interest’.

The concept of public interest appears more regularly in judicial reasoning, but is not theorized to the same extent as public purpose in the expropriation context. Van der Walt highlights the implication of the more recent cases’ endorsement of the lenient pre-constitutional precedent to interpreting the term public purpose: the broad understanding of public purpose aligns so well with the general conception of the public interest that it practically eliminates the need for a ‘double-barreled’ (i.e. binary) provision in the Constitution. The one instance in which courts understand public interest to afford the expropriator more leeway than what public purpose would, is in undertaking legitimate third-party transfers.

126. *Id.*, at p. 142.
128. *Id.*, at p. 462.
130. Where the authorising statute and context permitted.
3.3.2.2 Public Interest and Social Justice

Nginase points out that the introduction of constitutional control over expropriation after 1994 enabled an analysis of the purpose of expropriation “in the specific context of social and economic transformation, particularly because of the strong emphasis on social justice and land reform in the South African constitutions of 1993 and 1996”. While the binary public purpose requirement itself has seen very little application in this context, the statement holds true, because the term public interest is also used in another context of the constitutional property inquiry, namely, in the determination of just and equitable compensation. The same can be said of other contexts in which the public interest requirement has been conceptualized: restitution proceedings as redress for past injustices, and eviction proceedings.

Calculation of Just Compensation

Section 25(3) determines:

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including – (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

The partial definition of public interest in section 25(4)(a), which provides that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources”, applies to the use of the term in section 25(3) as well. In applying section 25(3) read with section 25(4)(a) to disputes about the justness of compensation, the judiciary has explored the meaning of public interest.

_Du Toit v. Minister of Transport_ involved a dispute about the payment of compensation for the expropriation of the right to extract gravel from a particular piece of land for the maintenance of an important national road. The Cape High Court held that the South African road system was a national asset and its maintenance was a matter of public interest. On the basis of this reasoning, it was decided that compensation at full market value of the land would, in the circumstances, be unfair and favor the expropriatee’s interests at the expense of the public interest. Consequently the amount of

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The decision was subsequently appealed, and both the SCA and CC had opportunity to air their views. Both confirmed the a quo judgment, although the reasoning differed. The SCA limited its decision to the finding that no actual financial loss was proven and that the Minister’s payment of market value of what was taken (the gravel, as opposed to the land) was appropriate. The CC brought the issue back to the balancing of private and public interests, holding that application of s 25(3) of the Constitution justified a conclusion that the compensation the expropriatee received was just and equitable and reflected an equitable balance between the private and public interests.136

b Restitution through the Land Claims Court’s Orders
The Cape High Court’s judgment is interesting for present purposes, because it introduces the consideration of social justice and the public interest when considering the amount of compensation to be granted pursuant to an expropriation. However, it is really in the jurisprudence of the Land Claims Court where the full import of the social justice consideration becomes clear. The Land Claims Court was instituted primarily to deal with disputes in the context of restitution, but its jurisdiction was promptly expanded to incorporate most matters pertaining to land reform.137 As such, it has become a forum

133. Id., at paras. 46, 50-52.
134. Id., at para. 29. Quoted is a statement from First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 (4) SA 768 (CC), at para. [50] in which it is highlighted that “one of the purposes of [the Constitution] was to establish a society based on [inter alia] … ‘social justice’ and that this means that the ‘tension between individual rights and social responsibilities has to be the guiding principle’ in analysing section 25 of the Constitution. The FNB court also then points out that s 25 must protect existing private property rights and serve the public interest, ‘mainly in the sphere of land reform but not limited thereto’.” See A.J. van der Walt, The constitutional property clause: a comparative analysis of Section 25 of the South African constitution of 1996, Juta, Kenwyn, 1997.
135. Id. (Du Toit v. Minister of Transport), paras. 32, 47.
137. See, e.g. the discussion of J.M. Pienaar, Land Reform, 1st edn, Juta, Cape Town, 2014, pp. 576-582 regarding the duties and functions of the Land Claims Court as set out in s 22(1), Restitution of Land Rights Act 22 of 1994.
for conceptualizing the demands of social justice on the constitutional property clause. The difficulties with which the court has to grapple are aptly summarized by Harms JA in the SCA judgment of *Khosis Community Lohatla v. Minister of Defence*:

Land is finite and there are millions out there who also wish to have their share. All claims and aspirations cannot be satisfied. A balance must be struck and the limited resources of the country must be considered.

The Land Claims Court has had the opportunity to develop the concept of public interest mainly in the context of its capacity to order that certain land must be excluded from restitution. The court will only make an order excluding land from restoration if it is satisfied that it is in the public interest and that, but for the order, the public or a significant part thereof will suffer substantial prejudice. The examples discussed below (North and South Central; Nkomazi Municipality) illustrate that in these cases, the public interest is assessed mainly by contrasting it with and balancing it against private interests.

*Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another* is a case in point. It arose from the purported development of Cato Manor, an area from which a large group of people were forcibly removed during Apartheid. Two metropolitan councils applied for an order to exclude a particular strip of land from the restitution process, and were opposed by restitution claimants. The parties wanted to incorporate a settlement they reached during the proceedings into the court order. They settled to proceed with the development as planned, but subject to the proviso that where restoration was feasible any respondent who wished to pursue a claim, would be entitled to do so. Respondents who wished to return to the area without insisting on restoration, or respondents for whom restoration was not a viable option, could also benefit from the development.

The parties’ wish to have the settlement included in the court order compelled the court to scrutinize the concept of public interest. The Land Claims Court (LCC) found that both development and restoration of the land would serve the public interest: the devastation caused by dispossession, and the resultant hardship suffered, rendered restoration a logical response in addressing historical injustice, and thus ‘in the

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142. *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 (1) SA 78 (LCC).
144. *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 (1) SA 78 (LCC), pp. 83B-C, E-F.
public interest’. However, a blanket restoration order would result in the loss of the intended development, which ultimately was also ‘in the public interest’ for supporting the provision of affordable housing for a disadvantaged community, creating employment opportunities; upgrading informal settlements; promoting foreign investments and economic upliftment for the whole area. The court thus found that any agreement that accommodated both development and restoration, with the consent of all the parties concerned, would eminently be in the public interest.

Another example is found in Nkomazi Municipality v. Ngomane of Lugedlane Community and others, which concerned an application for an order that certain land, comprising four towns, should not be restored to any claimant in terms of the land restitution process. In granting such an order, the Land Claims Court had to consider several factors, such as feasibility of restoration, social upheaval, current use of the property and ultimately the public interest. The LCC indicated that an assessment of the public interest requires a “comparison of the deprivation of some private convenience or resource … with the benefit that is likely to result from such deprivation for the general public or part thereof”.

In this case, the benefit – that the Community be restored to properties within the delineated urban edges of the four towns – was weighed against the financially prohibitive fact that the land would need to be expropriated, at the cost of the public purse. Also, what the claimant community would receive would be far more valuable than the rural land of which they were deprived; a consideration aggravated by the fact that the claimant community had already been restored to other land, paid for by the public purse. They would hence be ‘substantially overcompensated’ and it would be ‘contrary to the interests of justice and equity’ to allow the land claim to the four towns to succeed.

145. Id., at pp. 86H-87D.
146. A section 34(5) order was consequently granted. In Singh and Others v. North Central and South Central Local Councils and Others 1999 (1) All SA 350 (LCC), another application was brought before the court by participants and other claimants in respect of land in Cato Manor who were not party to the agreement that was incorporated into the s 34 court order. The applicants claimed that the respondents were in breach of numerous obligations under the said agreement and claimed, in most instances, orders of specific performance. The application was dismissed on the facts.
150. In Nkomazi Municipality v. Ngomane of Lugedlane Community and Others [2010] (3) All SA 563 (LCC), para. 9, indicating that not all the factors listed in section 33 of the Restitution Act are necessarily always applicable the LCC highlighted the feasibility of restoration (section 33(c)(A), social upheaval (section 33(d)) and the current use of the land as factors closely related to the public interest considerations in section 34(6)(a).
152. Id., at para. 27.
Another context which requires a similar modus operandi, of weighing public interests against private interests, is eviction proceedings. South Africa’s tainted past of forced removals under Apartheid renders eviction a particularly sensitive and heavily regulated aspect of the law. Legislation describing the parameters within which eviction can take place has several safeguards in place to ensure that those to be evicted are not prejudiced. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act\textsuperscript{153} is the legislative centerpiece in the eviction context, but several other statutes also prescribe procedures to achieve eviction legitimately. Essentially, an order will be granted if it is just and equitable and after the court has considered all the relevant circumstances.\textsuperscript{154} This includes questions such as whether the occupant is in occupation of land or has erected a structure without the necessary consent; or whether it is in the public interest to grant such an order.\textsuperscript{155} The interests and safety of those occupying the land, as well as the interests of the general public need to be considered.

The context in which eviction proceedings play out very frequently involve invasion-like behavior from larger groups of people who have nowhere else to go, or who have been on waiting lists for state housing for longer than they care to remember. Where a landowner succeeds in obtaining an eviction order against groups of unlawful occupiers, the relevant municipality must frequently participate in finding suitable alternative accommodation for the occupiers. This is the context in which the next-mentioned example from case law needs to be understood.

\textit{Kungwini Local Municipality v. Puntlyf 520 Investments (Pty) Ltd & others}\textsuperscript{156} involved an application to stay an eviction order, duly granted to the landowners of properties in the applicant municipality’s jurisdiction, against some three families of unlawful occupants, comprising 24 persons. The Municipality applied for the stay of the eviction order, arguing that it intends to expropriate the land to provide suitable alternative accommodation for the unlawful occupants, as is their duty in terms of relevant legislation. The LCC held in this instance that the Municipality’s duty\textsuperscript{157} to provide housing and its concomitant right to expropriate the land depends on whether the imminent eviction would deprive the unlawful occupiers of their constitutional right of access to housing and whether this outweighs landowners’ constitutional right to the property from which the unlawful occupiers are to be evicted.

\textsuperscript{153} Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.
\textsuperscript{155} Sec. 6(1), Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.
\textsuperscript{156} \textit{Kungwini Local Municipality v. Puntlyf 520 Investments (Pty) Ltd & Others} 2011 JOL 27244 (LCC).
\textsuperscript{157} Envisaged in section 79(24)(a) of the Local Government Ordinance (Transvaal) 17 of 1939.
Relying on Australian case law to distinguish between the motive for an expropriation and its purpose, the LCC found that the true purpose of the intended expropriation is not to develop housing, but to prevent the imminent eviction of the three families unlawfully occupying the property. The LCC expounded the relationship between the unlawful occupants and the Municipality, indicating that the latter had exerted huge efforts, including footing the lawyers’ bills, in assisting the former to remain on the property, even though these occupiers were not considered to be indigent, and hence were not particularly vulnerable.\footnote{Kungwini Local Municipality v. Puntlyf 520 Investments (Pty) Ltd & Others 2011 JOL 27244 (LCC), paras. 26-27.} The LCC further considered that there was no reason advanced why the three families could not be accommodated in another housing development scheme of the Municipality, already in process.

The inference the LCC drew from these considerations was that the real purpose of the purported expropriation was “neither to provide housing nor to protect the occupiers’ constitutional right to housing.”\footnote{Id., at para. 34.} It was to enable the unlawful occupiers, described by the Court as “land invaders,”\footnote{Id., at para. 31.} to “continue their illegal occupation of a large farm where they graze their cattle and which they regard as their own.” The LCC found that such an expropriation would not be for a public purpose and would not be in the public interest.\footnote{Id., at para. 34.}

The Kungwini judgment was discussed with approval by the High Court in the subsequent case of Grobler v. Msimanga,\footnote{Grobler v. Msimanga [2008] (3) All SA 549 (W).} in which the court had to grapple with the question whether refusal of an eviction order amounted to a \textit{de facto} expropriation. The court found it inconceivable that the legislature in regulating eviction would have intended unlawful occupation of property to result in a \textit{de facto} expropriation of that property without compensation to the landowner. The Court hence emphasized that a just and equitable order must consider the availability of alternative land and the other requirements referred to in section 4(7) of the PIE, which include all the relevant circumstances.\footnote{[92].} It stressed that expropriation cannot occur for an unintended purpose, and that expropriating land to assist unlawful occupiers is not in accordance with the law.

The most interesting insight to be gleaned from cases, such as \textit{Nkomazi} and \textit{Kungwini} for present purposes, is that considerations of public interest are used in the restitution and eviction contexts \textit{to curtail expectations} based on the acknowledged need for transformation and social justice.

\begin{itemize}
  \item \footnote{Id., at para. 34.}
  \item \footnote{Id., at para. 31.}
  \item \footnote{Id., at para. 34.}
  \item Grobler v. Msimanga [2008] (3) All SA 549 (W).
  \item [92].
\end{itemize}
3.3.2.3 The Poverty of Post-Apartheid Precedent

If the point of incorporating the term public interest into the Constitution’s provision on expropriation was to eliminate the problem of a limited interpretation stemming from judicial precedent on the matter, it has not achieved its goal. Instead, its use in subsequent case law is creating further confusion. Contrary to what might have been expected by the constitutional drafters, the public purpose requirement has featured much less in the context of cases dealing with social justice and transformation issues such as land reform, and much more frequently in run-of-the-mill expropriation cases. In fact, it is in the area of expropriation for reasons of economic development that most of the post-1996 judicial activity is noticeable. What complicates matters is that expropriation for economic reasons, unlike land and natural resource reform, is not explicitly foreseen in the Constitutional definition of public interest. This does not mean that it must be excluded without more. It means that more judicial footwork is necessary if economic reasons are to be included in the public purpose requirement. This footwork is to be done by employing the public interest aspect of the binary requirement.

In a relatively short, but clear line of reasoning since Van Streepen, it seems as if the judiciary has no doubt that expropriation of property for the benefit of a third party cannot be for a public purpose. Nevertheless, none of Van Streepen, Bartsch or Harvey’s cases resulted in a ruling that the expropriation was invalid for this reason. In each of these cases the third party’s business enterprise was regarded as so important for the public as a whole that it was accepted that the expropriation would be salvaged by applying the public interest standard. The approach in Bartsch is particularly telling: the court accepted that the expropriation of property to benefit of a third party cannot be for a public purpose, but added that “it could qualify as a valid act of expropriation if it could be brought within the realm of an act performed in the public interest”. The process of considering the applicability of the public purpose requirement first, before considering whether the public interest consideration makes a difference to the outcome, does not seem to be a deliberate modus operandi of the courts. The courts nevertheless are quite consistent in this approach.

Nevertheless the distinction between public purpose and public interest is more nuanced than what first meets the eye. Slade indicates convincingly that case law does not support a finding that expropriation that is undertaken for the benefit

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167. Slade 2012, supra note 1, at p. 51.
of a third party meets the public purpose requirement. However, the case seems to be different “where the expropriated property is transferred to a third party to enable the third party to realize a public purpose”.

The distinction here is between the private and public benefit. This is borne out by the SCA’s statement in Offit that

[There is no apparent reason why the identity of the party undertaking the relevant development as opposed to the character and purpose of the development should determine whether it is undertaken for a public purpose.]

Of the three cases of Van Streepen, Bartsch and Harvey, it is the Bartsch decision that seems most problematic when evaluating it from the point of view of the public purpose requirement. Here the gap between the primary purpose (building a road) and the secondary purpose (building a shopping center) seems so large that it is hard to see how the latter can be ‘ancillary’ to the former. What seemed to motivate the court’s position was the consideration that the shopping center would enhance the economy of Harrismith, the town outside which the shopping center was to be built, and that it was therefore in the public interest. Slade correctly points out that the legislation and expropriation notice, which allowed the expropriation, “cannot be read this broadly”. It is one thing to expropriate land to relocate water and electricity ducts to enable the construction of a road, and then also to take gravel, as was the case in Van Streepen. It is quite another to expropriate property to build a road, and then also a shopping center. As Slade points out, one might have thought differently about this if the property was expropriated to establish a petrol filling station alongside the road, but a shopping mall is too far removed to qualify as being ancillary to the building of the road. The inconsistency of the approach is thrown into even starker light if one bears in mind that the property was expropriated from a landowner who wanted to develop the land for commercial purposes anyway.

Be that as it may, Bartsch now provides precedent for motivating an expropriation on the consideration that the economy will thus be stimulated. Once this argument can be made, it seems irrelevant, on the strength of Bartsch, that the goal is to be achieved through a third-party transfer. Had Offit eventually resulted in an expropriation, it would likely have been motivated on similar reasoning. As it stands, both the Offit a quo and Supreme

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168. Id., at p. 51.
169. Offit Enterprises (Pty) Ltd and Another v. Coega Development Corp (Pty) Ltd and Others [2010] (2) All SA 545 (SCA), para. 15.
170. Id., is discounted here because it eventually did not result in an expropriation.
171. Slade 2012, supra note 1, at p. 117.
172. Id., at p. 117.
173. The high court accepted that the development would create many permanent and temporary jobs and would add to social benefits, such as increasing the per-capita income. Because the investment potential of the development exceeded R20 billion, the high court was satisfied that the development scheme
Court of Appeal decisions referred to the economic advantages that the development in the Coega Industrial Development Zone would bring to justify the expropriation. In this sense it endorses the conclusion in respect of Bartsch. It means that, as Slade says, the courts [have] effectively opened up the public interest requirement to include the expropriation of property for economic development purposes, even in the absence of legislative authority, purely on the basis of a particular interpretation of the public interest requirement.

What is more, the judicial development has occurred without a proper engagement with what the public interest entails. What the courts seem to do is to distinguish between the purpose for the expropriation and the motivation for it, and slipping whatever considerations would be discounted, even under the broadest meaning of public purposes, back in through the back door of public interest. As Slade once again remarks, in the absence of clear and specific legislative authority, increased employment opportunities, increased revenue and the general improvement of the economy are ... not enough to justify the expropriation of property for the state to implement projects of economic development.

The Bartsch decision demonstrates very well, that a set of economic reasons to support a particular development may be just as applicable to support a development across the road. The only difference would be in the decision as to which third party gets to benefit, and who gets to lose their land involuntarily. The courts cannot allow the state to play loose and fast with private property in this way.

By now, it is generally accepted that expropriation may be necessary to reverse historically unjust land-holding patterns. In this respect, the judiciary’s consistently broad understanding of the term public purposes in the new constitutional dispensation is

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174. Considering the provincial government and Department of Trade and Industry’s stakes in the Coega development project, the Supreme Court of Appeal found that Coega Development Corporation’s input was of national and provincial importance. Accordingly the “industrial development with all its concomitant benefits of employment and economic growth is manifestly a public purpose, and indeed a central public purpose in South Africa” Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation and Others 2010 (4) SA 242 (SCA), para. 17.

175. Slade 2012, supra note 1, at pp. 117-118.

176. Id., at pp. 118-119
commendable, and it allays Van der Walt’s initial apprehension\textsuperscript{177} that courts could frustrate essential reforms by interpreting the public purpose requirement too strictly. The more imminent problem in the South African context seems to be that the vagueness of public interest within the binary public purposes requirement may attract reprehensible attempts by individuals and organs of state to ‘play the system’ in a way that would secure advantages where they are not due. It is ironic that, of all branches of the judiciary, it is in the judgments of the Land Claims Court – a driver of social change if ever there was one – that the need to draw limits to the expectations upon the public interest concept as an agent of change are made clearest.

Treatment of the public interest consideration in other branches of the judiciary is less commendable, especially where it is aimed at avoiding a situation that invalidates third-party transfers outside the social reconstruction context. Noticeably, it is in those cases (such as \textit{Bartsch}) where the expropriator was unable to bring an expropriation within the rather broad ambit of the South African public purpose requirement, and the courts were at pains to validate the expropriation, that reliance on public interest related arguments raise the red herring of the good faith of an expropriating authority. That an expropriation is to be undertaken in good faith goes without saying. There should be no need for a court to consider this argument in lieu of a finding that the public purpose requirement has been met. Yet, in cases such as \textit{Bartsch} and \textit{Harvey}, good faith on the part of the expropriator, it seems, is what allows the court to defer to the expropriator the decision about whether the expropriation is or remains legitimate.

The question with which this piece concludes is this: if the critique of existing precedent on the interpretation of the binary public purpose requirement stands, what lessons can be learned in reconceptualizing the requirement for future use? It is not acceptable for an expropriator to advance any old reason that would make a particular expropriation seem to fall within the public interest without that this is subjected to proper, thorough judicial scrutiny.

\section*{3.4 Conclusion: Rethinking Public Interest}

Were it not for the manner in which the courts introduced the public interest consideration into their jurisprudence on expropriations for economic development reasons, one could have concluded that the public interest aspect of the binary public purpose requirement is obsolete.\textsuperscript{178} As things stand, however, it is necessary to present an alternative to the current judicial treatment of the public interest concept.

\textsuperscript{177} Van der Walt 1997, \textit{supra} note 134, at pp. 135-139.
\textsuperscript{178} In this regard, see, e.g. Van der Walt 2011, \textit{supra} note 2, at p. 460.
What remains, then, is to re-examine the role and place of the public interest element of our binary public purpose requirement. In the most recent version of the Expropriation Bill, 2015, clause 2(1), the binary requirement as found in the Constitution is reproduced, and in the definitions clause the meanings of public purpose and public interest are confirmed to be those that have already become established in South African law. Existing precedent is hence likely to remain relevant, even if the statute is amended.

Ostensibly, the binary public purpose requirement serves to justify an expropriation: a substantial part of the public should benefit from the expropriation. It is not sufficient that the state is enriched by the expropriation.\(^\text{179}\) If it is merely an individual/group of individuals benefitting, then there is normally no justification for the expropriation. The exception here is expropriation for purposes of achieving land and natural resource reform, which is specifically to be validated in terms of the Constitution, even though it might benefit private individuals only.

In the past, authors already engaged with the difficulties experienced in giving content to public interest and related terms,\(^\text{180}\) especially in the context of expropriation. Matters are complicated by the meanings attached to the term in different contexts.\(^\text{181}\) Public interest seems to be a term used when policy choices need to be justified. As such, it is useful to evaluate all those factors (like economic considerations, state security, as well as administrative and legal interests) which could influence the wellbeing of a body politic. The state can rely on these factors to motivate infringements upon individual rights, but must also take these factors into account to determine whether such infringements are justified. The problem arises when the term is employed in the legal context, to provide a means of measuring state conduct. It begs the judiciary to make a call on the appropriateness of the choices made for the people by their elected representatives.

It is quite understandable that courts would be wary of interfering in the political process. It is necessary to distinguish between the use of this term in the legal context and its motivation of policy choices. Blaauw\(^\text{182}\) illustrated the distinction by relying on

\(^{179}\) Slade 2012, *supra* note 1, at p. 48.


\(^{181}\) See Eisenberg 1995, *supra* note 3, at pp. 208-209 who also draws attention to other similar terms (like public use, public weal, public purposes) used in differently overlapping ways.

existentialist engagement with the concept of ‘sociality’: in the vertical relationship between the state and its subjects that lies at the heart of public law, the public at large is not a direct player. On this level, as ‘a regulative legal principle’, public interest is a legal norm applicable in resolving disputes. This differs from the understanding of ideas in liberal philosophical traditions, where the general communal will may be characterized more normatively through endorsement of fundamental values such as freedom, justice, security, peace and prosperity. 

By way of example, the South African Constitution’s property clause is a reflection of some of the values upon which South African society wants to be founded: respect for private property and responsibility to redress injustice and reform proprietary relations to achieve dignity, equality and freedom. The inclusion of public interest in the binary public purpose requirement must be understood in this context, and the directive of section 25(4) of the Constitution must be kept in mind: land reform and equitable access to natural resources are explicitly mentioned as being in the public interest for the sake of justifying expropriation and determining compensation. Land and resource reform are hence sufficiently important to render expropriation for those purposes possible.

Practically, expropriation occurs with a specific objective in mind, and a realization strategy at hand. At the very least, the public interest consideration must be assessed by scrutinizing the development plan in which such objectives and strategies are exposed. Some further guidance can be taken from the cases in which public interest was considered in the context of social reconstruction, even though this did not necessarily deal with expropriation. In Nkomazi, the court’s contrasting of public and private interests was helpful to understand its ruling that the private benefit to be gained by restoring land on which four towns are established to a claimant community under the Restitution Act could not topple the public interest in maintaining the status quo. Similarly, and perhaps even more clearly, the Kungwini judgment exposes the fallacy of an argument that tries to dismember the motive for an expropriation from its purpose.

To conclude, the review of past precedent confirms that in South African expropriation law, public purpose and public interest are not two terms denoting one and the same thing. The role of public interest in the binary requirement for expropriation is to

183. Id., at p. 180.
184. Id., at pp. 180-182.
185. Id., at p. 185.
enable the execution of social restructuring; to reverse unjust patterns of land-holding. In that context it can be theorized, as the Land Claims Court is doing. However, public interest is not conceptualized well outside the sphere of social transformation. Where it is applied outside this context, it makes for confusion and anomaly. In transformation cases – where land reform goals have to be assessed – the role and influence of public interest is quite different. There it simultaneously entrenches reform and places limits on it. It is especially in the context of cases that have nothing to do with social restructuring, but rather with run-of-the-mill expropriations and expropriations for economic development purposes that some academic intervention is urgently needed. And now is the time to do so, with the expropriation law being reconsidered by the South African Parliament.
“SOMEWHA T AT SEA”
PUBLIC USE AND THIRD-PARTY TRANSFER LIMITS IN TWO US STATES

John A. Lovett*

4.1 INTRODUCTION

The jurisprudence of the United States Supreme Court interpreting the ‘public use’ requirement of the Fifth Amendment has powerfully influenced the exercise of eminent domain in the United States. At the same time, though, state courts, state constitutions, and state statutes have played an increasingly important role in establishing the limits on the power of state and local governments to expropriate private property. In recent years particularly, a number of US states have established jurisprudential, constitutional, and statutory limits on the power of state and local governments to expropriate private property and transfer it to private parties for purposes of economic development. This chapter does not attempt to survey all of these state level attempts to regulate or control economic development takings. Surveys of that nature have generally shown that these state efforts to ‘reign in’ economic development takings have produced mixed results, with some states imposing significant prohibitions on economic development takings, but many others leaving the field more or less unchanged, especially in light of permissive regulation of so called ‘blight’ takings.1

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Numerous scholars have also explored the important normative questions of whether economic development expropriations should be prohibited entirely, permitted and subjected to deferential judicial scrutiny, allowed but subjected to heightened forms of judicial scrutiny or community level review, or allowed but coupled with more robust forms of compensation that would protect vulnerable property owners and residents, especially in distressed urban communities.2

In light of this voluminous scholarship, this chapter focuses on two particular states (Michigan and Louisiana) that have implemented especially rigorous legal frameworks designed to constrain economic development expropriations even though state and local government actors have often pursued such expropriations in response to significant economic dislocation and natural disaster. One of these states (Michigan) has also played a particularly important role in the evolving normative debates over the propriety of economic development takings.

Section 4.2 of this chapter explains why, in the wake of the United States Supreme Court’s decision in *Kelo v. City of New London*,3 state courts and legislatures will continue to play a crucial role in defining the limits of the expropriation of private property for third-party transfers in the United States. Section 4.3 identifies the origins of Michigan expropriation law in the work of Thomas M. Cooley, the influential, late 19th century

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Michigan Supreme Court Justice and legal scholar. It then analyzes how Cooley’s principles subsided and then re-emerged in two landmark decisions: *Poletown Neighborhood Council v. City of Detroit* and *County of Wayne v. Hathcock*. Section 4.3 also takes note of other important post-*Kelo* developments in Michigan, including strict constitutional prohibitions on economic development and blight takings and strengthened compensation rights for residential property owners affected by expropriation.

Section 4.4 examines Louisiana’s enactment of constitutional prohibitions on economic development takings and third-party transfers in reaction to *Kelo* and traces how, after Hurricane Katrina, the state struggled to modify those strict limits in the face of demands for post-disaster community revitalization. This part also details recent jurisprudential developments in Louisiana, including an important decision that threatens to create a significant loophole in Louisiana’s otherwise apparently strict constitutional limits on post-condemnation, third-party transfers by allowing condemning authorities to disguise such transfers in quasi-feudal property forms. Section 4.5 concludes.

While expropriation can play an important role in a state’s efforts to respond to an economic crisis or a natural disaster, the approaches of Michigan and Louisiana to limitations on the expropriation power reveal significant internal contradiction. On the one hand, these two states’ stories reveal the growing skepticism of courts and legislatures in the United States towards economic development expropriations that appear to concentrate the benefits of such expropriations in the hands of a limited number of private interests while concentrating the sacrifice exacted by the expropriation in often weak and vulnerable communities. On the other hand, and especially as the experience in Louisiana demonstrates, legislators and courts sometimes respond to the pressures created by economic crisis and natural disasters by loosening these limitations on economic development expropriation and creating more malleable standards.

### 4.2 Why State Law Matters

Writing in the *Alabama Law Review*, retired United States Supreme Court Justice John Paul Stevens, the author of the Court’s majority opinion in *Kelo*, offers a curious admission:

> The majority opinion that I authored in the *Kelo* case incorrectly assumed – as Justice Kennedy and each of the dissenting opinions also did – that the case required us to construe the ‘Takings’ or ‘Public Use’ clause of the Fifth Amendment to the Constitution.⁷

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⁵. 684 N.W.2d 765 (Mich. 2004).
⁷. Id., at p. 946.
Although many judges and scholars have long assumed that the Fifth Amendment to the United States Constitution was made applicable to the states by the Fourteenth Amendment in a 1897 Supreme Court decision, \textit{Chicago B. & Q.R. Co. v. Chicago}, which the \textit{Kelo} majority opinion duly cited, Justice Stevens now acknowledges that this 1897 decision did not actually ‘even cite the Fifth Amendment’ and, moreover, ‘neither that case nor any later Supreme Court case’ with which Stevens is familiar ‘explained how or why the Takings Clause might have been made applicable to the states’.

Not to worry, though, according to Justice Stevens. The Court still reached the correct result in \textit{Kelo}. Why? Because what the Court addressed in 1897 and what almost all of the Court’s subsequent ‘public use’ takings cases really concern is substantive due process. According to Stevens, it is the substantive dimensions of the Fourteenth Amendment’s statement that property cannot be taken ‘without due process of law’ that should have been the focus in \textit{Kelo}. Under Steven’s new version of a substantive due process/public use analysis, courts should generally defer to state and local policy determinations as to whether a particular proposed use of property taken via eminent domain is purely private, and thus a violation of substantive due process, or sufficiently public in some respect to satisfy minimal substantive due process guarantees.

In support of his new substantive due process rationale for federal constitutional deference to state and local government exercise of eminent domain, Stevens now invokes Justice Oliver Wendell Holmes’ well-known dissent in \textit{Lochner v. New York}. Just as courts applying substantive due process should defer to state level decisions regarding the contours of economic regulation, so too should courts defer, \textit{as a matter of substantive due process}, to state level determinations regarding the sufficiency of a particular public use for eminent domain. As Holmes famously stated, “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of citizen to the state or of \textit{laissez faire}”. Similarly, despite his own mistake in framing \textit{Kelo} as a Fifth Amendment Public Use case, Stevens now claims the majority reached the right result in \textit{Kelo} because, except in rare cases of blatant irrationality or abuse that violate baseline principles of substantive due process, determining the permissible public ends that state and local governments can invoke to justify exercising their expropriation power is a function best handled by state legislatures and, concomitantly, state courts interpreting state constitutions and state statutes.

\textbf{8.} 166 U.S. 226, 17 S.Ct. 581 (1897).
\textbf{9.} Stevens 2012, \textit{supra} note 6, at p. 946.
\textbf{10.} Stevens 2012, \textit{supra} note 6, at pp. 947-950.
\textbf{12.} \textit{Lochner}, 25 S.Ct., at p. 547 (emphasis in original).
In the *Kelo* decision itself, Justice Stevens indicated as much at the conclusion of his own now admittedly unnecessary Fifth Amendment ‘takings’ analysis, when he observed “that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power” and when he further noted that “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate”. Assuming that Stevens’ analysis is technically correct or at least that he is correct in prophesying that the real action regarding the ‘public use’ limitation on eminent domain will take place at the state level, it will be fruitful to examine two states, Michigan and Louisiana, that have been the locus of important attempts to define the proper scope of the expropriation power, especially in the context of economic crises and natural disaster response, to measure how state legal systems are controlling the power that Stevens suggests properly belongs to them.

4.3 **MICHIGAN**

Perhaps no state has played a more important role in defining the terms of the American debate over the limits of state expropriation power than Michigan. The Michigan Supreme Court’s decision in *County of Wayne v. Hathcock* helped launch a period of intense national scrutiny into the wisdom and constitutionality of the actions of municipal corporations in expropriating private property and transferring it to private third-party developers for the purpose of economic development. That *Hathcock* was decided while the property owners’ appeal in *Kelo* was pending raised expectations that the Court might declare economic development takings unconstitutional under the United States Constitution. Of course, the majority decision in *Kelo* disappointed property rights advocates but simultaneously ignited a widespread legislative and judicial backlash against the use of expropriation as an economic development tool, a backlash whose long-term impacts remain uncertain. The following analysis reveals the pattern of Michigan’s experience with the public use requirement for expropriation and other related restraints.

4.3.1 *Thomas M. Cooley and the Origins of Michigan’s Constitutional Limitations on Public Use*

The roots of Michigan’s constitutional jurisprudence on eminent domain are found in the work of Thomas McIntyre Cooley – perhaps the most important judge, law teacher and law scholar during a crucial period when American courts struggled...
to define the relationship between the state and the individual in the second half of the 19th century. Born in New York in 1824, Cooley first studied law in 1842 under the tutelage of Theron Strong, a lawyer who had just completed a term in the United States Congress as a representative of New York. In 1843, Cooley moved to Michigan where he continued his legal studies for two more years. He was admitted to the Michigan bar in 1846, just 9 years after Michigan was admitted to the Union.

Cooley’s legal career accelerated quickly once he became a member of the Michigan bar. He compiled and published statutes and became an early reporter of Michigan Supreme Court decisions. Before the outbreak of the Civil War, Cooley moved to Ann Arbor where he was one of the founding professors of the University of Michigan Law School, on whose faculty he served until 1885 and where he served as Dean from 1871 to 1883. In 1865, just before the conclusion of the Civil War, Cooley was elected to the Michigan Supreme Court, one of the most highly regarded appellate courts in the United States at the time, and served on that court for the next 20 years, including a period as its Chief Justice. Cooley’s politics mirrored those of other idealistic men of his era with humble origins, who identified with the interests of small farmers and the working poor. Though he began his career as a Democrat, he helped found the Free Soil party in Michigan in the 1850s. In 1856, following Abraham Lincoln, whom he revered, Cooley joined the Republican Party and became a supporter of both emancipation and preservation of the Union.

In the beginning of his judicial career, Cooley was not a proponent of laissez-fair constitutionalism, even though he later became associated with this school of constitutional thought. Rather, just like Stephen J. Field and Christopher G. Tiedeman, Cooley began his legal career as a supporter of “the Jacksonian political ideals of liberty and equality, not the economic ideal of unregulated markets”. Cooley feared growing concentrations of wealth and worried about the potentially undemocratic

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17. Id. (Carrington 1997, Common Thoughts of Man), at p. 517.
18. Id., at p. 518.
19. For details on Cooley’s impact as a law teacher and founder of the University of Michigan Law School and how the law school he built differed from Langdell’s emerging model of legal education at Harvard Law School, see, generally, id., at pp. 496-520.
20. Id., at p. 496.
21. Id., at p. 518.
23. Id. (Alexander 1997), at p. 249. See also, id. (Thomas Cooley, ‘Public Use’, and New Directions in Takings Jurisprudence), at p. 850.
impact of ‘class legislation’. As Alexander notes, Cooley “argued not simply that government should avoid redistributing property from the rich to the poor but should not favor any class, rich over poor any more than poor over rich”.24 In Cooley’s egalitarian vision of society, class should not influence the government’s allocation of benefits and burdens at all. Instead, as Cooley himself put it, “[e]quality of rights, privileges, and capacities unquestionably should be the aim of the law”.25 One contemporary legal historian has claimed that, far from being a ‘social Darwinist’, Cooley was actually ‘among the first American Progressives’ or, alternatively a ‘communitarian’ or ‘Burkean’ conservative.26

Although Cooley authored several well-regarded academic treatises, his most important scholarly work was undoubtedly *Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. First published in 1868, *Constitutional Limitations* analyzed state constitutions and state law making power. With its six editions, the last of which was published in 1890, *Constitutional Limitations* became the most widely circulated, best-selling and most frequently cited book on American law in the second half of the 19th century.27

Cooley’s other crucial texts on ‘public use’ from this period were majority opinions he authored for the Michigan Supreme Court in 1870 and 1877. In the first, *People Ex Rel. Detroit and Howell Railroad Co. v. Township of Salem*,28 the court invalidated a statute that would have allowed several Michigan townships to pledge 5% of their local property tax revenue to secure bonds that were to have been sold to fund the construction of a railroad line from Detroit through the townships by a private railroad company. Writing for the majority in *Salem*, Cooley found the statute unconstitutional because it imposed a tax for a private, not a public, purpose, even though the railroad project would likely have produced incidental public benefits.29

In the second case, *Ryerson v. Brown*,30 the court invalidated a statute authorizing private mill owners to dam the flow of water in rivers and streams and obtain the right to

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30. 35 Mich. 333 (1877).
flow water on the land of upstream neighbors by paying these neighbors damages determined by appointed commissioners. Cooley held that Michigan’s own post-Civil War Mill Act amounted to an unconstitutional taking of property for a private use.

Two basic principles emerge from Cooley’s decisions and academic writing in this period. The first concerns the argument that the public use requirement for eminent domain should be construed liberally because the public purpose requirement for the government’s power to tax is also construed liberally. For Cooley, the requirements regarding the public ends for both of these exercises of governmental power should not necessarily be equivalent. Although both eminent domain and taxation require an infringement of an individual’s private property – whether in the form of income, land or some other intangible wealth – Cooley rejected the notion that a public purpose sufficient to justify the exercise of one of these powers was necessarily sufficient to justify the other. Cooley resisted this conflation of the tax and expropriation power most clearly in this passage from his opinion in Salem:

Reasoning by analogy from one of the sovereign powers of government to another, is exceedingly liable to deceive and mislead. An object may be public in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest.

Curiously in Salem, Cooley asserted that the public purpose necessary to sustain an exercise of the eminent domain power should be more liberally construed than a public purpose alleged to support an exercise of the taxing power because the former resulted in ‘forced sale for a reasonable compensation paid’ while the latter produced ‘af orce exaction without any pecuniary return’. In time, as the state’s taxing power expanded, the degree of scrutiny applied to assertions of public purpose to support the taxing

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power and the eminent domain power inverted, with Michigan courts eventually construing the public purpose requirement for eminent domain more narrowly than for the taxing power. What remains crucial, though, is Cooley’s disaggregation of public purpose analysis, his insistence that each distinctive form of governmental intrusion on private property rights deserved a specialized, contextual evaluation of the fit between the alleged public end served and the means used to achieve that end.

Cooley’s second key principle concerning eminent domain focused specifically on post-condemnation third-party transfers. Although he recognized that state and local governments could, in certain cases, use the expropriation power to take property from one private person and transfer it to another private person, Cooley asserted that third-party transfers were constitutionally permissible only in a few narrow circumstances – specifically when the third-party transferee would be a common carrier or some other private entity that would be subject to some form of government control to guarantee that the public would receive some *direct benefit* from or *direct access* to the activity made possible by the expropriation and third-party transfer. For Cooley, *incidental public benefits* would never be sufficient to justify expropriation benefiting a private party. Put differently, Cooley took the position that expropriation followed by a third-party transfer should only be permitted when the accomplishment of a public purpose is otherwise impossible or highly impracticable.

Cooley’s opinion in *Ryerson* reveals the degree to which he had come to distrust rationalizations of expropriation that provided a mixture of public and private benefits. Indeed, in a striking passage, Cooley pointed out that a local water mill which would benefit from a *de facto* expropriation of the common law right of an upstream neighbor to be free from flooding could profit handsomely in the international market without providing any significant benefit to the local economy:

> Whether the use to which the machinery is to be put which is to be operated by the power can be declared a public use, is the question that remains to be considered. If the act were limited in scope to manufacturers which are of local necessity, as gristmills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such a case, it would be essential that the statute should require the use to be public in fact; in other words that it should contain provision entitling the public to accommodation. A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively to Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed, the last named would have far higher claims, for they would subserve

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actual needs, while the former would at most only incidentally benefit the locality by fur-

nishing and adding to the local trade.38

This passage reveals Cooley’s Jacksonian fear that powerful commercial forces could
easily capture the reigns of the eminent domain power and use it to improve their
own economic interests without providing any material benefit to local constitu-
encies. As Greg Alexander has observed, Cooley worried that the eminent domain
power, like other forms of governmental power, could be wielded to achieve the ends
of class legislation – legislation that benefited the powerful at the expense of the weak.

Cooley’s narrow interpretation of the public use requirement for eminent domain in
the context of proposed third-party transfers also surfaces in Constitutional Limitations,
particularly the Fifth Edition, published in 1883, which was often cited by Michigan
courts in the 20th century. By this point, Cooley had acquired a sufficiently long view
of his own work on the Michigan Supreme Court and the work of other American
courts to distill a more generalized theory of public use limitations on eminent
domain. First, Cooley noted the general consensus that a legislature could not “take
the property of one individual and pass it over to another without reference to some
use to which it is to be applied for the public benefit”.39 At the same time, Cooley
doubted that either direct takings under the eminent domain power or indirect tak-
ings under other provisions of law could be justified ‘on vague grounds of public
benefit’ that would result from the ‘profitable use’ to which a post-expropriation
transferee may devote the expropriated property.40 Although he admitted “[w]e find
ourselves somewhat at sea… when we undertake to define, in light of the judicial deci-
sions, what constitutes a public use”, Cooley clearly disapproved of the carte blanche
defereence to legislative determinations of public benefit that Kent had recommended
in his commentaries earlier in the 19th century and that had been used to authorize the
effective condemnation of lands for mill sites under the earlier Mill Acts.41

Cooley also emphatically rejected the contention that increasing land values, intensi-
fying economic activities occurring on land or generalized economic development
could ever be a sufficient justification for taking private property. As he explained:

It may be for the public benefit that all the wild lands of the State be improved and culti-
vated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings
replaced by new; because all of these things tend to give an aspect of beauty, thrift and

39. T.M. Cooley, Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United
40. Id., at p. 659.
41. Id., at p. 659 (emphasis added).
comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be sanctioned by our constitution.42

For Cooley, the elusive ‘further element’ that could justify an expropriation and third-party transfer arose in only two situations: (1) when ‘the government is supplying its own needs’, by which he meant direct ‘possession, occupation, and enjoyment of the land by the public at large, or by public agencies’;43 and (2) when the government is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which on account of their peculiar character and difficulty – perhaps impossibility – of making provision for them otherwise, it is alike proper, useful and needful for the government to provide.44

By this latter category, Cooley meant simply common highways and common carriers and perhaps appropriations under the early Mill Acts, when power generation was more or less solely dependent on water power, but not Mill Acts enacted in the 1860s or later when power generation was increasingly diversified as a result of the steam power revolution.45 In short, this ‘further element’ was, as Cooley explained in Salem, “the necessity of accomplishing some public good which is otherwise impracticable”.46

But here it is worth noting Cooley’s unease even with regard to common carrier expropriations. Even though railroads were often characterized as a ‘species of public highway’, Cooley pointed out that, once established and operating, railroads did not actually function like public highways:

They are not, when in private hands, the people’s highways; but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, and for such pecuniary compensation as may be stipulated.47

In sum, Cooley’s constitutional decision making and commentary expressed a deep skepticism of the legitimacy of governmental expropriation designed to aid private economic actors, even those who provided services directly available to the public.

42. Id., at p. 660.
43. Id., at p. 659.
44. Id., at p. 660.
45. Id., at pp. 660-667.
As we will see, this skepticism about expropriation and third-party transfers resurfaced powerfully in Michigan’s two famous late 20th-century eminent domain cases.

4.3.2 Poletown: General Motors and Justice James L. Ryan

It is difficult to understate the importance of the Michigan Supreme Court’s decision in Poletown Neighborhood Council v. City of Detroit48 to the development of American eminent domain jurisprudence. The controversy crystallized for many American lawyers at least the potential for abuse that condemnations of private property in the name of economic development could inflict on economically disadvantaged, politically weak communities. At a more formal level, though, the dueling opinions in the case – the mild, conclusory per curium majority opinion upholding the city’s condemnation of 465 acres (145 within the City of Detroit and the remainder within the adjoining City of Hamtramck) at the behest of General Motors Corporation so that it could build a new automobile manufacturing facility and supposedly save over 6,000 jobs, and the dissenting opinions of Justice John Warner Fitzgerald and James L. Ryan – all cast themselves in the shadows of Cooley’s public use jurisprudence. In the end, it was Justice Ryan’s powerful evocation of Cooley in his dissent that set the stage for the Michigan Supreme Court’s eventual return to a restrictive interpretation of the public use requirement 23 years later and helped set the stage for the controversy surrounding the United States Supreme Court’s opinion in Kelo.

The per curium majority opinion in Poletown is primarily noteworthy because of its thin analysis. It ignores the human and social costs of the condemnation it sanctioned. It assumes, without any significant explanation, that (1) the concepts of public use and public purpose are generally synonymous; (2) the concept of public benefit, which the court used to encapsulate both public use and public purpose, is ‘protean’ and can evolve dynamically with the changing conditions of society; and (3) the fundamental problem in a case involving a proposed post-condemnation third-party transfer is simply one of line drawing – determining whether the ‘primary benefit’ of the proposed condemnation and transfer will be a public or a private one.49

The majority opinion also sent mixed signals about the appropriate level of judicial scrutiny to apply in these kinds of cases. On one hand, the majority evoked Justice Douglas’ practically blind judicial deference to legislative discretion in Berman v. Parker,50 but, on the other hand, after announcing its conclusion that the proposed condemnation in Poletown served a public purpose of ‘alleviating unemployment and

49. Poletown, 304 N.W.2d, at pp. 457-458.
50. Id., at p. 459 (“When a legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive’” (quoting Berman v. Parker, 348 U.S. 26, at p. 32 (1954)).
revitalizing the economic base of the community” and that the benefit to General Motors was ‘merely incidental’, it suggested that a court must use a form of heightened scrutiny whenever ‘specific and identifiable private interests’ are advanced by a condemnation.51 After stating this test, though, the court simply declared in conclusory fashion that the purported public benefit for the people of Michigan had been demonstrated.

Finally, aware of Cooley’s importance to constitutional legitimacy in Michigan, the per curium opinion in Poletown cited Cooley’s opinion in Salem for the proposition that

the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable … the law does not so much regard the means as the need.52

The per curium opinion, however, failed to note that the court in Salem actually rejected a broad interpretation of public use to justify the pledge of tax revenues to collateralize the private railroad construction project, just as it failed to acknowledge Cooley’s general view that third-party transfers were rarely ever a justifiable accessory to the power of eminent domain.

Dissenting in Poletown, Justice John Warner Fitzgerald was far more skeptical of economic development takings. Citing Salem, Fitzgerald first noted that determination of whether a particular condemnation serves a public or private use is ‘always one of law’ and that legislative judgments about public use should never be ‘conclusive’ or else “citizens could be subjected to the most outrageous confiscation of property for the benefit of other private interests without redress”.53 Evoking Cooley’s refusal to conflate the public use requirements for eminent domain and taxation, Fitzgerald observed that the risk of abuse is actually greater with regard to exercise of the eminent domain power than it is with taxation because the former “places the burden of aiding industry on the few who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry”.54 Fitzgerald also noted that the only instances in which post-condemnation transfers to private parties had been sanctioned were in so called ‘slum clearance’ cases where the primary public purpose served is the ‘elimination of existing blight’ and that in these instances post-condemnation transfers to third parties constitute only incidental

51. Id., at pp. 459-460. Under this heightened scrutiny test, a court must determine whether the claimed public interest is the ‘predominant interest being advanced’ and whether that interest is ‘clear and significant’ or merely ‘speculative and marginal’.


53. Id., at pp. 461-462.

54. Id., at p. 463.
Finally, Fitzgerald offered up an apocalyptic specter of unlimited economic development takings under the majority’s rationale, a specter that Justice O’Connor would evoke decades later in *Kelo*:

> Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner’s, merchant’s, or manufacturer’s property, however, productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a ‘higher’ use.56

For all the force of Justice Fitzgerald’s dissent, Justice Ryan’s dissenting opinion, which was not released until several weeks after the majority opinion in *Poletown*, is more remarkable still. Simply put, it is a striking example of contextualized reasoning and a thoughtful exegesis of Cooley’s 19th century writings that laid the doctrinal framework for the eventual cabining of economic development takings by the Michigan Supreme Court in *County of Wayne v. Hathcock*.

Ryan’s dissent draws its power from several sources. First, Ryan was absolutely candid about the severity of the economic crisis affecting the City of Detroit in the early 1980s and acknowledged the almost irresistible economic and political pressure that General Motors could bring to bear on the city’s political leadership. He scoured the record of the trial court to show not only Mayor Coleman Young’s willingness to cooperate with General Motor’s every whim and desire but also the harsh economic terms that General Motors was able to extract from the city.57 Unlike the majority opinion, Ryan also humanized the property owner plaintiffs in the case—“the generally elderly, mostly retired and largely Polish-American residents of the neighborhood”58—and repeatedly drew attention to their vulnerable political and economic status. For Ryan, the city’s action would not simply require an involuntary transfer of relatively fungible property but would result in

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55. *Id.*, at p. 462 (citing *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951); *Ellis v. City of Grand Rapids*, 257 F. Supp. 564 (W.D. Mich. 1966)).

56. *Id.*, at p. 464. See also *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, at p. 2676 (2005) (J. O’Connor dissenting) (“The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory”).

57. *Id.*, at pp. 465-469. Ryan was careful to note that the total costs Detroit was forced to absorb to complete the condemnations and ready the site for General Motor’s occupancy amounted to more than $200 million, but that the city was only scheduled to receive $8 million from General Motors as the purchase price for the land. *Id.*, at p. 469. What is more, General Motors was able to extract an additional twelve years of property tax abatements from the City. *Id.*, at p. 470. In the long run, the City claimed that it might realize more than $15 million in new property taxes at some point in the future. *Id.*, at p. 467.

58. *Id.*, at p. 470.
sweeping away a tightly-knit residential enclave of first and second-generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives.\textsuperscript{59}

After his detailed, humanizing restatement of the facts, Ryan’s analysis of the fundamental issue in the case (“the right of government to expropriate property from those who do not wish to sell for the use and benefit of a strictly private corporation”\textsuperscript{60}) divided into three main branches. First, Ryan resuscitated Cooley’s insistence that the ‘public purpose’ requirement for the exercise of the government’s power to tax and spend and the ‘public use’ requirement for eminent domain were two distinct concepts and that a liberal construction of the former did not necessarily justify a liberal construction of the latter. Quoting extensively from \textit{Salem} and \textit{Ryerson}, Ryan argued that the majority’s failure to maintain a clear distinction between the two concepts was a clear error,\textsuperscript{61} whereas Cooley had been wise to untangle the concepts. Further, Cooley’s greater solicitude for the exercise of eminent domain in \textit{Salem} and \textit{Ryerson} could be explained by (1) the generally more skeptical view of taxation in the 19th century and (2) the fact that the private corporations that were the beneficiaries of governmental power in both cases were ‘engaged in the establishment of instrumentalities of commerce’, a special category of private actors who could legitimately benefit from eminent domain under certain conditions.\textsuperscript{62} By the time of \textit{Pole-town}, Ryan observed, it was reasonable to restrict the eminent domain power more narrowly than the taxation power, especially when eminent domain was being employed to aid private corporations for purposes unrelated to the development of avenues of commerce.\textsuperscript{63} Ryan justified this narrow conception of public use for eminent domain by pointing to the loss experienced by the property owner:

\textit{It is one thing to disagree with the purpose for which one’s taxes are spent; it is quite another to be compelled to give up one’s land and be required, as in this case, to leave what may well be a lifelong home and community.}\textsuperscript{64}

The second branch of Ryan’s dissent presciently introduced the themes of federalism and localism that Justice John Paul Stevens has recently evoked in his post-\textit{Kelo} writings. Ryan pointed out that the majority’s reliance on \textit{Berman v. Parker} and other cases purportedly standing for the proposition that courts must show great deference to legislative determinations regarding public use was misplaced. In particular, Ryan

\textsuperscript{59. Id., at p. 470.}
\textsuperscript{60. Id., at p. 471.}
\textsuperscript{61. Id., at pp. 472-474.}
\textsuperscript{62. Id., at p. 474.}
\textsuperscript{63. Id., at p. 474.}
\textsuperscript{64. Id., at p. 474.}
called the majority’s reliance on Berman ‘disingenuous’ because there the Court only insisted upon “minimal judicial review of acts of Congress by federal courts with respect to application of the Fifth Amendment taking clause, which per se applies only to the federal government”.65 Although he assumed (just as Justice Stevens mistakenly did in Kelo) that the takings clause is incorporated into the Fourteenth Amendment due process clause and applies to the states, Ryan noted that other federal court decisions showing deference in questions of public use were actually deferring to state court interpretations of state law on the scope of public use.66 For Ryan, none of these authorities mandated that a Michigan court interpreting the Michigan Constitution should defer to a Michigan legislative determination of public use.

The third branch of Ryan’s analysis consisted of a review of the traditional rationales for post-condemnation transfers of expropriated property to private corporations engaged in “instrumentalities of commerce”.67 While his reasoning may not appear particularly novel today, what is important is Ryan’s appeal to Cooley and his 19th century colleagues on the Michigan Supreme Court to illuminate the narrow reasons such expropriations may be warranted. Ryan also acknowledged several ‘slum clearance’ cases that had been decided in Michigan but was careful to cabin their holdings as standing only for the proposition that in those cases “clearance in and of itself is a public use” because the object in those cases was “not to convey land to a private corporation as it is in this case, but to erase blight, danger, and disease.”68

Building on his recognition of the instrumentalities of commerce exception, Ryan moved on to consider whether the reasons justifying this exception might justify another exception to the general prohibition against third-party transfers to private corporations – and specifically one that would justify the proposed condemnation by Detroit for General Motors. Reviewing all of the jurisprudence described above, Ryan distilled three common elements that justify the use of eminent domain to benefit a private corporation.

First, under the heading of ‘Public Necessity of the Extreme Sort Otherwise Impracticable: The Indispensability of Collective Action’, Ryan explained that corporations engaged in instrumentalities of commerce were entitled to benefit from eminent domain because their “very existence depends on the use of land that can be assem-

65. Id., at p. 475 (emphasis in original).
66. Id., at p. 475 (citing Rindge v. Los Angeles County, 262 U.S. 700, at pp. 705-706 (1923)).
67. Id., at pp. 476-477.
68. Id., at p. 477 (emphasis in original) (discussing In re Slum Clearance, 50 N.W.2d 340 (Mich. 1951); General Development Corp. v. City of Detroit, 33 N.W.2d 919 (Mich. 1948); In re Jeffries Homes Housing Project, 11 N.W.2d 272 (Mich. 1943); In re Brewster Street Housing Site 289 N.W. 493 (Mich. 1939)).
bled only by the coordination central government alone is capable of achieving." 69 General Motors did not fit into this category because it could certainly assemble a sufficiently sized tract of land somewhere to construct a new manufacturing facility. The fact that it could not find a sufficiently large tract of land within the boundaries of Detroit, Ryan noted, did not justify the city’s use of eminent domain in Poletown. 70

Second, Ryan observed that in most cases governed by the instrumentalities of commerce exception, the private corporation is subject to some form of government regulation or control to guarantee that the public will have ‘fair access to use’ as long as the expropriated property remains in the hands of the expropriation beneficiary. 71 Again, the proposed condemnation in Poletown failed to meet this test, according to Ryan, because the use of the condemned land by General Motors would not be subject to any public oversight or control after the post-condemnation transfers took place. Indeed, sounding Cooley’s populist themes, Ryan noted that the only persons General Motors would be accountable to would be its stockholders. 72

The third element common to both the instrumentality of commerce exception and the slum clearance cases was, according to Ryan, that the choice of land condemned is generally made without regard to the private interests of a benefited corporation but based upon ‘Facts of Independent Public Significance’; i.e. the selected land is condemned because the railroad or canal company must acquire relatively straight parcels linking population centers and must take account of natural phenomena such as rivers and mountains, or, in the case of slum clearance, when the condemnation must focus on the actual location of blight. 73 Once again, Detroit’s condemnation of Poletown failed this test in Ryan’s eyes because the site was determined solely to satisfy General Motor’s private interests, not because of any inherent and independent facts. 74

In conclusion, Ryan identified an even more fundamental principle underlying all of Michigan’s jurisprudence interpreting its taking clause:

[The right to own and occupy land will not be subordinated to private corporate interests unless the use of the land condemned by or for the corporation is invested with public attributes sufficient to fairly deem the corporate activity governmental. 75

69. Id., at p. 478.
70. Id., at p. 478.
71. Id., at p. 479.
72. Id., at p. 480.
73. Id., at p. 480.
74. Id., No doubt, supporters of Detroit’s action in Poletown would note that the location of the expropriation did have independent significance if the zone of available land was limited to the jurisdictional boundaries of Detroit and excluded suburban sites or sites in other states with more favorable regulatory environments.
75. Id., at p. 481.
It appears that Ryan saw economic development expropriation primarily as an occasion for corporate rent seeking. He saw condemnees in these cases primarily as helpless victims of powerful corporate interests who could easily capture the eminent domain power of local municipal development corporations for their own private gain. In a word, economic development expropriations threatened to turn a healthy democratic political system upside down:

Eminent domain is an attribute of sovereignty. When individuals are forced to suffer great social dislocation to permit private corporations to construct plants where they deem it most profitable, one is left to wonder who the sovereign is.76

In his Poletown dissent, then, Justice Ryan powerfully echoed Thomas Cooley’s ‘underlying fear’, as described by James Ely, that “eminent domain, unless confined, would become a tool for the powerful and politically well-connected to promote their interests, to the detriment of individuals with little political clout”.77

4.3.3 Hathcock: Resurrecting Cooley and Ryan

In 2004, the Michigan Supreme Court was confronted with another classic economic development expropriation controversy. In Wayne County v. Hathcock,78 the local government’s involvement in economic development activities evolved out of a $2 billion construction program to build a new terminal and runway at Detroit’s Metropolitan Airport. Concerned that neighboring land owners would be harmed by increased aviation noise and aided by a federal noise abatement grant, Wayne County officials began purchasing neighboring properties through voluntary sales. During this process, local officials decided it would be a good idea to construct a large business and technology park with a conference center adjacent to the airport. The ‘Pinnacle Project’, as it came to be known, encompassed 1300 acres and aimed to create thousands of jobs and hundreds of millions of dollars in tax revenue for the county over its lifetime.79

Eventually 1000 of the necessary 1300 acres were acquired voluntarily by the county. After resolutions paving the way for expropriation were readied and appraisals conducted, 27 more property owners acceded to the county’s wishes and sold their parcels. Now only 19 additional parcels, whose owners refused to sell to the county, remained. Finally, in 2001, the county filed condemnation actions to acquire these remaining parcels. The affected property owners then filed motions to review the necessity of the proposed condemnations. The trial court and intermediate court of

76. Id.
78. 684 N.W.2d 765 (Mich. 2004).
appeal affirmed the county’s finding that the condemnations were authorized by the relevant Michigan condemnation statute (MCL 213.23). Further, the lower courts found that the county did not abuse its discretion in exercising its eminent domain power and, moreover, concluded that the Pinnacle Project served a ‘public purpose’ as defined by Poletown. The Michigan Supreme Court, however, reversed, holding that the proposed condemnation violated the ‘public use’ clause of Michigan’s Constitution and overruled Poletown both prospectively and retroactively.80

Interestingly, a substantial part of Justice Robert Young’s majority opinion for the Michigan Supreme Court in Hathcock actually upheld the lower courts’ determinations that the county possessed the power of eminent domain and that the proposed condemnations fell within the scope of the Michigan’s condemnation statute because they advanced the ‘public purpose’ of promoting the transition from an industrial to a ‘technology-driven economy’ and were in fact ‘necessary’ to achieving that purpose.81 In other words, as a matter of statutory law, the court found that Wayne County’s actions were reasonable, despite objections by the landowners that the county was using eminent domain merely to ‘stockpile’ land for future development without having identified specific private purchasers or having determined how all the condemned parcels would be used.82

According to the court, however, the problem with the county’s Pinnacle Project condemnations in Hathcock was lack of compliance with the ‘public use’ requirement for eminent domain under Article 10, Section 2 of the Michigan Constitution. In a dramatic change of course, the court in Hathcock completely resuscitated Thomas Cooley’s late 19th-century constitutional jurisprudence and Justice Ryan’s dissent in Poletown. The constitutional core of the Hathcock decision re-established that there are only the three instances in which a condemning authority can transfer property post-condemnation to a private person: (1) when the condemned property is transferred to a private entity involved in ‘public necessity of the extreme sort otherwise impracticable’, i.e. railroads, gas lines, highways, and other such ‘instrumentalities of commerce’;83 (2) when the private entity enriched by the condemnation ‘remains accountable to the public in its use of that property’;84 or (3) when the condemned land is selected based on ‘facts of independent public significance’, and not merely to satisfy the ‘interests of the private entity to which the property is eventually transferred’.85 Not surprisingly, given the majority’s loyalty to Cooley and Justice Ryan’s anti-corporatist vision of public use, the court found that the Pinnacle Project

80. Id., at pp. 770-772, 787-788.
82. Id., at pp. 776-777.
83. Id., at p. 781 (quoting Poletown, 304 N.W. 2d 455 (J. Ryan dissenting)).
84. Id., at p. 782.
85. Id., at p. 783.
condemnations failed to qualify under any of these pre-
Poletown exceptions.86 The majority in Hathcock
devoted the remainder of its opinion to a detailed rebuttal of
the reasoning in Poletown based on a careful reading of Cooley and Ryan’s Poletown
dissent,87 and to its determination to overrule Poletown retroactively despite the like-
lihood that Wayne County officials relied on that precedent in planning the Pinnacle
Project.88

Although it is true that the Hathcock decision is only binding precedent in Michigan for
purposes of interpretation of the Michigan Constitution, one should not underesti-
mate its importance. Rendered on July 30, 2004, just 1 year before the United States
Court’s decision in Kelo, Hathcock legitimized a more traditional, less plastic approach
to economic development takings in the United States and attracted the attention of
many commentators.89 In another important decision, the Supreme Court of Ohio
examined the principles set forth in Hathcock favorably in holding that an economic
or financial benefit to a community, standing alone, is insufficient to satisfy the public
use requirement for appropriations under the Ohio Constitution.90 Similarly, the
Supreme Court of Oklahoma also relied on Hathcock in holding that economic devel-
opment alone was not a public use or public purpose sufficient to justify the exercise
of eminent domain under the Oklahoma constitution.91

4.3.4 Distinguishing Hathcock and Constitutional Codification

Since Hathcock, Michigan courts have only been required to apply that decision’s prin-
ciples in a few reported cases. In one decision rendered a year after Hathcock, the Mich-
igan Supreme Court held that a municipality’s expropriation of land for the
construction of a public spur road designed to be used primarily by a single private
entity, which had actually contributed funds for the project, still satisfied the ‘public

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86. Id., at pp. 783-784.
87. Id., at pp. 784-787.
88. Id., at pp. 787-788. Two justices dissented on this last issue and would have only overruled Poletown
prospectively. See id., at pp. 799-800 (J. Cavanagh & J. Kelley dissenting in part and concurring in part).
89. See A. Mossoff, ‘The Death of Poletown: The Future of Eminent Domain and Urban Development after
1039; Allan T. Ackerman, ‘The Changing Landscape and Recognition of the Public Use Limitation: Is
91. Board of County Commissioners of Muskogee County v. Lowery, 136 P.3d 639, at p. 651, n. 20 (Okla. 2006).
use’ requirement of Article 10, Section 2 of the Michigan Constitution because the road would be open to public use by any member of the public.92 In other words, although one private entity would be the primary beneficiary of the project, the principles articulated in Hathcock did not bar the expropriation because the condemning agency would retain ownership and control over the newly constructed road.93

Responding to the public outcry that ensued after the United States Supreme Court decision in Kelo, Michigan voters approved a constitutional amendment to codify Hathcock in 2006. The amendment explicitly prohibited economic development takings by revising Article 10, Section 2 of the Michigan Constitution to provide:

‘Public use’ does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.94

In addition, the same constitutional amendment provided broader compensatory protection for homes in any condemnation. Specifically, any time that a condemned property is ‘an individual’s principal residence’, the Michigan Constitution now requires that the amount of compensation shall not be “less than 125% of that property’s fair market value, in addition to any other reimbursement allowed by law.”95 Several other states have experimented with similar premium compensation regimes for homes.96 Yet Michigan’s constitutional amendment is one of the most direct and simple protections enacted to compensate homeowners for loss of the subjective values frequently associated with an individual’s personal residence.

93. Id.
95. Id.
At the same time, Article X, Section 2 of the Michigan Constitution was also amended to provide additional safeguards against potentially abusive blight takings, which, as some scholars have noted, can be used to evade legislative or constitutional restrictions on explicit economic development takings. While a condemning authority must generally prove that a taking of private property is for a public use by only a ‘preponderance of the evidence’, Article X, Section 2 now requires that in blight takings the condemning authority must prove that the private property is taken for a public use by ‘clear and convincing evidence’. In theory, this elevated burden of proof will provide private property owners with additional judicial protection from over-reaching blight takings.

4.4 Louisiana

Prior to August 2005, when Hurricane Katrina came ashore and caused massive damage to New Orleans and much of the United States Gulf Coast, Louisiana’s experience with the public use requirement for expropriation was not exceptional. Although Kelo was decided a few months prior to Katrina’s landfall, the Louisiana legislature’s response to both events was not well coordinated. As the years unfolded, the desire of local governments to eradicate blighted houses and other structures, promote economic development and rebuild critical public infrastructure came into conflict with the state legislature’s goal of responding to Kelo in a way that would eliminate the perceived risk of abusive economic development takings. Today, Louisiana’s Constitution reflects an attempt to balance these conflicting interests, but recent judicial decisions show how precarious this balance can be.

4.4.1 The Post-Kelo Constitutional Amendments

The Louisiana story begins, not with Hurricane Katrina, whose physical destruction and social disruption has been recounted by so many, but with two acts of the Louisiana legislature passed in the summer of 2006 in direct response to the widespread public dismay over Kelo. These two acts amended the Louisiana Constitution in several important ways. Prior to these amendments, the Louisiana Constitution placed few restrictions on the kind of purpose that an act of expropriation could serve but

sought to constrain expropriation primarily by requiring somewhat more generous compensation than is mandated under the United States Constitution.

Prior to the 2006 amendments, Article 1, Section 4(B) of the Louisiana Constitution provided two different public interest standards for two distinct kinds of expropriations:

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner.\(^{100}\)

As is evident, Louisiana does not employ the ‘public use’ qualification of the United States Constitution and instead adopts the potentially broader ‘public purposes’ language as the limitation for an expropriation conducted either by the state or one of its political subdivisions. With respect to expropriation by authorized private entities (e.g. common carriers), however, the Louisiana Constitution adds the additional limitation that the expropriation be for a ‘public and necessary purpose’.

Although Louisiana had generally not been targeted by property rights advocates as a state afflicted by widespread ‘eminent domain abuse’,\(^{101}\) courts had occasionally interpreted the ‘public purposes’ requirement of the state constitution liberally to allow a municipal development corporation to expropriate private property and transfer that property to other private persons. In those cases, the courts reasoned that the post-expropriation transfer was only a secondary effect of the expropriation, while municipal redevelopment was the primary public purpose.\(^{102}\)

101. See Miller 2008, supra note 99, at p. 649, n. 103 (discussing analyses by the Institute for Justice, the plaintiffs’ counsel in \textit{Kelo}, and the Castle Coalition, another property rights advocacy group, which found that Louisiana was not plagued by so called ‘eminent domain abuse’ prior to \textit{Kelo}).
102. See \textit{Town of Vidalia v. Unopened Succession of Ruffin}, 663 So.2d 315, at p. 319 (La. App. 3 Cir. 1995) (broadly interpreting ‘public purpose’ requirement of Art 4, § 1 of the Louisiana Constitution to permit expropriation of land for riverfront development project to consist of a river walk, hotel, commercial and retail space, a marina and boat ramp, even though it would result in use of some of the expropriated property by a private individual or corporation “when such use is merely incidental to the public use of the property” and when project’s projected ‘stimulation of economic growth’ would contribute to “the general welfare and prosperity of the community”); \textit{City of Shreveport v. Chausse Gas Corp.}, 794 So.2d 962, at p. 972 (La. App. 2 Cir. 2001) (approving expropriation of private property for construction of convention center and an adjacent hotel, relying on \textit{Berman} and \textit{Midkiff}, and reasoning that courts should not disturb a determination of public necessity if made in ‘good faith’). For a detailed discussion of these decisions, see S.C. Stone, 2007, supra note 99, at pp. 139-141. See also \textit{New Orleans Exhibition Hall Authority v. Missouri Pacific Railroad Co.}, 625 So.2d 1070, at pp. 1074-1075 (La. App. 4 Cir. 1993) (approving expropriation of commercial property for convention center, to be operated by a private, non-profit corporation, when economic development was cited as purpose for the taking).
Starting in 1974, when the Louisiana Constitution was substantially amended, the far more important restraint on expropriations emerged from the Constitution’s requirement that an owner be compensated ‘to the full extent of his loss’. Louisiana courts have interpreted this language to mean that condemnees are entitled to recover not just the fair market value of the condemned property, but also attorney fees, moving and relocation costs, lost profits, and sometimes even damages for inconvenience. In addition, several courts had interpreted this language to mean that the fair market value of expropriated property should be determined “in light of the highest, best, and most profitable use to which it may reasonably be put in the future”.

The 2006 amendments to the Louisiana Constitution, which were inspired by the anti-Kelo backlash across the United States, changed this landscape dramatically. First, Article 1, Section 4(B) was specifically amended to prohibit a naked economic development expropriation that would involve a post-expropriation third-party transfer to a private person as sanctioned by the United States Supreme Court in Kelo:

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into the court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution, property shall not be taken or damaged by the state or its political subdivisions: (a) for predominate use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

To make the anti-Kelo intent even clearer, this subsection of Article 1 was further amended to specify that

[n]either economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose.

Moreover, another amendment spelled out that ‘public purpose’ as used in subparagraph 4(B)(1) “shall be limited to the following”:

a. A general right to a definite use of the property.

b. Continuous public ownership of property dedicated to one or more of the following objectives and uses.


c. The removal of a threat to public health or safety caused by the existing use or disuse of the property.  

Finally, as if all of these changes were insufficient to register the state’s disapproval of economic development takings, the 2006 Amendments went one step further. Article 1, Section 4(H)(1) was amended to impose significant hurdles in the way of almost any post-condemnation transfer of expropriated property to a new private owner:

(H)(1) Except for leases or operation agreements for port facilities, highways, qualified transportation facilities or airports, the state or its political subdivisions shall not sell or lease property which has been expropriated and held for not more than thirty years without first offering the property to the original owner or his heir, or if there is no heir, to the successor in title to the owner at the time of the expropriation at the current fair market value, after which the property can only be transferred by competitive bid open to the general public. After thirty years have passed from the date the property was expropriated, the state or political subdivision may sell or otherwise transfer the property as provided by law.

In effect, this paragraph required that any expropriated property that had not been held for at least 30 years by the expropriating entity could not be sold or leased to a designated private person, unless it was first offered back to the original owner (or the heir or successor) at fair market value. Then, even if the original owner declined to take advantage of this effective right of first refusal, the property had to be offered to the public-at-large through an auction, thus thwarting a local government’s ability to guarantee a developer that it would be able to acquire the expropriated property for a specific redevelopment project.

4.4.2 Failed Test Case and Constitutional Revision

Several commentators soon warned that Louisiana’s post-Kelo amendments could seriously frustrate post-Katrina redevelopment efforts in New Orleans and its environs, especially for purposes of remediating blighted property. Acting on their

108. Id.
110. It is noteworthy that even though these constitutional amendments were passed almost unanimously in the Louisiana legislature in the summer of 2006, they were approved more narrowly when they were placed before the state’s registered voters in a referendum, with only 55% of actual voters approving Amendment V, the key amendment to Art. 1, Section 4(b) containing the prohibitions on Kelo-style economic development takings. See Miller 2008, supra note 99, at p. 652.
advice, the New Orleans Redevelopment Authority (NORA), the city’s leading redevelopment agency,\(^{112}\) filed a lawsuit in 2007 to challenge the state’s post-
\(\)Kelo amendments in the hope that the Louisiana Supreme Court would interpret them narrowly and allow the expropriation of several blighted lots and their subsequent transfer to a respected, not-for-profit private developer selected by NORA.

The condemned property in New Orleans Redevelopment Authority v. Burgess\(^{113}\) was carefully chosen—two vacant lots in the upper Ninth Ward, a neighborhood that had suffered significant Katrina flooding. The property owners had not paid property taxes on the lots since 1996. The house that once stood on one of the lots had been demolished in 1997 because of its dangerous condition. In 2002, an administrative tribunal operated by the city’s Department of Health certified the weed and debris filled property as blighted and authorized NORA to acquire it pursuant to the applicable administrative proceeding rules. At the time of the expropriation petition, the total amount of unpaid taxes, liens, penalties and interest relating to the property was in excess of $37,000. Relying on a recent appraisal, NORA proposed to pay the owners (or their estate) $8,500.\(^{114}\) After the expropriation, NORA proposed to transfer the lots to Habitat for Humanity, a widely respected non-profit builder of affordable homes for low income households, which in turn promised to build several tidy houses that would form part of the widely acclaimed Musician’s Village Project.\(^{115}\)

The potential benefits to the public and the City of New Orleans were undeniable. A formerly vacant, weed-infested lot would be transformed, at relatively low cost, into several well-maintained homes that would anchor a residential neighborhood struggling to stabilize. The potential harm to the property owners appeared to be minimal. The property owner’s long neglect of the lots—whether intentional or unintentional—suggests that their economic and subjective interests in the condemned property were modest, perhaps even non-existent.

Unfortunately, this test case did not produce the clear judicial blessing NORA hoped to achieve. Although the Louisiana Fourth Circuit Court of Appeal agreed with the trial court and held that NORA could exercise the power of expropriation to acquire blighted property with the intent to transfer it to a private party, it declined, on justiciability

\(^{112}\) For details of NORA’s considerable powers to expropriate not just individual blighted parcels but entire neighborhoods—so-called “community improvement area[s]”—in the name of urban redevelopment, see Costonis 2008, supra note 111, at pp. 403-407. For a more critical perspective on the power of municipal redevelopment corporations to target entire areas with eminent domain, even though individual parcels within them are not blighted, see G. Lefcoe, ‘After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forging Ineffectual Blight Tests, Empowering Property Owners and School Districts’, Tul. L. Rev., Vol. 83, No. 1, 2008, pp. 45-110.

\(^{113}\) 16 So.3d 569 (La. Ct. App. 4 Cir. 2009).

\(^{114}\) Burgess, 16 So.2d, at pp. 571-574.

\(^{115}\) Id., at pp. 584-585, n. 29.
grounds, to address the provisions of Article 1, subsection 4(h)(1) granting the original owner a right of first refusal and requiring a public auction before a post-condemnation transfer could occur. The court refused to address the applicability of these post-condemnation requirements because neither NORA, the condemning authority, nor Habitat for Humanity, the potential transferee, had actually sought court authorization to transfer the blighted lots in question. The Louisiana Supreme Court then refused to grant writs, leaving NORA and its opponents in an ambiguous tie.

In 2010, however, the tie was broken when the Louisiana legislature enacted, and the state’s voters narrowly approved, another constitutional amendment that expressly exempted property acquired through blight takings from the onerous right of first refusal and public auction requirements of Article 1, subsection 4(h)(1). So, today, redevelopment authorities like NORA can expropriate blighted property and freely transfer it to private third parties.

Despite this prodigious amount of litigation and constitutional revision, eminent domain has not turned out to be a central tool in the effort to create affordable housing in the New Orleans region. One reason is that the mixed income housing developers who took advantage of a federal tax credit program and other special post-Katrina subsidies found plenty of well situated, and sufficiently large, parcels for housing redevelopment without having to resort to eminent domain for land assembly. In particular, the city’s former public housing projects, which the city decided to demolish in late 2007, provided a ready pool of such parcels whose title was already in public hands. Many other underused and inexpensive parcels were also available throughout the city for smaller scale, tax credit financed projects. A second reason that eminent domain became less important for post-Katrina redevelopment is that NORA, the city’s lead redevelopment agency, itself acquired thousands of small dispersed parcels for free from the Louisiana Land Trust, the state entity that acquired properties directly from homeowners who accepted buy-out offers under the state’s Road Home Homeowner Assistance Program. In short, NORA simply had more than

121. In Orleans Parish, more than 5,000 homeowners accepted one of the Road Home Program’s two buy-out options. The Louisiana Land Trust acquired these properties and has begun transferring them to NORA, which will then be responsible for placing them back into commerce. See <www.noraworks.>
enough land at its disposal and thus had no need to pursue aggressive, large scale expropriation in the name of economic development.\textsuperscript{122}

Eminent domain did not disappear completely from the New Orleans redevelopment landscape. The city and the state of Louisiana used it to acquire and then demolish a 26-block, largely residential and African American neighborhood near downtown to make way for a vast medical complex that will feature both a new Veterans Administration Medical Center (VAMC) and a new Louisiana State University (LSU) Medical School Hospital.\textsuperscript{123} Neighborhood activists and historic preservation advocates both protested against this massively scaled medical center project and urged public officials to either renovate the city’s historic Charity Hospital building or locate the new medical center project in another area that already housed a vacant hospital, but the coalition of local, state, and federal officials who supported the new VA-LSU medical center proved to be unstoppable. Curiously, the most important legal precedent to emerge from this redevelopment effort did not concern the scope of the ‘public purpose’ requirement for expropriation, but rather the limits imposed in the amended state constitution on post-condemnation transfers.

4.4.3 Evading Third-Party Transfer Limits – Feudal Tenures to the Rescue

In March 2010, LSU’s Board of Supervisors filed a petition to expropriate a tract of land and an office building located on Canal Street near downtown New Orleans. The stated purpose of the expropriation was to facilitate the construction of the new VAMC, to be operated by the United States Department of Veterans Affairs (the VA).\textsuperscript{124} Prior to the expropriation, LSU, the City of New Orleans and the State of Louisiana entered into a cooperative endeavor agreement (CEA) to acquire the property for the VAMC. In September 2011, LSU and the owner of the condemned property, 2400 Canal Street L.L.C. (2400 Canal), settled all claims and causes of actions arising out of the expropriation. After the settlement, 2400 Canal claimed to have discovered for the first time that LSU intended to transfer the expropriated property to the VA.\textsuperscript{125}


\textsuperscript{123} For maps of the LSU-VA Medical Center footprint and portraits of some of the lawyers and community activists involved in the effort to encourage the state to rebuild the former Charity Hospital rather than demolish the mid-city neighborhood, see \url{http://insidethefootprint.blogspot.com}; and \url{http://savecharityhospital.com/content/review-plans}.

\textsuperscript{124} 2400 Canal LLC v. Board of Supervisors of Louisiana State University Agricultural and Mechanical College, 105 So.3d 819, at pp. 821-822 (La. App. 4 Cir. 2012).

\textsuperscript{125} Id.
Although the purported post-expropriation transfer did not alter the ostensible purpose supporting the expropriation, 2400 Canal soon filed a lawsuit against LSU, alleging in particular that the ‘Right of Possession, Use and Occupancy Agreement’ (the Use Agreement), signed by LSU and the VA a few weeks prior to the filing of LSU’s expropriation suit, violated Article 1, Section 4(H) of the Louisiana Constitution because LSU did not offer the expropriated property back to the original owner at its current fair market value. In effect, the suit sought to nullify the Use Agreement on the ground that it actually constituted a lease or a sale of the condemned property in violation of Article 1, § 4(H).

To be sure, the Use Agreement was a curious juridical act. Pursuant to its terms:

• LSU (the grantor) gave the VA (the grantee) ‘an irrevocable right of possession, use, and occupancy for the premises’.
• The VA agreed to pay LSU rent of one dollar per year during the term.
• The VA’s plan to construct the VMAC ‘in close proximity’ to a new University medical center being constructed by LSU was ‘additional consideration’ for the agreement.
• LSU would not obtain any property interest in any improvements placed upon the property by the VA, and all improvements would remain property of the United States.
• The VA would be responsible for all real property taxes assessed against its interests in the land and buildings.
• But the agreement would ‘not constitute a transfer of a fee simple title ownership in the Premises’ to the VA.

It appears that, even though the parties intended for LSU to remain the residual, nominal owner of the land under the agreement, the VA would acquire almost all of the valuable incidents of ownership, including an ‘irrevocable right of possession, use, and occupancy’ and permanent ownership of all improvements constructed on the land. Although no real rent was owed by the VA to LSU, there was real consideration for the transaction – the construction of a billion dollar medical center that would benefit the state’s long-term economic interests.

The trial court dismissed the suit on multiple grounds, including that the property owner’s constitutional claims were barred by res judicata based on the September 2010 settlement of all of the potential claims and causes of action arising from the initial expropriation suit. The Louisiana Fourth Circuit Court of Appeal affirmed the dismissal, but for completely different reasons. It held that the property owner lacked

126. Id., at pp. 822-823.
127. Id., at p. 827.
128. Id., at p. 823.
a cause of action under the Louisiana Constitution, reasoning that the February 2010 Use Agreement executed by LSU and the VA was not a lease (and presumably not a sale either), but only a transfer of a ‘right of use’, that is, one of the permissible dismemberments of ownership under the Louisiana Civil Code.129

Rights of use are ubiquitous in Louisiana. A right of use is best understood as the civil law equivalent to an easement in gross. A right of use allows a person to acquire a possessory interest in another person’s immovable property, even in the absence of a dominant estate, which is required for the existence of a predial servitude.130 In Louisiana, a right of use can only “confer an advantage that may be established by a predial servitude”.131 The most common examples of a right of use are rights of way held by utility companies and pipeline companies. Rights of use are both transferable and heritable unless the contrary has been provided for by law or contract.132

Prior to this case, Louisiana courts had tended to classify ambiguous agreements that did not fit the traditional model of a right of use as creating a mere personal obligation, and not one of the recognized dismemberments of ownership.133 But here, in 2400 Canal, the court characterized the Use Agreement confected by LSU and the VA as a right of use because it conferred ‘real rights on the VA’.134 According to the court, the Use Agreement between LSU and the VA was not a lease, i.e. a ‘synallagmatic contract’ that creates ‘personal rights’ in the lessor and lessee,135 even though it used the term ‘rental’ and provided for the VA to pay LSU a dollar a year in rent. Nor was it a sale, a “contract whereby a person transfers ownership of a thing to another for a price in money”,136 even though the VA acquired ‘an irrevocable right of possession, use, and occupancy’ and the United States acquired ownership of all improvements on the property. All that mattered to the appellate court was LSU’s apparent intent to convey a right of use.137

129. Id., at pp. 824-826. See La. Civ. Code Art. 639 (1976) (‘The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment’).
134. 2400 Canal, 105 So.3d, at p. 827.
137. 2400 Canal, 105 So.3d, at p. 827. Curiously, the court also ignored two instruments labeled an Act of Exchange and an Amended Act of Exchange, which also might have violated the prohibition against
The court’s highly formalistic ruling in 2400 Canal creates a significant loophole in Louisiana’s constitutional restrictions on post-expropriation third-party transfers. If the state or a political subdivision can avoid the limitations imposed by Article 1, Section 4(H)(1) on such transfers merely by conveying a ‘right of use’, rather than executing a lease or a sale, property owners would be unprotected from an expropriation whose actual purpose is economic development and tax revenue enhancement. Despite the Constitution’s prohibitions to the contrary, an expropriating authority could simply retain nominal ownership in its own right and transfer a right of use to any third party, whether an insider developer with ties to the expropriating authority or another governmental agency planning to engage in a traditional public purpose such as operating a hospital for military veterans.

Perhaps the court in 2400 Canal sincerely believed that the evil Article I, § 4(H)(1) was designed to prevent – insider deals in which government authorities use their expropriation power to acquire valuable property and turn it over to pre-selected third-party developers – was not implicated in this case. Indeed, the court may have noted sub silentio that if the VA had simply executed the expropriation in the first instance, there would have been no reason for 2400 Canal to question the propriety of the expropriation at all. But regardless of the court’s ultimate rationale in 2400 Canal, its decision opens a potentially wide loophole in Louisiana’s constitutional limitations against the use of eminent domain for economic development purposes. Indeed, since the decision in 2400 Canal, the state of Louisiana and the VA have used a similar transactional structure to acquire additional property, outside the original VA-LSU Medical Center footprint, and avoid time-consuming expropriations through the City of New Orleans.138

4.5 Conclusion

In this Chapter, I have not attempted to make a general theoretical or empirical case for either a narrow or liberal view of the power of state and local governments to expropriate property from one private owner and transfer it to another. Rather, I have traced how the legal systems of two states, both of which have faced severe economic crises, have responded to the difficult legal question of whether the public use

post-condemnation sales in Art. 1, § 4(H)(1) of the Constitution because the property owner failed to introduce the instruments in the trial court. Id.

138. See Dixie Brewing Co. v. U.S. Dept. of Veterans Affairs, 2013 WL 2557108 (E.D. La. 10 June 2013) (dismissing Louisiana Constitutional claims asserted by owner of historic brewery in federal court on jurisdictional grounds). As commentators have noted, the VA has benefitted from state expropriations in this massive redevelopment project because the state of Louisiana enjoys quick-take eminent domain power that the City of New Orleans lacks. R.B. Gratz, ‘Demolition without Due Process’, The Huffington Post, 6 January 2013, at <www.huffingtonpost.com/roberta-brandes-gratz/demolition-without-due-pr_b_4534741.html>. 
requirement for eminent domain should be used to constrain post-condemnation transfers to third parties to promote economic development and respond to natural disasters.

Although Michigan has faced some of the most devastating effects of deindustrialization in the United States, its state courts and its legislature have returned to a jurisprudential position – first articulated by Thomas Cooley in the second half of the 19th century – that is highly skeptical of condemnations that result in the transfer of private property from one private owner to another. Michigan has reverted to a class-conscious, Jacksonian approach to economic development takings that prioritizes the property rights of individual home owners and constrains attempts of local governments to assist powerful corporate interests with land assembly for primarily private, corporate gain despite the potential for incidental benefits to the general public.

Louisiana’s experience after Hurricane Katrina displays a different trajectory. The Louisiana legislature initially reacted to the widespread public dismay sparked by the United States Supreme Court’s decision in *Kelo* by prohibiting economic development takings entirely and severely constraining post-expropriation transfers to third persons. Soon enough, though, the legislature partially undid some of those constitutional limitations after an important test case failed to create room for post-expropriation transfers of blighted property as part of a post-Katrina community redevelopment project. Further, Louisiana courts seem to have cracked open a significant loophole in Louisiana’s constitutional limitations on the post-expropriation sale and lease of expropriated property to third persons by allowing transfers of a ‘right of use’ to third parties.

Taken together, the engagements of Michigan and Louisiana’s legal systems with the public use limitation on eminent domain and the desire of local governments to expropriate property with the aim of transferring that property to private interests or other public actors demonstrate both continuity and change. Continuity emerges in Michigan’s return to a late-19th-century conception of public use that cabins governmental expropriation and third-party transfers to a narrow set of categories designed to insure broad public benefits and to minimize the sacrifice of individuals’ property interests in their homes and communities. In Louisiana, we also see continuity, but we also see the legislature and courts struggle for greater flexibility in the use of expropriation to respond to the pressure of natural disaster recovery.
REVIEWING EXPROPRIATIONS
LOOKING BEYOND CONSTITUTIONAL PROPERTY CLAUSES

Rachael Walsh*

INTRODUCTION

Although most constitutional property clauses expressly or implicitly recognize that the state is empowered to expropriate private property, they often do not specifically state the reasons or purposes that should motivate the exercise of that power.1 Nonetheless, constitutional challenges (sometimes highly controversial) are brought against expropriations on the basis of their aims. In responding to such arguments, courts generally defer to the judgments of legislatures and administrators as to the need for such interferences with property rights. In particular, judges are usually reluctant to second-guess the purpose(s) of expropriations.2 Accordingly, they tend to accept broad objectives as sufficiently specific to justify expropriation powers and decisions, and do not require evidence that a particular acquisition is actually justified in light of that broad objective. Rather, a conceivable contribution to the realization of the broadly stated aim is usually held to be sufficient.3

A common academic (and indeed judicial) response to the seriousness of the impact of expropriations on property rights has been to favor ‘strict’ or ‘heightened’ scrutiny of various forms, usually focused on the connection between means and ends.4 This approach

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1. E.g. the Takings Clause of the Fifth Amendment of the US Constitution simply states that property shall not be taken except for public use, while Article 43 of the Irish Constitution refers to the “delimitation of the exercise of property rights” in light of the “exigencies of the common good” and “the principles of social justice”.


is preferred to stringent review of the aims or purposes of expropriations, because it is focused on the way in which the legislature and/or administrators seek to realize public goals, rather than on the substantive legitimacy of those goals. The Irish experience of judicial review of expropriations casts into sharp relief the problems caused by this approach as a means of constraining and supervising the introduction and implementation of expropriation powers. The Irish courts have accepted broad objectives for expropriations, and have not generally required acquisition-specific justification in light of those objectives. At the same time, they have articulated a strict scrutiny standard for judicial review of expropriations. This has resulted in doctrinal incoherence that obscures the scope of both the right to secure possession of private property and the state’s power to expropriate such property, since, as this chapter will argue, strict scrutiny review is in fact weak when applied to very loosely defined public goals.

This chapter contends that judges may find useful guidance within constitutional texts, but beyond constitutional property clauses, that could inform judicial review of expropriations, both as to their purposes and their means. It argues that doctrinal incoherence in expropriation law could be reduced if judges paid closer attention to relevant property values enshrined in constitutional provisions other than property rights clauses. It analyses Irish expropriation law to illustrate this argument, considering two alternative sources of relevant property values contained within the Irish Constitution: first, the express constitutional values concerning property distribution and use contained in Article 45 of the Constitution, which could provide a basis for validating the legitimacy of the specific objectives underpinning expropriations; and second, the protection for the inviolability of the dwelling in Article 40.5 of the Constitution, which could act as trigger for requiring greater evidence of project-specific justification of expropriations. Neither of these approaches prescribes the circumstances in which the power of expropriation can be employed by the state, nor do they require judges to second-guess legislative or administrative objectives. The first is concerned with attending to constitutional values that can support the exercise of expropriation powers. The second approach is relatively more interventionist, but it still falls short of requiring judicial review of the substantive merits of the objectives of expropriations, and thus of the proper functions of government. Rather, it requires administrators to demonstrate that an impugned compulsory acquisition is actually required in pursuance of their stated objective(s). As such, it does not require the courts to assess the legitimacy or justifiability of objective(s), but rather gives meaningful effect to the strict means-ends scrutiny that the Irish courts already purport to apply in reviewing expropriations.

These approaches draw on rich resources in the text of the Irish Constitution beyond the constitutional property rights clauses that can support judges in reviewing expropriations. While lacking the prescriptive detail of, for example, s. 25 of the

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Constitution of the Republic of South Africa, 1996,\textsuperscript{5} the Irish Constitution is certainly less sparse on the issue of property than the US Constitution,\textsuperscript{6} and less sparse again than the common law protection for property rights.\textsuperscript{7} This chapter argues that the distinctive guidance that the text of the Irish Constitution provides can assist judges when they are called upon to review the constitutionality of expropriations, without unduly limiting legislative freedom, or the exercise of administrative powers. A text-oriented approach certainly does not obviate the need for judicial interpretation and development of relevant constitutional principles in determining when the ‘public interest’ justifies expropriation. Furthermore, this chapter does not argue that close scrutiny of the text will yield a uniform ‘core’ of property, or indeed that one single keystone property value exists. Rather, the chapter argues that where a constitutional text provides signals concerning the circumstances in which the compulsory deprivation of private property is more or less constitutionally permissible, those signals should be taken into account by judges, even if they are rooted in constitutional provisions other than a property rights guarantee. To borrow from Akhil Amar, close attention to property values in the text as a whole may yield useful ‘interpretive leads and clues’ to support and guide judicial interpretation.\textsuperscript{8} The chapter analyses this issue in the context of Irish constitutional property law, as an example of how judges can be assisted in supervising the exercise of expropriation powers by constitutional sources other than classic property rights guarantees.

Section 5.2 analyses the judicial tendency to favor means-ends scrutiny over objective-review, and to defer to legislative and administrative decision-making, in the expropriation context. Section 5.3 analyses the meaning of the ‘public interest’ in assessing the purposes of expropriations in Irish constitutional property law, and the extent to which the courts have limited the purposes for which expropriation powers can be enacted and exercised. Section 5.4 explores the guidance that can be obtained from constitutional provisions beyond the property clauses that could help to correct the doctrinal incoherence that currently pre-dominates concerning the meaning of the public interest in Irish expropriation law. This strategy could be of assistance in other jurisdictions that grapple with the same challenge in expropriation law, and could provide a constitutional basis for greater context sensitivity in judicial review of expropriations.

\begin{itemize}
\item \textsuperscript{5} It provides, for example, that the ‘public interest’ includes “the nation’s commitment to land reform, and to reforms to bring about equitable access to land”.
\item \textsuperscript{6} It simply prohibits the taking of property except for public use and with the payment of just compensation.
\end{itemize}
5.2 The Preference for Means-Ends Scrutiny in Expropriation Law

Close scrutiny of the objectives of expropriations has generally received little judicial support. As Thomas Merrill argued in his seminal analysis of the public use requirement for the exercise of the power of eminent domain in the United States, “with the transition from the minimalist state to the activist state […] courts have become increasingly uncomfortable in defining the correct or ‘natural’ ends of government.” He notes that the exercise of the power of ‘eminent domain’ as it is termed in the United States raises two distinct questions of justification: first, the ends of the acquisition; and second, the necessity of eminent domain as a means of achieving those ends. As he points out, the former question considers the proposed use of the property once acquired, which “…in turn, requires a clear conception of the legitimate functions or purposes of the state”. This means that judicial review of the objectives of expropriations is a sensitive exercise, with which judges are uncomfortable for reasons of expertise and legitimacy. In a majoritarian democracy, judges are understood (and crucially, understand themselves) to be relatively less qualified than the other branches of government to determine the permissible ends of the exercise of the power of eminent domain. Accordingly, judges generally gravitate towards means-scrutiny, which appears to be less political than ends-scrutiny. The same trend exists in the Irish legal context, with Donal Barrington noting that judges have instinctively avoided the questions of social and economic policy necessarily at issue in constitutional property law, on the basis of legitimacy and expertise concerns.

Perhaps in light of this trend in constitutional property rights adjudication, many academics arguing for tighter judicial control of the exercise of expropriation

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9. Merrill, supra note 2, p. 64.
10. Id., p. 66.
11. Id.
12. Id., p. 67.
powers have focused their attention on strict or heightened means-ends scrutiny, particularly in the context of expropriation of residential property. For example, Nicole Stelle Garnett contends that heightened means-ends scrutiny is required in all circumstances whenever eminent domain powers are exercised. She argues that courts should require, “...that a given exercise of eminent domain is ‘reasonably necessary’ to advance or, put differently, ‘related in nature and extent’ to the public purpose used to justify it.” Margaret-Jane Radin sought ‘heightened protection’ for personal property, such as private homes, suggesting that they should be immune from involuntary acquisition even upon payment of market value compensation, or alternatively that the government should be required to show a ‘compelling state interest’ to justify acquisition and that the acquisition was the ‘least intrusive alternative’ in order to justify it. However, requiring a ‘compelling’ or ‘important’ public interest rationale for an expropriation does not necessarily require an expropriating body to establish that a particular acquisition is actually required in order to realize that objective. It may suffice to show that the acquisition is hypothetically justified in light of a particularly important public aim (which might be very broadly defined). Benjamin Barros argued that compulsory acquisitions of homes should be permitted only where an acquiring authority can show that the property could not be purchased voluntarily, and that there was no reasonable alternative course of action that would achieve the same public goal. Such


20. As Doyle notes in the constitutional equality law context, “[t]here is a crucial distinction between questioning whether something is justified or whether it could reasonably be justified.” O. Doyle, Constitutional Equality Law, Thomson Round Hall, Dublin 2004, p. 113. He further notes that this distinction is “[…] routinely ignored in academic commentary.” Id., at note 97.

21. Barros, supra note 4, pp. 297-298. More recently, Andre van der Walt has argued for heightened scrutiny of expropriation and regulation for economic or general redevelopment purposes causing displacement or dispossession from homes. Van der Walt, supra note 4, pp. 55, 86, 99.
tests of ‘necessity’ or ‘least intrusive means’ go further, as they apparently require acquisition-specific justification. However, that justification may still be established in light of a very broad objective, relative to which a wide range of means could reasonably be regarded as necessary. Accordingly, hypothetical justification remains possible under necessity tests, depending on how a judge chooses to apply them, since any given expropriation could be held to be conceivably necessary or required to realize a broadly stated aim (e.g. economic development).

This chapter argues that project-specific justification, applied so as to require actual as opposed to hypothetical justification, is needed in order to give meaningful effect to strict/heightened scrutiny analysis of expropriations. Where loosely defined objectives are accepted as justifying an expropriation, a very wide range of means and impacts might be ‘reasonably necessary’ for achieving a broad public policy goal, which limits the constraint that such a standard of review imposes on the exercise of expropriation powers. As Garnett acknowledges,

'[t]he distinction between – ‘is this policy goal (e.g. economic development) in the public interest?’ – and – ‘is this particular project reasonably necessary to promote economic development?’ – may be real.'

However, she argues “[…] entertaining such a distinction may prove an exercise in casuistry that intervention-wary courts are simply unwilling to undertake”. It is submitted that this distinction is in fact highly significant in the context of judicial review of expropriations, and that where judges do not require project-specific justification, their strict means-ends scrutiny fails to achieve the property rights protection that it purports to guarantee, resulting in doctrinal incoherence. This is well illustrated by the Irish experience of judicial review of expropriations, to which this chapter now turns.

22. As Somin notes in discussing economic development takings, “[…]so long as economic development is regarded as a legitimate public use, means-ends scrutiny could probably be used to justify virtually any condemnation that dispossessed homeowners or nonprofit institutions for the benefit of for-profit business interests.” Somin, supra note 16, p. 214.
23. Doyle argues that the combination of a necessity requirement, with a compelling purpose requirement, would mean that a reviewing court “[…] would have to articulate a purpose both compelling and so closely related to the legislative measure that it could not be achieved in any other, less intrusive, way.” Doyle, supra note 20, pp. 120-121.
24. Garnett, supra note 4, p. 939. Garnett argues later that “[b]y demanding that a condemning entity link the means by which and the particular reason for which it seeks to acquire land, a court may well uncover ‘ulterior’ purposes for the exercise of eminent domain.” Id., p. 963.
25. Id., p. 966.
26. Id.
5.3.1 Constitutional Background

The Irish Constitution, adopted by referendum in 1937, protects private property at two levels: as an individual right, and as a social and economic institution. Article 40.3.2° requires the State by its laws to protect individual property rights “as best it may from unjust attack, and to vindicate those rights in the case of injustice”. It must be read in conjunction with Article 43, which protects the institution of private ownership, and sets out the circumstances in which the exercise of property rights can be delimited.

It provides that:

1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

1.2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The historical origins of these distinctively worded constitutional property guarantees set the tone for the public interest debate in Irish expropriation law. At the time of their adoption in 1937, a significant program of land redistribution, designed to transfer land from landlords to tenants, and so to increase the traditionally small Irish holdings to economically viable sizes, had almost reached completion.27 The legitimacy of the exercise of compulsory acquisition powers by the state (acting through the Land Commission) to achieve this redistribution was widely accepted.28 Moreover, it was a key consideration for the drafters of the Constitution, who were eager to ensure that such land redistribution could not be questioned or undone on the basis of the new protections for private property, which was not protected as an individual right under the previous 1922 Constitution of the Irish Free State.29 Accordingly, the

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27. Land redistribution was carried out by the Land Commission pursuant to the Land Law (Ireland) Act 1881 and the Land Acts of 1923 and 1933, and the bulk of its work was completed by 1937. See, Michael Forde, Constitutional Law, 2nd edn, First Law, Dublin 2004, p. 432.


29. As the former Chief Justice of Ireland, Ronan Keane, noted writing extrajudicially, “…the mightiest social revolution ever to take place in Ireland, the end of landlordism as the dominant form of
1937 Constitution (adopted by the Irish people through referendum) was understood to protect private property rights in Articles 40.3.2° and 43, thereby satisfying the demands of the new class of owners created through the Land Acts. However, the power of the state to redistribute property, including as between private owners, in the *public interest*, as opposed to in pursuance of any particular *public use* or *purpose*, was clearly accepted at the time of the adoption of the Constitution.

Considered against this constitutional background, it was not surprising that the Irish courts repeatedly affirmed the legitimacy of land redistribution when it fell to be assessed by reference to the property rights guarantees in the Constitution. Most recently, in *Shirley v. AO Gorman* (which concerned compulsory property redistribution between landlords and tenants), Peart J held

> [...] legislation which has as its object an equitable distribution of property rights amongst all sectors of society is legislation which is pursuing a social justice principle, even if in achieving that objective some persons who do not need to benefit from the scheme in monetary terms, in fact come through some chance within the specific terms of the scheme.31

In that case, a legislative scheme designed to assist needy tenants operated to allow a corporation to require its landlord to sell the freehold to it at substantially less than market value.32 Peart J regarded deferential review of the aim of such legislation as appropriate in light of Article 43 of the Constitution, saying

> [u]ntil some point of absolute extremity is reached where legislation is patently and manifestly not in pursuit of any possible common good exigency, the Court should abstain from interfering with the role of the legislature in deciding what measures are needed.33

This deferential, generalized approach to the assessment of the aims of expropriation has dominated Irish expropriation law. Once an acquisition can be loosely connected to a broad public interest, it is generally held by the courts to be justified by Article 43.

Ownership of agricultural land, had been fuelled by the vast powers of expropriation vested in the Irish Land Commission. De Valera and those who framed the Constitution with him had no intention of allowing those major social changes to be rolled back, or similar reforms to be impeded in the future, and hence the second section of Article 43, permitting such inroads on private property rights where they were justified by the requirements of 'social justice' and 'the common good'."Mr. Justice Ronan Keane, ‘Property in the Constitution and in the Courts’, in Brian Farrell (Ed.), *Dev’s Constitution and Ours*, Gill and MacMillan, Dublin 1988, p. 138.

33. [2006] IEHC 27.
A specific purpose is not required for either the expropriation power or for a given expropriation. This in turn pre-determines the justifiability of the expropriation, since the objective relative to which judges assess the expropriation is derived from a differential assessment of the legislative scheme in question – as Doyle notes in the equality context, it is understood to be “[…] that state of affairs which is rationally likely to be advanced by the statute”. As a result, the impugned measure “[…] cannot but be rationally connected or proportionate to the legislative purpose”. The effect of this tautological approach has been most starkly evident in the Irish expropriation cases on urban renewal.

5.3.2 Urban Renewal

The Irish courts, like the courts in the United States and the United Kingdom, have accepted that property can be compulsorily acquired for redevelopment or regeneration purposes, and that such projects can be carried out through the transfer of acquired land to private developers. There is no requirement that blight be established – the Irish High Court has endorsed compulsory purchase for aesthetic reasons. The urban renewal cases involved challenges to the exercise of statutory compulsory purchase powers that permitted acquisition for redevelopment. Nonetheless, the applicants in these cases argued that the obligation to interpret compulsory purchase statutes narrowly, in light of the constitutional protection of property rights, and to strike down statutory provisions and administrative actions that failed to guarantee such protection, required project-specific justification by the acquiring bodies. Such arguments failed to win out in the urban renewal cases.

They were first advanced in *Crosbie v. Custom House Docks Development Authority*. The plaintiff owned lands in the Docklands area of Dublin City, and the Custom House Dock Development Authority, acting under s. 5 of the Urban Renewal (Amendment) Act, 1987, issued a compulsory acquisition order in respect of those lands. All concerned parties understood that the land would be used for the development of a national sports center once it was acquired. However, the compulsory purchase order did not expressly refer to that project. It simply stated that the authority

34. Doyle, *supra* note 20, p. 118.
35. Id.
40. [1996] 2 IR 531.
had the power to compulsorily acquire the land for the purposes of the Urban Renewal Acts, 1986 and 1987, and in particular, for the purposes of s. 9 of the 1986 Act, which imposed a general duty on the authority to secure the redevelopment of the Custom House Docks Area. The plaintiff sought to have the property re-conveyed to him, as the sports center project fell through. However, because that project was not specifically relied upon in the compulsory purchase order, the court held that the authority was not tied to it, and further held that the Authority was entitled to frame the compulsory purchase order in terms of a broad purpose.41

Costello P reasoned that when an acquiring authority states that the purpose of a proposed acquisition is to exercise its general statutory powers, it is not permissible to go behind the stated purpose in order to suggest that some other construction should be placed on its decisions.42 Accordingly, a general, rather than a project-specific, public interest rationale for the acquisition was held to be sufficient in Crobie, and close scrutiny of purpose was not permitted. Costello P emphasized that through its statutory delegation of power to the authority, the legislature had “[...]in effect concluded that the public good which is to be achieved by urban renewal requires the limitations on the objector’s constitutionally protected rights”.43 Thus, Costello P inferred the justifiability of the expropriation from its objective without any supporting explanatory reasoning, indicating a highly deferential approach to judicial review of expropriations.

In Clinton v. An Bord Pleanála, the courts again endorsed the use of compulsory acquisition powers for urban renewal.44 Clinton concerned the compulsory acquisition by Dublin City Council of the applicant’s property on O’Connell Street (one of Dublin’s main thoroughfares) as part of a broader regeneration project. The order issued by the council stated that the property was required for ‘development purposes’. It was confirmed by An Bord Pleanála (the Irish Planning Board) on the basis that it was necessary to facilitate the implementation of the council’s development plan.

A key theme of the owner’s objections to the acquisition was that the acquiring authority had to specify a particular purpose for which it intended to use the property in order to justify issuing a compulsory purchase order. He made this argument both as a matter of statutory interpretation, and on the basis of the need to protect his property rights. Section 212 of the Planning and Development Act 2000 conferred power on planning authorities to develop or secure the development of land. Section 213(3) provided for acquisition of land through compulsory purchase or agreement where it

41. Id., pp. 548-549.
42. Id., p. 550.
43. Id., pp. 544-545.
was not immediately required for a particular purpose, but where the local authority was of the opinion that it would be so required in the future. However, if the land was not required for a particular purpose, but rather for the fulfillment of the local authority’s functions in some undefined way, it could only be acquired by agreement. In light of these provisions, it was argued that the acquisition of the affected land for ‘development’ was not for a ‘particular’ purpose (present or future), and thus could only be achieved by agreement. The applicant contended that this interpretation of the statutory scheme was constitutionally required in light of the impact of compulsory acquisition on his property rights.

In the High Court, Finnegan P rejected this contention, primarily on the grounds of his interpretation of ss. 212 and 213, which he held meant that a planning authority could simply refer to stated statutory purposes, such as ‘development’, to support a compulsory purchase order. Finnegan P accepted the argument that compensation could not validate an interference with property rights not justified by ‘the exigencies of the common good’. However, he said that it was up to the planning board at the administrative stage to balance the right to private property with the exigencies of the common good. At the same time, he acknowledged the far-reaching impact of expropriation on property rights by holding that statutory compulsory purchase powers, and the manner and purpose for which they were exercised in particular cases, should be subject to heightened scrutiny. He did not elaborate on the nature of such heightened scrutiny, and in particular, on whether it would involve a requirement of actual justification.

On the facts, Finnegan P concluded that the participatory planning procedures that were followed by the Authority adequately balanced property rights against the public interest, and accordingly, that the broad purpose of development advanced by the Authority for the acquisition was sufficient to justify that decision. He held that a reviewing court should simply consider whether the purpose of an acquisition falls within the scope of the relevant statutory powers conferred on the acquiring body. This indicates that the ‘strict scrutiny’ that Finnegan P argued for was largely of rhetorical rather than practical significance, since the breadth of the accepted statutory purpose (development) left a very broad range of means reasonably open to the legislature. Furthermore, Finnegan P’s approach left open the possibility of hypothetical justification in light of such an objective, depending on the interpretation of the ‘exigencies of the common good’ adopted.

In the Supreme Court, Geoghegan J decided the case on a more limited basis, as he did not accept that a general statutory purpose would be sufficiently specific to justify the

45. He emphasized the limited nature of the court’s role, stating, “[i]f the acquiring authority possesses a statutory power to acquire then the function of An Bord Pleanála and on Judicial Review of this Court is to determine if the exercise of the power is for a purpose for which the power is conferred [2005] IEHC 84.”

46. See discussion infra, at notes 65-68, of the incoherence of the Irish doctrine on the meaning of the ‘exigencies of the common good’. 
exercise of compulsory acquisition powers in all cases, depending on the nature of the intended use of the acquired land. He held that while some compulsory acquisitions were for a particular purpose that might need to be specified, that was not the case with the acquisition of the applicant’s land for regeneration. He explained:

[…] the whole process would usually involve private developers in some form at least and plans as yet unknown which they would propose and envisage and which would eventually require planning permission. That is quite different from property required for the purposes of council offices or a public swimming pool, for instance.

The complex and indeterminate nature of ‘regeneration’ as a goal in planning law, particularly where private developers were involved, meant that the council simply had to show that acquisition was desirable in the public interest to achieve that broadly stated aim.

At the same time, Geoghegan J stated that an acquiring authority, when deciding whether to issue a compulsory purchase order, would have to exercise its powers with regard to the affected property rights, and in particular, would have to be satisfied that the acquisition was justified by the exigencies of the common good. Their decisions could in turn be closely scrutinized by judges, on the basis of the principles set out in the decision of the English Court of Appeal in *Prest v. Secretary of State for Wales*. Geoghegan J further accepted that “compensation as such is no substitute for the property itself”. Consequently, he rejected the contention that property rights were solely protected through liability rules, such that payment of compensation could always be an adequate remedy for a deprivation of property. Rather, a deprivation could be legitimately resisted by an owner where it was not in the public interest, indicating that a form of qualified property rule protection exists for owners’ rights of security of possession.

On the basis of this approach, he concluded that the council had satisfied itself appropriately that the acquisition of the applicant’s property was necessary to secure the aims of the 2000 Act in relation to development, and accordingly dismissed the appeal.

47. [2007] 4 IR 701, pp. 716.
50. In that case, Watkins LJ held “[t]he taking of a person’s land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinized. The courts must be vigilant to see to it that that authority is not abused” [1982] 81 LGR 193, pp. 211-212.”
The courts in *Crosbie* and *Clinton* accepted very broad reasons for compulsory acquisition, such as ‘regeneration’ and ‘redevelopment’, treating the general policy objective to be achieved (for example, regeneration in *Clinton*) as the purpose for the particular acquisition. They characterized the specific use to which the land was put as the means by which that broad purpose was achieved. However, this characterization could equally be reversed. Taking *Crosbie* as an example, one could just as easily say that the purpose of the acquisition was to build a sports center, rather to regenerate the Docklands area. If the purpose is construed more narrowly, the fit between means and ends becomes tighter and more apparent. On the other hand, if the purpose is broadly defined, it is very difficult for a court to engage in any meaningful review of means-ends fit, and thus of proportionality. For instance, in *Clinton*, where the stated purpose was regeneration and the stated means were the acquisition of property for either public or private redevelopment, the court could not rigorously scrutinize whether the acquisition was necessary for a public purpose, since, as Justice O’Connor pointed out in the context of the US Takings Clause in *Kelo v. City of New London*, redevelopment of property always arguably enhances regeneration. Therefore, once the courts in *Crosbie* and *Clinton* accepted very broad public purposes as conceivably justifying the impugned compulsory acquisitions, they emptied their ‘heightened scrutiny’ test of any real bite. The resulting doctrinal incoherence tended to obscure the choices made by the judges in those cases concerning how to characterize and review the aims of the impugned expropriations. Moreover, it obscured the determinative impact of those judicial choices on the outcomes in the cases.

Furthermore, *Clinton* indicates that where broad objectives are accepted as sufficient to justify expropriations, the most controversial uses of expropriation powers will in fact receive the least searching scrutiny of their objectives and means. It holds that specificity is not required in relation to complex projects involving third parties. Thus as the multi-faceted and vague nature of the aim of the project increases, along with the likelihood of private parties being involved in the future ownership and/or use of the acquired property, the onus on the acquiring authority to specify the purpose of the acquisition with particularity decreases. The fact that Geoghegan J adopted such a deferential approach is unsurprising. As Errol Meidinger notes,

53. This trend is further reinforced by the decision in *Reid v. Industrial Development Agency* [2013] IEHC 255, which accepted as sufficiently specific the legislative purpose of acquiring property to encourage industrial development. While Hedigan J emphasized the need to assess the proportionality of an expropriation (paras. 7.6-7.7), he did not scrutinize the objective of the expropriation. On appeal, the Supreme Court overturned the High Court decision, holding that landbanking was not within the powers created by the relevant statutory scheme. However, it did not express concern with economic development as a purpose for compulsory acquisition where a particular development was contemplated for acquired land. [2015] IESC 82.


55. See also, Doyle, supra note 20, p. 229.
In cases which involve complex demand projections, numerous but ambiguous alternatives, and major amounts of investment, as do most important eminent domain projects, courts can be expected to resist second-guessing projects that comport generally with legislatively approved purposes.\textsuperscript{56}

However, such deference has significant consequences, both in terms of the signals it sends to those exercising compulsory acquisition powers in the fulfillment of statutory duties, and in terms of its impact on property rights protection.

The consequence of Geoghegan J’s approach in \textit{Clinton} is that as the vagueness of the terms of a project increases, the likelihood of close judicial scrutiny of the objective(s) of an expropriation decreases.\textsuperscript{57} This potentially incentivizes acquiring authorities to state their aims at a high level of generality, and to delegate responsibility for their realization to private actors, since it signals that expropriations framed in that way are less likely to be found unconstitutional. Consequently, it leaves owners in cases involving acquisition for private redevelopment with very limited possibility of successfully challenging such decisions, since the breadth of the accepted purpose(s) is such as to legitimize a broad range of measures, including compulsory purchase and private transfer. Furthermore, administrative bodies vested with compulsory purchase powers pursuant to statute are regarded as having primary responsibility for balancing the competing rights and interests at issue in the context of expropriation. Their decisions in that regard are afforded significant weight by judges, reflecting the general tendency of Irish judges to emphasize the public interest in analyzing interferences with property rights, while paying relatively little attention to the impact on those rights.\textsuperscript{58} A somewhat less deferential approach was adopted by the Supreme Court recently in \textit{Reid v. Industrial Development Agency}.\textsuperscript{59} Interpreting a statutory power of compulsory acquisition for industrial development purposes in light of the constitutional protection of property rights, it held that landbanking was ultra vires the relevant statutory powers. McKechnie J stressed that the impact of compulsory acquisitions must be as minimal as possible in light of the objective(s) pursued, which in turn must be consistent with the principles of social justice and the exigencie of the common good. However, the Court did not reach the question of the constitutionality of the acquisition of land for economic development.


\textsuperscript{59} [2015] IESC 82.
Overall, judicial review of the purposes of compulsory purchase powers and decisions in Irish law has been highly deferential, despite the adoption of a heightened scrutiny approach, demonstrating that the adoption of a strict scrutiny standard alone does not necessarily constrain legislative and administrative freedom in the exercise of expropriation powers. While judges acknowledge the far-reaching impact of compulsory purchase on property rights, and purport to vindicate such rights through strict scrutiny, their prior acceptance of broad objectives, and their failure to explicitly require project-specific justification, means that their strict scrutiny review does not in fact constrain legislative and administrative freedom in relation to the purposes of expropriations. As a result, the ‘presentation of the reasoning’ in judicial review of expropriations does not match the ‘reality of the reasoning’. Such doctrinal incoherence tends to reduce transparency in judicial review of expropriations, thereby further increasing concerns surrounding the legitimacy of such review, as well as obscuring the scope of the power of compulsory acquisition.

However, some guidance may be found beyond the realms of the constitutional property clauses that may help judges to clarify when, and to what extent, they are mandated by the Constitution to closely review the aims of expropriations, and when they ought to defer to the judgment of the legislature and/or administrators. Such provisions suggest that different contexts may warrant less or more searching scrutiny of expropriations – the political sensitivity of judicial review of expropriations appears to be variable in nature. That guidance is considered in the next part of this chapter.

5.4 Property Values beyond Articles 40.3.20 and 43

5.4.1 The Lack of ‘Internal’ Guidance

As already noted, the text of Article 43 refers to ‘the principles of social justice’ and ‘the exigencies of the common good’ as the delimiting principles by reference to which the state can regulate the exercise of property rights. It provides no other guidance on the purposes for which expropriation powers can be exercised by the state. In interpreting Article 43, the Irish courts have held that it is only where an interference with property rights is adopted in pursuance of the principles of social justice that it is constitutionally justified. Beyond that, there has been no consistency or coherence from the Irish courts on the impact of these principles. For example, in An Blascaod Mór Teoranta v. Commissioners for Public Works, the High Court held that ‘exigencies’ meant...
more than simply desirable or reasonable, instead requiring “the existence of a pressing social need.” In stark contrast, in \textit{Shirley v. AO Gorman}, Peart J adopted a deferential approach, holding that a meaning falling far short of necessity was appropriate. The Supreme Court has provided little clarification on the matter, although it did indicate in \textit{Re Article 26 and the Health (Amendment) (No. 2) Bill, 2004} that the property rights of vulnerable individuals were most stringently protected under the Constitution, and that where an abrogation of property rights was undertaken by the State simply for financial reasons, an extreme financial crisis would be required for such an abrogation to be justifiable under Article 43. Consequently, the constraining effect of the delimiting principles in Article 43 on the purposes for which property can be compulsorily acquired is unclear. The constitutional property clauses, taken together with the jurisprudence interpreting their meaning, do not provide much guidance for judges as to the line between permissible and impermissible expropriations.

However, a rich source of values and principles exists outside of Articles 40.3.2° and 43, but within the Constitution, which could, if more fully drawn upon, inform and supplement judicial interpretations of ‘the exigencies of the common good’ and ‘the principles of social justice’. This in turn would provide judges with a textual basis for reviewing the justifiability of particular expropriations, and would require them to develop more fully their understanding of the constitutional values advanced by both the protection and limitation of property rights. As Hanoch Dagan rightly points out, the balance of property values may vary depending on the context in which property falls to be protected, suggesting the need for context-sensitivity in judicial review of expropriations. However, where constitutional provisions overlap in terms of their property subject matter, related property values may be implicated, meaning that attention to the interpretation of those values in one context may assist in their interpretation and application elsewhere in the Constitution. The aim is not to require a homogenous treatment of property in all of its constitutional contexts, but rather to ‘mine’ the text of the Constitution for as much relevant information as possible concerning its protection of property rights in order to assist in the difficult and sensitive process of judicially reviewing expropriations. This part of the chapter considers two Irish examples from outside of expropriation law demonstrating how constitutional provisions other than the constitutional property clauses can inform judicial review of limitations on the

\textsuperscript{62} [1998] IEHC 38, [150].
\textsuperscript{63} [2006] IEHC 27. He reasoned, “…otherwise the legislature would be under such a strict requirement of proof of absolute necessity in every instance where they wish to amend the law in relation to delimiting property rights that the situation would become impossible.” \textit{Id}.
\textsuperscript{64} [2005] 1 IR 105, 206.
exercise of property rights. These examples suggest that judges may be constitutionally mandated to review expropriations more strictly in some contexts than others.

The first, Article 45 of the Constitution, operates positively. It sets out values that tend to legitimate expropriations, by describing a vision of desired social policy goals to be realized by the legislature, and thus of constitutional values supporting limitations on secure possession of private property. Article 45 could inform judicial interpretation of ‘the exigencies of the common good’ and ‘the principles of social justice’, and thereby enhance the coherence of judicial review of the aims of expropriations, since it would provide a textual basis for affirming the legitimacy of the aims of expropriations. Through aligning the aims of expropriations to Article 45’s goals, the State could bolster its contention that they advance the public interest as envisaged by Article 43 of the Constitution, and that accordingly, the courts ought to defer to the judgment of the legislature and administrators on the need for particular expropriation powers and decisions.

The second, Article 40.5, delineates circumstances in which property should not be taken by the State without very good reason, by focusing on the type of property that is affected (a dwelling), and on the particular values associated with protecting that kind of property. Those values may trigger strict scrutiny of some interferences with property rights, in particular, by requiring project-specific justification of decisions that undermine the privacy of the dwelling.

The legitimacy of these text-based approaches is reinforced by the fact that the protection of property rights must form part of the assessment of the ‘public interest’ in any expropriation decision-making process. The Irish Constitution protects private ownership as an institution in Article 43.1, thereby signaling that its protection forms part of the ‘public interest’. This fact should be reflected in judicial review of expropriations. As Laura Mansernus points out in the US context:

> The presumption of constitutionality that courts invoke in eminent domain actions [...] assumes that the government has not only followed its own rules and performed its arithmetic correctly but also has respected constitutionally protected interests in distributing social burdens. In sum, it assumes that the political decision makers have struck a careful and constitutional balance.67

Thus the ‘public interest’ analysis captured in the decision to expropriate should also take account of the need to protect property rights. This was recognized by Budd J in *An Blascaod Mór Teoranta v. Commissioners for Public Works*, which concerned the compulsory acquisition of lands owned by a discrete category of owners on the Great

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Blasket Island for the development of a heritage park. As already noted, Budd J imposed an exacting necessity test for the justification of such an acquisition. He reasoned:

[...] when the exigencies of the common good are called in aid to justify restrictions on the exercise of the rights of private property, being fundamental rights spelt out in the Constitution, it should be remembered that the protection of the fundamental right, is one of the objects which needs to be secured as part of the common good.

Accordingly, a blunt public/private balancing exercise, comparing the impact of an expropriation on the affected property rights with its public policy objective(s), fails to recognize the richness of the notion of the common good captured in Article 43, and the complexity of its relationship with property rights. The protection of property rights is a (non-determinative) factor in any analysis of the ‘public interest’ advanced by the State to justify an expropriation. At the same time, property rights are undoubtedly enhanced through the existence of the power of compulsory acquisition, which facilitates the development of vital public infrastructure that increases property values, as well as individual enjoyment of the use of property. Therefore, a degree of mutualism exists between both ‘sides’ in any expropriation dispute.

Against such a backdrop, generalized judicial deference in reviewing expropriations may not seem any more neutral or non-political than a more interventionist approach. Rather, careful judicial analysis is required to ensure that the ‘exigencies of the common good’ are satisfied, which means that the protection of property rights must neither be left out of account in assessing the ‘public interest’, nor given undue weight. As Donal Barrington notes in analyzing the delimiting principles set out in Article 43, “[t]he ultimate criterion [...] is not expediency but justice.” Accordingly, Irish judges are clearly constitutionally mandated to supervise the fairness of expropriations, rather than simply rubber-stamping the assertions of the legislature and/or administrators as to their potential usefulness as public policy tools. However, that is a challenging task because of the vagueness and political sensitivity of the delimiting concepts in Articles 40.3.2° and Article 43. Judges may be assisted in their task by drawing on other constitutional sources of property values to inform their review of expropriations. Two such sources are explored in the next sections of this part of the chapter.

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68. [1998] IEHC 38. The acquisition was pursuant to powers established by the An Blascaod Mór National Historic Park Act, 1989.
69. Id., para. 150.
70. See, Mansnerus, supra note 18, pp. 440-441.
71. Barrington, supra note 15, p. 3.
5.4.2 The Directive Principles of Social Policy

As already noted, Article 45 of the Irish Constitution sets out ‘Directive Principles of Social Policy’, many of which deal with matters related to the distribution and use of property. In particular, Article 45.2 identifies the goals of dispersing ownership of material resources in the interests of the common good, preventing undue concentration of ownership or control of such resources, controlling credit in the common interest, and installing as many families as possible on the land. More generally, Article 45 recognises the particular claims of vulnerable members of the community to support, and identifies ‘justice and charity’ as the key principles of the Irish social order. The directive principles in Article 45 are expressly stated to be for the guidance of the legislature only.

[Full text of Article 45]

72. Article 45 in full states: “The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognizable by any court under any of the provisions of this Constitution.

1. The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.

2. The State shall, in particular, direct its policy towards securing:
   i That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.
   ii That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
   iii That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of ownership or control of essential commodities in a few individuals to the common detriment.
   iv That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.
   v That there may be established on the land in economic security as many families as in the circumstances shall be practicable.

3. i The State shall favour and where necessary, supplement private initiative in industry and commerce.
   ii The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.

4. i The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged.
   ii The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.”
Throughout the early stages of the drafting process that led to the adoption of the Irish Constitution of 1937, these principles formed part of the draft constitutional property provision that eventually became Article 43. Heavily influenced by Catholic social teaching, the policies were designed to establish the communitarian context within which private property rights were to be exercised, thereby putting flesh on the bones of the delimiting concepts that were to control private ownership, namely, ‘the exigencies of the common good’ and ‘the principles of social justice’. Property rights were initially protected in a provision that set out a non-exhaustive list of the kinds of public-regarding reasons that could justify their restriction and expropriation, in a manner akin to s. 25 of the Constitution of the Republic of South Africa, 1996. However, due to fears about the potential for such provisions to generate positive claims against the State that would be enforceable in the courts, for example, to property or employment, the directive principles were relegated to Article 45 at a late stage in the drafting process, and were expressly stated to be non-justiciable.

Nonetheless, in a number of cases the Irish courts have held that they are entitled to have regard to those principles in constitutional interpretation, although they have not gone as far as to invoke Article 45 to support a decision to strike down a legislative measure. Instead, Article 45 has been drawn upon as a positive source of values that informs the meaning of ‘the exigencies of the common good’ in Article 43, thus signaling the kinds of circumstances in which the exercise of property rights can be justifiably delimited. In adopting this approach in Landers v. Attorney General, Finlay J reasoned,

\[
\text{[t]he common good mentioned in Article 43 section 2 sub-section 2 is not of course precisely defined. Assistance in an attempt to define some facets of the common good can however and in my view must be obtained from other articles of the Constitution.}
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Such internal cross-referencing in constitutional interpretation of the broad delimiting principles contained in Article 43 seems entirely appropriate, and gains legitimacy from its grounding in the text of the Constitution, and in the drafting history of that text. While Article 45 was undoubtedly a product of its time, and of the religious influences on the drafting of the Constitution, it was clearly intended to amplify the meaning of ‘social justice’ and the ‘common good’ for the purposes of Article 43, and accordingly appropriately informs judicial review of expropriations. By following the lead set by

74. Id., pp. 95-97.
77. Walsh, supra note 73, pp. 109-113.
Finlay J in *Landers* and making positive use of the directive principles to affirm the exercise of expropriation powers for purposes consistent with those set out in Article 45, judges could clarify the kinds of purposes for which expropriation is permitted by the Constitution, which may further justify judicial deference to expropriations consistent with that guidance. In addition, by following this approach, judges could clarify the scope of secure possession of property that is guaranteed to owners in the Irish legal context, which has so far been obscured through deferential and under-reasoned judicial acceptance of broad purposes for expropriations. Accordingly, Irish judges should meaningfully engage with the guidance that Article 45 provides as to the kinds of reasons for which property can be expropriated. Since it would be directed towards affirming the exercise of expropriation powers, such an approach would neither limit legislative freedom, nor interfere in the exercise of administrative powers.

5.4.3 Inviolability of the Dwelling

Article 40.5 of the Irish Constitution states, “[t]he dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”. As naturally suggested by the language of this provision, it has primarily been invoked in relation to the establishment and exercise of search and seizure powers for police and other public forces. In this regard, it has a strong common law underpinning, finding its roots in the ‘castle’ doctrine originating in *Semayne’s case*. For a long time, very little attention was paid to Article 40.5 outside of this context, nor was there any judicial consideration of the values that it implicated, beyond the physical exclusion of the state. However, in recent years, Irish judges have developed their understanding of the normative underpinnings of Article 40.5, and have emphasized its constitutional pre-eminence. In so doing, they have developed jurisprudence that could operate to require project-specific, non-hypothetical justification of expropriations of dwellings, triggered by the particularly significant private sphere that constitutional protection of the dwelling is understood to secure.

In *DPP v. Barnes*, which concerned the scope of permissible self-defense by a homeowner against an intruder, Hardiman J described Article 40.5 as:

> [...] a modern Irish formulation of a principle deeply felt throughout historical time and in every area to which the common law has penetrated. This is that a person’s dwelling house is far more than bricks and mortar; it is the home of a person and his or her family, dependents or guests (if any) and is entitled to a very high degree of protection at law for this reason.80

78. (1572-1616) 5 Co Rep 91.
79. [2007] 3 IR 130.
80. Id., p. 144.
He distinguished between the dwelling house and other forms of fungible and non-fungible property, and held that the dwelling house was the most highly protected form of property under the Constitution. He held that its “[...] free and secure occupation” was “a necessity for the human dignity and development of the individual and the family”. Accordingly, Hardiman J treated property as a differentiated concept, comprising a continuum of property interests receiving more or less constitutional protection depending on their importance to individual dignity and development. This approach echoed Margaret-Jane Radin’s ‘personhood continuum’ between fungible and personal property, and her characterization of that continuum as an appropriate basis for making normative distinctions in the context of property disputes.

The substantive content of Article 40.5 was further developed in a number of subsequent criminal procedure cases. For example, in *The People v. O’Brien*, Hardiman J stated, “[t]his constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world”. In *Damache v. DPP*, the Supreme Court appeared to envisage applications for Article 40.5 beyond the search and seizure, context noting “[e]ntry into a home is at the core of potential State interference with the inviolability of the dwelling”. Thus, while search and seizure may be Article 40.5’s paradigm, the broad nature of the terms in which it is expressed means that it is potentially applicable beyond that context.

The potentially far-reaching and dramatic influence of Article 40.5 is illustrated by the High Court decisions in *Wicklow County Council v. Fortune*, where Article 40.5 was relied upon in closely scrutinizing the justifiability of a proposed planning decision that would have had the effect of depriving an owner of her dwelling. The case originated in an application brought by a local council (acting in its capacity as a planning authority) to the Circuit Court pursuant to s. 160 of the Planning and Development Act 2000, seeking a statutory injunction to require the demolition of a dwelling that was built in contravention of the applicable planning laws, and as such, was unlawful development. The dwelling in question was a small timber chalet situated in a

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81. Id., pp. 148-149.
86. The relevant parts of s. 160 of the Planning and Development Act 2000 provide:

1. Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

a. that the unauthorised development is not carried out or continued;
wooded area of significant natural beauty. The chalet was unobservable from the nearest road and was accessible only via a country lane. It was, according to Hogan J in the High Court, ‘tastefully constructed’ and did not adversely affect “the amenities or aspect of any other landowner or local inhabitant”. Nonetheless, the planning authorities had rejected two applications for retention permission for the structure, and accordingly the Circuit Court granted the injunction sought. That decision was appealed to the High Court.

Hogan J noted that the development in question was not bona fide, since Ms Fortune must have known that planning permission was required to build a dwelling in an area of high amenity. However, he refused to confine the application of Article 40.5 to criminal law and procedure. He considered that Article 40.5 went further than the protection of the home in Article 8 of the European Convention on Human Rights, given its “[…] more emphatic language”. He held that the word inviolability could not be interpreted as affording absolute protection to dwellings, since such an interpretation of Article 40.5 would allow individuals to profit from their own wrongs by asserting immunity from legal action on grounds of Article 40.5. Furthermore, it would nullify residential development control. Nonetheless, in light of Article 40.5’s language, he held, “[…] the dwelling should enjoy the highest possible level of legal protection which might realistically be afforded in a modern society”. He translated that level of protection into a strict test, requiring the council to show “[…] that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response”. Thus, he required evidence that demolition, in the specific case in issue, was the only means of securing the relevant planning aims, citing as examples of such evidence circumstances where a dwelling threatened the rights and amenities of others, or an area of high natural beauty, or created a ‘real and immediate’ traffic or fire hazard, or was so manifestly inconsistent with local development

b. in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

c. that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject?

2. In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.?

88. Id., para. 34.
89. Id., para. 45. See also, Sullivan v. Boylan [2012] IEHC 389, [2013] IEHC 104 (application of inviolability of the dwelling to justify an award of constitutional damages in favor of an individual who was continually harassed at her home by debt collectors).
91. Id.
92. Id., para. 41.
93. Id., para. 42.
plans that the owner had ‘no realistic prospect’ of securing a grant of planning permission for the dwelling.  

Hogan J adjourned proceedings to allow parties to make submissions on the basis of the stringent standard of review that he articulated, which were assessed in Wicklow County Council v. Fortune (No. 2).  

In that decision, he noted that a judicial order requiring an owner to demolish her own house without compensation would have far-reaching effects on her property rights, and would have to be a proportionate interference with those rights.  

The council invoked environmental protection and the preservation of the integrity of the planning system in support of its application for an injunction requiring demolition of the unlawful development. In particular, it argued that the precedential impact of a decision in Ms. Fortune’s favor would adversely impact on effective planning control in an area of natural beauty and environmental significance. Hogan J rejected these arguments, emphasizing the need to consider the case on its own merits. He determined that the fact that a development such as Ms. Fortune’s was unlawful was a sufficient deterrent against future illegal development, regardless of whether its demolition was ordered under s. 160.  

He closely interrogated the planning arguments advanced in favor of demolition, and ultimately rejected them. He concluded that the chalet did not adversely impact on the rights of others, or on the local area of outstanding beauty. In addition, Hogan J rejected the traffic concerns cited by the planning board on appeal (stemming from the poor quality of the road leading to the property), on the basis that many such roads existed throughout rural Wicklow, and that no visibility problems arose in entering or exiting the site.  

Fortune presented significant challenges for the enforcement of planning law, which were frankly acknowledged by Hogan J, who argued that Article 40.5 required “…a complete re-appraisal of even familiar features of the legal system – including the operation of planning laws – insofar as they impact on the private dwelling”. However, in the recent High Court decision in Wicklow County Council v. Kinsella, Kearns P strongly objected to the suggestion that Article 40.5 could have such a far-reaching impact on planning law. The case concerned another demolition application, in this
case concerning a chalet erected on a site adjacent to a busy national road without planning permission, which was not *bona fide*. The homeowner relied upon *Fortune* to argue that demolition would be an unconstitutional interference with his rights under Article 40.5 of the Constitution. Kearns P rejected that argument, and in the course of doing so, expressed strong disagreement with the decision of his High Court colleague in *Fortune*.

He argued that Hogan J failed to adequately address the potential adverse consequence of a precedent such as *Fortune* on the overall enforcement of planning control. While he accepted that the jurisdiction to issue injunctions on foot of s. 160 must be exercised constitutionally, he held that where unlawful development was undertaken in bad faith, Article 40.5 could not itself protect individual rights at the expense of the public interest in proper planning control. He argued that the property rights of individuals who act unlawfully should not take precedence over the interests of a democratic society in the orderly enforcement of planning and development regulation. He rejected the relevance of decisions such as *Damache*, which concerned forcible entry by the police into private dwellings, to the lawful enforcement of planning control on foot of a statutory procedure involving notice and regularization opportunities for adversely affected individuals (e.g. through applications for retention permission). He held that observations should not be transposed between such different legal contexts, and determined that the rights guarantees in the Constitution were not intended to provide immunities to wrongdoers, or to allow individuals to establish dwellings wherever they chose. Rather, property rights were held subject to the constraints imposed by planning law, which body of law was intended to be primarily applied by planning experts, not the courts. Kearns P concluded that Hogan J’s alternative test re-wrote the relevant statutory scheme, and required judges to assume the role that had been assigned by the legislature to planners, in a manner that was inconsistent with the separation of powers.

On the facts, he declined to second-guess the judgment of the planning authorities that the dwelling constituted a sufficiently serious traffic hazard to warrant its demolition. It remains to be seen whether the Court of Appeal and the Supreme Court will prefer the approach of Hogan J or Kearns P in future cases that may arise on this issue. Much will turn on whether Article 40.5 is understood to be solely concerned with guaranteeing privacy within the dwelling, or whether it also guarantees a degree of secure possession of private dwellings to owners – i.e., whether it provides a basis for elevating the constitutional protection of property rights in dwellings above other forms of property rights. While Hardiman J in *Barnes* treated dwellings as *per se* worthier of stronger protection than other forms of property, the courts in the other recent criminal procedure cases were primarily concerning with ensuring the privacy of dwellings,

103. He reasoned that the mere fact that a dwelling would remain unlawful development would not necessarily provide a sufficiently strong deterrent against further breaches of planning law. *Id.*
104. The relevant statutory scheme was that set out in Part VIII of the Planning and Development Act 2000.
although they did not rule out a potentially wider significance for Article 40.5.\(^{105}\) Although Kearns P was correct to note that the standard of review adopted by Hogan J was much more searching than that commonly applied to planning decisions in Irish law, that may be justified if Article 40.5 is understood to guarantee a degree of secure possession of private dwellings, since the effect of the planning decision in question in *Fortune* was to deprive an owner of her dwelling outright, rather than merely regulating her use of the dwelling (the most common impact of planning decisions). In its recent decision in *Reid v. Industrial Development Agency* the Supreme Court suggested a preference for Hogan J’s approach, although without squarely addressing the issue.\(^{106}\) McKeachie J. for the Court cited decisions concerning search warrants in support of a strict construction of compulsory acquisition powers, and characterised secure possession of private property as a right “safeguarded at the highest level possible within our system of law.”\(^{107}\) He said that Articles 40.32, 43 and 40.5 of the Constitution mutually inform each other.

These recent developments suggest that Article 40.5’s relevance cannot be discounted in reviewing the constitutionality of legislative measures and administrative decisions that adversely affect rights in relation to dwellings.\(^{108}\) Accordingly, Article 40.5 is likely to be invoked in future legal disputes concerning expropriations, particularly since the Supreme Court has already recognized the very serious nature of the interference with property rights that is involved in expropriation.\(^{109}\) The effect of the invocation of Article 40.5 in *Fortune* was to require compelling justification of the particular decision adversely affecting the home as a means of realizing the relevant public policy goal, as opposed to simply requiring justification of the regulatory regime in general. If a similar approach is adopted in the expropriation context, even if a more deferential standard of review is applied than that used in *Fortune*, acquiring authorities might no longer be permitted to advance vague, generalized rationales for expropriation, but rather might be required to establish a specific ‘public interest’ case for the acquisition of a particular dwelling.

It is submitted that Article 40.5 should have a role, alongside property rights, in the constitutional assessment of expropriation powers and decisions that affect dwellings.\(^{110}\) It provides courts with another source of values that can inform judicial review of expropriations. While there is obviously some room for debate as to what constitutes a dwelling, it is reasonably non-controversial, and has been worked out

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106. [2015] IESC 82.
108. The Irish Courts have recognized that Article 8 of the European Convention on Human Rights, which protects the home, privacy, and family life, is a relevant factor in assessing the proportionality of an expropriation. See, Reid v. Industrial Development Authority [2013] IEHC 433.
without significant difficulty in a number of Irish cases. Its meaning is certainly clearer, less contestable, and less closely linked to sensitive issues of social and economic policy than the delimiting principles set out in Articles 40.3.2° and 43. Accordingly, Article 40.5 may furnish judges with a useful textual basis upon which to justify and more fully apply their existing strict scrutiny review of expropriations, thereby facilitating greater doctrinal coherence on the issue. This in turn would usefully clarify the balance between the State’s power to expropriate and owners’ rights to secure possession of private property under the Irish Constitution. It would not necessarily increase the relative protection of security of possession vis-à-vis the public interest – taking account of the particular importance of rights in relation to dwellings in assessing the justifiability of expropriations need not always cause such rights to win out. However, such rights would have a strong claim to be considered and carefully weighed in any proportionality balancing carried out to determine the constitutionality of an expropriation. Furthermore, the engagement of such rights could trigger a requirement for at least some evidence of project-specific, as opposed to generalized and hypothetical, justification of particular expropriation decisions.

5.5 Conclusions

Given the sensitivity involved in questioning legislative and administrative judgments on social and economic matters, Irish judges, like their counterparts elsewhere, almost universally incline towards deferential review of the aims of expropriations. That inclination, which prompts them to accept broad, generalized objectives and hypothetical justification of expropriations, has a determinative impact on the scope of protection that the Constitution guarantees for secure possession of private property. It empties subsequent means-ends review of traction, regardless of the standard of review adopted. This trend is problematic, as it fails to constrain the exercise of expropriation powers, which in substance limits property rights to liability rule protection in almost all cases. Such protection, reducing property rights to compensation entitlements, is inconsistent with the current judicial interpretation of the level of protection for property rights that the Constitution requires. The judicial inclination towards deference is particularly troubling where, as in the Irish context, the courts purport to protect property rights stringently through strict scrutiny analysis. In such

112. Indeed, in Kelo v. City of New London 545 U.S. 469 (2005), p. 517, Justice Thomas noted that there was no question of deference to legislative judgments concerning the reasonableness of searches and seizures in the context of the Fourth Amendment of the US Constitution, and in various other constitutional contexts where issues affecting property rights fell to be determined.
circumstances, the reality of the Constitution’s protection for property rights as interpreted by the courts does not match the judicial rhetoric, which obscures the real scope of the state’s power to regulate the exercise of such rights, and the judicial choices that affect that power.

The question that thus arises is how to address this doctrinal incoherence, given the sensitivity involved in judicial review of the aims of expropriations. Judges are not helped by the fact that constitutional property guarantees often do not provide substantive principles that help to delineate impermissible from permissible exercises of expropriation powers.115 This increases the extent to which judicial review of expropriations, in particular of their objectives, is understood to trespass illegitimately on legislative freedom, which in turn prompts an entrenchment of general judicial deference to the decisions of legislators and administrators.

As a response to this problem, this chapter has drawn on the Irish experience to argue that judicial review of expropriations should not be based solely on the principles and values contained in constitutional property clauses. Rather, guidance should be sought where available from other constitutional provisions where property rights are implicated, which may provide useful signals and signposts for reviewing the legitimacy of expropriations. Those values may lead to more robust protection of property rights (as in the case of Article 40.5 in the Irish context), or may strengthen the state’s hand in limiting those rights (as with Article 45). However, regardless of the direction in which they point, they are relevant factors that should receive greater attention from judges in reviewing expropriations. They indicate that a degree of context-sensitivity may be appropriate in judicial review of expropriations, with searching review more appropriate in some circumstances than others. For example, in the Irish context, where the social and economic aims set out in Article 45 are pursued through expropriation, deference is appropriate, whereas a decision interfering with the private enjoyment and/or secure possession of a private dwelling merits closer attention from the courts, given the high level of protection afforded to dwellings by Article 40.5. Through such a context-sensitive approach, judges can ensure that constitutionally protected property rights entail more than a right to compensation, without unduly limiting legislative freedom.116

Overall, the Irish experience with Article 45 and Article 40.5 demonstrates that insight into the appropriate constitutional balance between the ‘social’ and ‘individual’ aspects of ownership may be found outside, as well as within, constitutional property clauses, and greater attention should be paid to that possibility by judges and academics alike, within and beyond expropriation law.

115. Section 25 of the Constitution of the Republic of South Africa, is a notable exception to this trend, as it specifies land reform, equitable access to natural resources, and water reform as permissible bases for regulation of private property rights.

116. See, e.g. the statements of Finnegan P and Geoghegan J in Clinton, discussed supra at notes 46-54.
6 | **IN THE SHADOW OF ZIMBABWE**

**PUBLIC INTEREST, LAND REFORM, AND THE TRANSFER OF PROPERTY IN SOUTH AFRICA**

*Heinz Klug*

6.1 **INTRODUCTION**

Responding to the introduction of a new Expropriation Bill in the South African Parliament in 2008, former South African President and later Deputy-President FW de Klerk told the Cape Town Press Club that the Bill was unconstitutional and struck at the heart of property rights. He argued that “[i]t would allow any property to be expropriated in what the minister of land affairs construed to be ‘the public interest’” including shares in the stock market.¹

He went on to warn that the Bill would have very serious consequences for the economy, and the degree to which compensation fell short of perceived market value – a determination that the courts would be barred from changing – would be seen by markets as unfair deprivation of property. According to De Klerk,

> The consequent perception of arbitrary deprivation of property … will have a very negative impact on national and international investor confidence, and will seriously damage South Africa’s international credibility .... At a stroke most of the excellent work that the government has done over the past 14 years to establish South Africa’s creditworthiness could be undone.²

De Klerk described section 25 of the Constitution, which deals with property, as having been a sincere effort to achieve a delicate balance between protection of vested property rights and the need for land reform. He then went on to warn that

> [i]f this balance is disturbed then the whole essence and the spirit of the agreement which was reached around section 25 will be undermined…. My contention is, and I feel very strongly about it, that this Bill in its present form disturbs that balance in a very serious way.³

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³ Id.
De Klerk’s argument, that the property clause of the Constitution limits the government’s attempt to address inequality in land holdings to policies based on market mechanisms denies the history of the debates over the property clause during the constitution-making process and ignores the legacy of dispossession and forced removals that were central to the apartheid project. These processes of dispossession were not only the basic means of colonization but continued late into the 20th century, as the darkest face of apartheid policy – justifying the international community’s designation of apartheid as a crime against humanity. It is this legacy: in which millions were forced from their homes and declared pariahs in the land of their birth; in which communities were dismantled brick by brick and their members scattered across the most barren wastelands of the country; in which people clung to the land and refused to give up their claims; that set the stage for the recognition and shaping of property rights in post-apartheid South Africa. Yet 20 years after the formal adoption of a post-apartheid constitution resistance to change, particularly to the basic economic structure and distribution of resources – which is the premise of agrarian reform – continues.

Agrarian reform has been repeatedly consigned to the dustbin of history yet it returns repeatedly, often in new forms, in different locations and under different guises. While agrarian reform is often justly identified with land reform, it is important to recognize that land reform is part of the broader phenomena of agrarian reform which includes changes not only in land holding but also in the vast array of institutions, laws and practices that frame the political economy of any rural society. Law plays a central role in

any understanding of agrarian reform, if not in the actual design of the land reform, at least in the underlying relations of property and governance that are subject to change in the process of reform. In addition to the changing relations of property holders and users, law also provides the framework for local markets, sources of finance, labor relations, as well as the agricultural and environmental regulations which all shape the opportunities and choices of land-based communities. Although we will focus on the role of law in land reform, it is important to remain aware of the broader context that defines the overall pattern and direction of any agrarian reform.

The driving force behind most processes of agrarian reform is a prior history of dispossession or exclusion. While not all processes of dispossession have led to subsequent attempts to restore property rights or redistribute land, acts of colonial dispossession and exclusion remain the major sources of grievance underlying the justification for present and future reform efforts. Recently, processes of dispossession that were based on the racial or other aspects of the original occupiers’ identity have been termed ‘dignity takings’. These grievances are sustained in part by the extreme degree of social dislocation these processes of dispossession engendered. A different source of agrarian reform has been the attempts to redress historical inequities in access to land, particularly in Asia and Latin America. Although the most effective of these took place under United States military occupations in Taiwan, South Korea, and Japan, similar land-to-the-tiller forms of reform were undertaken in other countries including Mexico, India, Chile, and later Nicaragua. A more recent wave of agrarian reforms have been justified as rectification of past wrongful takings, reform (and a periodisation), in L. Ntsebeza & R. Hall (Eds.), The Land Question in South Africa: The Challenge of Transformation and Redistribution, HSRC Press, Cape Town 2007.


including in particular the movement to return property taken in the name of com-
munist revolutions or post–World War II state socialism in Eastern Europe.21

6.2 A History of Land and Agrarian Reform

The history of agrarian reform in the 20th century reveals a range of circumstances giving rise to a diverse pattern of rural struggles, government interventions and legal reform. The most far-reaching processes of land redistribution taking place at moments of extreme political change, whether in the context of violent revolutions or in post-war contexts. Beginning with the Mexican revolution and continuing through the Russian and Chinese revolutions, agrarian reform was characterized by the appropriation of land and its transfer into different forms of collective land tenure from village-based holdings to massive state run collective farms. After World War II agrarian reform played a major role in the reconstruction of Japan, Korea, and Taiwan but here the land was transferred to the existing individual land users with compensation paid to former landlords. Processes of wide-scale land reform in post-colonial settings in Africa, such as the million acre campaign in Kenya22 and after a left-wing electoral victory in Chile, were pursued in legal environments which dramatically limited the pace and depth of the reform process. One limiting factor was the process of resettlement in cases where land was obtained for purposes of redistribution and communities or individuals were required to uproot and move to the newly acquired lands. Not only was this a costly and often conflicted process but the beneficiaries of such reforms often lacked the local knowledge of the land or capacity to place it into production without major inputs of capital or government aid. Despite the payment of compensation according to the agrarian reform laws, the reaction of landed interests, often allied with conservative domestic and international forces, led after the coup in Chile and later after the electoral defeat of the Sandinistas in Nicaragua, to the reversal of agrarian reforms, or counter-
reforms in which land was sometimes returned to the previous owners.

Since the end of the Cold War, the impetus for agrarian reform has come less from demands for land redistribution and instead has been driven by demands for repa-
ration or restitution for past injustices. In the former state socialist countries, there has also been pressure for the privatization of state owned land as part of the market reform process. At the same time, land hunger and social movements, representing the rural landless in countries such as Brazil and South Africa, have continued to raise questions of redistribution and tenure reform. In the United States of America, claims

for restitution of the land of indigenous peoples were first recognized by the Indian Claims Commission (ICC); however, the ICC, a statutory body established to resolve claims by Indian tribes against the United States Government, could only grant monetary compensation. First Nations and Native American land claims represent both demands for the recognition of past injustice and a demand for political recognition and the right to governmental authority over communities and natural resources. Recognition by the United Nations of the rights of indigenous peoples has given impetus to the territorial claims of indigenous communities around the world. The South African land claims process, initiated by the first post-apartheid constitution in 1994, explicitly recognized the need to return the land and only in exceptional circumstances to substitute monetary compensation to those who lost their land as a consequence of racially discriminatory laws between 1913 and the first democratic elections in 1994.23 In contrast to the steady, if constrained, process of land reform in South Africa, the continuing dramatic conflict over land in neighboring Zimbabwe, has highlighted the continued salience of agrarian reform in the 21st century.

6.3 The Role of Law

Law is central to the definition and protection of property rights, but it is also a key element in processes of agrarian reform. While all significant reforms have usually accompanied major shifts in political and social power, the role of law has been central to the justification and stabilization of changes in ownership and tenure relations. Land Commissions and special land courts have enabled restitution processes and mediated conflict between tenants and landlords from South Africa to Albania. Courts have however also played a major role in resisting land reform efforts in post-independence India and under the government of President Frei in Chile. Whether through statutory change or constitutional mandate, the law has in some places fundamentally altered the existing gendered relations to land, particularly under indigenous or customary law as well as in circumstances where traditional authorities have retained or regained control over the allocation of land and the adjudication of disputes. At the other end of the legal spectrum, law plays a central role in creating and securing a market in land rights as well as resolving conflicts between holders of property rights. Another important role of law in agrarian reform has been in the regulation of agricultural markets, production, and financing, which are central to the reshaping of a rural economy as it responds to the needs and opportunities created by new tenure relations and participants on the agrarian landscape.

23. Constitution of the Republic of South Africa, Act 200 of 1993, s 8(3)(b): “Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.”
While the social sources and forms of agrarian reform might be varied, within the law it is the concept of property, rather than labor, welfare, or community that has shaped the options open to reformers and has shaped the patterns of change that have emerged. Among the varying notions of property, it has been the Lockean assertion of inherent individual rights to property as the basis of the social contract that has dominated the debate, especially since the collapse of state socialism. Most interesting however has been the failure among property rights activists to recognize what has been termed the ‘Lockean caveat’ which in fact provides a justification not for the dominance of all property claims but rather a more nuanced or balanced relationship between claims of right and access to the basic resource. Locke’s caveat is that the amount of property each individual might claim from the state of nature is inherently limited by the need to ensure that all have adequate access to the resource to ensure their basic sustenance.\(^\text{24}\) This relationship, within the Lockean conception, between rights to property and the need to guarantee access to basic resources has in some cases, such as in the German Basic Law, justified a notion of property that contains both rights and duties. However, in the last decade of the 20th century the triumph of private property in the context of neoliberal globalization has forced those historically dispossessed of property or denied access to property, to rely more on the concept of restitution and claims for reparation instead of the more traditional claims for redistribution.

The State’s power of eminent domain has historically been the most effective means of achieving agrarian reform. At the same time, the use of this power to expropriate private property, whether from landlords in India and Chile, or large landowners in Nicaragua or Zimbabwe, has led to heightened social and legal conflict. It was only under the umbrella of military occupation or war – in Taiwan, Japan, and South Korea – that the transfer of large amounts of land from landlords to tillers, with government compensation used to stimulate industrial investment, that agrarian reform through the mass redistribution of property rights was swiftly and effectively achieved. In other contexts expropriations have faced costly legal challenges, including constitutional challenges to the taking of property for the purpose of redistribution and endless litigation over the use of related legal mechanisms, such as: ceilings on land holdings; effective use requirements; and other measures designed to force the owner to relinquish control over significant portions of their land holdings. Challenges to the amounts and forms of compensation offered by governments after expropriation have also tied up land reform programs in legal challenges before the courts. In the most recent wave of land reform, from the initial political settlement in Zimbabwe to Eastern Europe and South Africa the emphasis, often encouraged by the multilateral financial institutions, shifted from expropriation to the principle of

‘willing-buyer, willing-seller’, the privatization of state property and market-assisted land reform.\textsuperscript{25}

A central feature of these most recent processes of agrarian reform has been the reassertion that individual land titling should be the goal of agrarian reform. Despite a long history of ineffective and ultimately failed processes of land titling, such as the ‘million acre’ program in Kenya just after independence, there has been an enormous amount of resources poured into new titling regimes in Eastern Europe and Africa, particularly post-1989. Once again, however, particularly in Africa, the question of traditional forms of communal title rooted in indigenous systems of land holding and government has raised questions about the sustainability of individual titling. At the same time, it has been recognized that even under ‘traditional’ systems of land tenure there exist a spectrum of rights and duties, held by individuals and communities, not recognized in the colonial codification of ‘customary law’. Demands for the recognition of different forms of land tenure have become most acute in the debates over land restitution and the reform of land tenure arrangements imposed by colonial, post-colonial, and in the case of South Africa, apartheid authorities. Both as a result of the recognition of legal pluralism and greater democratic participation, there has emerged a deeper understanding of different forms of land tenure and the need, even outside of systems of legal pluralism, to formally recognize a range of tenure forms and not just private property.

\section*{6.4 LAND, LAW, AND POVERTY REDUCTION}

Struggles over land, whether over access to arable land in rural areas, between agrarian and pastoral communities or over land use and the needs of people for housing in urban areas, have continued to play an important role in political conflicts, particularly in Latin America and Africa. Recognizing the need to address these issues the World Bank has recognized that future economic stability requires that land claims need to be settled and tenure security guaranteed.

Debate continues however over the role of land reform in releasing rural capital for development and over the exact parameters of tenure security. Outside of its policy department the World Bank, and the International Monetary Fund in particular, continue to push for market-related strategies such as individual land titling and are less open to demands for the recognition of a diversity of land tenure systems, including communal and indigenous tenure forms. This emphasis on the market fails to recognize that access to land in many developing countries serves a range of purposes.

including: the formation and maintenance of identity for indigenous communities; as a home of last resort for many rural/urban migrants; as a means to diversify economic opportunity and risk among rural families; and finally, and possibly most importantly, as a form of social security in times of economic hardship and old age.

Market-led reform has been the mantra of the World Bank as it has attempted to mediate between claims for restitution, demands for redistribution, and the need to resuscitate and stabilize markets in countries emerging from state socialism, authoritarian dictatorships, apartheid, and civil conflict. These policies have however failed in countries, such as Zimbabwe, where the post-colonial settlement dictated a willing-buyer, willing-seller process yet failed to provide the resources required to address the vast colonially derived inequalities in land ownership. In South Africa, there has thus far been less economic and political disruption with the process of restitution providing some relief and promise of change, yet the process remains extremely slow and the overall disparities continue to stimulate agrarian tension and at times violent disruption. In other circumstances, the process of privatization and individual titling continues apace; however, there is little evidence that this has significantly stimulated agrarian economies and lives. Faced with persistent rural poverty, developing countries and international non-government organizations, such as Oxfam, have pointed to farm subsidies in developed countries in addition to unequal access to land and capital as causes for the continued marginalization of agrarian economies in developing countries. As a result, the Doha round of international trade negotiations focused on the need to address these disparities in the context of the World Trade Organization, yet seemed unable to achieve these goals since domestic interests in the developed world continue to resist agricultural policies that would inevitably lead to massive changes and agrarian reform in their own countries.

After 20 years of democratic governance, the debate over South Africa’s land reform program has become an argument over whether the glass is half full or half empty. Although the promise of the 1994 African National Congress (ANC) election manifesto – a transfer of 30% of the land – has clearly not been met, it is the case that thousands of families and individuals from the most marginalized sections of society have been beneficiaries of the government’s threefold land reform strategy: land restitution; land redistribution and land tenure reform. Despite these slow gains, it remains the fact that the clearest indicator of poverty in South Africa even after 20 years of democracy is


being black, female, and living in a rural area. Unfortunately, this set of criteria now seems less likely to change, given a policy shift in which the government, after re-evaluating its land reform program, decided to target black commercial farmers instead of marginalized rural communities to be the beneficiaries of continued land reform. Despite these limitations, however, the land-reform program has produced some interesting opportunities for creating alternative ways to produce and build community. A new legal creation, the Community Property Association, for the recognition of communal property—which simultaneously guarantees the property rights of the participants yet requires members of this new property holding institution to adopt particular internal modes of governance that are both procedurally democratic and based on formal notions of gender and social equality—has produced a unique institutional form that attempts to bridge the divide between indigenous forms of communal tenure and the country’s constitutional commitments.

One of the major challenges in evaluating land reform policy is to clarify the nature of the goals the policy is designed to achieve. Given the failings of a century of capitalist development in Africa, and rural South Africa in particular, it might be prudent to acknowledge that the goal is simply to achieve freedom from the oppression of structural poverty. From this perspective, it is dependence or the lack of autonomy and self-determination in its widest sense that is the core feature of oppression under conditions of formal democracy. Thus, instead of focusing solely on the structure of ownership and the nature of the production process, it is important to consider the potential of a broader notion of emancipation from social, economic, and political dependence as an alternative to the current systems of production in the South African countryside. At its thinnest, this might entail a number of simple freedoms: to employ one’s own labor without coercion; to be free from regular hunger and disease; and to be able to take part in making decisions that directly impact one’s life and community. At its thickest, this might have the potential of providing a space in which communities might be able to engage the market from a position of relative self-sufficiency while also confronting some of the internal issues of gender and authority that limit the possibilities of internal intra-community or individual emancipation. Although land tenure arrangements and the status of community show a great deal of variation across the landscape, from former bantustans, or communal areas, to corporate and commercial farms in vastly different climatic and agricultural zones, the choices open to the vast majority of land reform beneficiaries remain tightly constrained. For the vast majority of rural South Africans, the immediate opportunity is to obtain some form of tenure security and hopefully

30. See, H. Klug, ‘Community, property and security in rural South Africa: emancipatory opportunities or marginalized survival strategies?’, in Boaventura de Sousa Santos (Ed.), Another Production is Possible: Beyond the Capitalist Canon, Verso Press, London 2006.
access to enough land to be able to adopt a feasible multi-tiered strategy of crop production, animal husbandry and off-farm employment, so as to both sustain themselves and gradually rebuild after the destruction and denial of apartheid which followed a century of colonial dispossession.

6.5 Claiming Land and Protecting Property

The debate over land was renewed in the ANC in late 1989 and coincided with De Klerk’s February 1990 public announcement of the political opening that would set the stage for South Africa’s democratic transition. At that moment, the ANC in Lusaka, Zambia organized a workshop on the ‘Land Question’ initiated by ANC activists Bongiwe Njobe and Helena Dolny. While the workshop focused on analyzing the state of rural South Africa, all the participants – ANC members who ranged from scholars and traditional leaders to peasant activists – seemed to assume that nationalization of existing land holdings, given a history of dispossession and the vast inequalities in land holdings between black and white, would be high on the agenda of an ANC government. This shared assumption was based in no small part on our commitment to the 1955 Freedom Charter – recognized by the ANC as expressing the will of the South African people – which declared in part that the “national wealth of our country … shall be restored to the people”, and “all the land re-divided amongst those who work it, to banish famine and land hunger”.

Despite these assumptions and the liberation movement’s general rhetoric on the ‘Land Question’, activists at the workshop had a realistic view of the low priority rural issues had on the mainly urban-based ANC’s political agenda in the late 1980s. They were however encouraged by the ‘Economy and Land’ sections of the ANC’s Constitutional Guidelines, which had been issued in 1988 as part of the ANC’s preparations for negotiations with the Apartheid regime. Here, the ANC signaled its future intentions to both the international community and the Apartheid regime, by announcing its intention to constitutionally protect property. While this promise went further than what might have been expected, given the rhetoric of socialization, nationalization and redistribution so dominant in the ANC at the time, the limited focus on

property for ‘personal use and consumption’, allowed these conflicting visions of redistribution and property rights to coexist. This coexistence was aided by the document’s commitment to “devise and implement a land reform programme … in conformity with the principle of affirmative action, taking into account the status of victims of forced removals”. With the exact modes of implementation still open to debate, the Lusaka workshop opted to institutionalize the issue within the ANC by calling for the formation of an ANC Land Commission to address the lack of specific policies within the organization.

It was as a member of the ANC Land Commission’s secretariat (first alone and joined later by two others) that I returned to South Africa in June 1990. In setting up the Land Commission, we soon began to work with the already well-established community of lawyers, NGOs, and activists who had long struggled against forced removals in the courts and on the land. This informal coalition provided both the organizational basis, knowledge, and experience, which sustained the struggle for the recognition of dispossessed land rights during the political transition and constitution-making process. While the ANC Land Commission had access to the ANC’s internal policy-making processes and could evoke strong public reaction as a voice of the ANC, it was the return to land campaigns of land claimants, and their lawyers’ continued engagement with the De Klerk government, that frustrated the apartheid regime’s attempts to preempt future claims. The apartheid government attempted to take the question of land off the negotiating table by repealing the Land Acts in 1991 and establishing an Advisory Commission on Land Allocation with the goal of settling all claims before the political transition to democratic rule could be completed.

‘The debate over land reform and property rights centered first on the ANC’s draft bill of rights published in 1990 which contained a single Article addressing the ‘economy, land, and property’. Within the ANC, the Land Commission began hearing from its constituency and opening debates on land reform, nationalization, and restitution. This process began with newly formed branches and communities locked in
land conflicts around the country, but increasingly focused on a series of internal discussions, joined at times by activists and lawyers of the land movement, with members of the Constitutional Committee as well as in engagements with other activists and sectors in a series of conferences initiated by the Constitutional Committee – at which special sessions or subgroups focused on the issue of land and property. Outside the ANC, the Land Commission built links and worked closely with lawyers and activists of the return to land movement and became engaged in wider public debates over land claims and land redistribution. It was here then that those cause lawyers who had long opposed government action began to participate in a process aimed at shaping the future law in this area. Central to these debates was the status that property rights would have in a future Constitution.

Although the ANC’s draft bill of rights only protected, in our view, limited rights to personal property, it became clear at the May 1991 conference convened by the ANC Constitutional Committee, that the ANC was under a great deal of pressure to grant greater recognition to property rights. In fact, attempts at that conference to question whether there should be any constitutionally protected property rights at all, elicited a highly charged response from one member of the Constitutional Committee who warned that the rejection of property rights would directly endanger the democratic transition. In response, the participants at the conference called for a reworking of the draft in which land would be recognized as a specific form of property and treated separately from property in general. As such, concern was expressed about the recognition of property rights before the implementation of the necessary process of redistribution. Furthermore, participants made a commitment to include positive rights to land for the landless.

While this internal debate sought simultaneously to limit the reach of existing property rights and to secure a more equitable distribution of property in the future, the response of the regime and the existing economic interests was expressed most clearly by the South African Law Commission – a nominally independent statutory body. In its August 1991 ‘Interim Report on Group and Human Rights’, the Law Commission launched a sustained attack against the ANC Draft, charging that the “ANC’s bill … provides, in a manner which hardly disguises the aim, for nationalization of private property without objectively testable norms for compensation”, and that what the


ANC intended was “in fact nothing but nationalization under the cloak of expropriation … designed to secure state control over property”.\(^{42}\) Instead, the Law Commission called for the protection of private property and for the payment of just compensation in the event of expropriation in the public interest. Likewise, the Democratic Party, traditionally the party of big capital and white ‘ liberals’, proposed a comprehensive right to property which could only be derogated by lawful expropriation in the public interest, and only then, when subject to the “proper payment of equitable compensation, which in the event of dispute, shall be determined by an ordinary court of law”.\(^{43}\) Neither of these proposals provided for the restitution of property taken under apartheid and as such failed to comprehend the threat to property rights, and even the very notion of constitutional rights, that the legal entrenchment of apartheid’s spoils entails.

While attention was focused on the question of property rights the ANC Land Commission continued to hold meetings around the country to discuss land issues, both as a means to increase awareness within the ANC, as well as to begin the formulation of a land policy for adoption by the movement. The first target of this campaign was to commit the organization to a set of principles upon which a policy could be built. With this as its goal, the ANC Land Commission held a national conference in June 1991 at which we produced a set of guidelines for the development of land policy. These guidelines were then presented and adopted at the ANC’s National Conference in July 1991. The most important features of the Land Manifesto were: its simultaneous commitment to both land restitution and land redistribution; its recognition of a diversity of land tenure forms; and the advancement of a policy of affirmative action as the main device to achieve specific policy goals.\(^{44}\) With these guidelines, the ANC effectively endorsed a strategy against the simple constitutional recognition of private property as recognized by the apartheid state. First, by demanding both restitution and land reform, it questioned and threatened the legitimacy of existing property rights. Second, the recognition of different forms of tenure de-centered private land ownership and provided a basis for the recognition of communal and other forms of land tenure. Finally, the manifesto recognized that affirmative action-type polices would provide a structure in which the multitude of specific policy goals and claims of different constituencies within the ANC could be accommodated and targeted to address land issues and the interests of the rural poor.


At the October 1991 National Conference on Affirmative Action, convened by the ANC Constitutional Committee, a report back to the plenary session from the subgroup on land concluded that a ‘wealth tax’ would be necessary to fund land redistribution. Given the demand that any expropriation be compensated, the group concluded that the only way to achieve the redistribution of land necessary to overcome the legacy of the 1913 Land Acts was to create a specific compensation fund. In order to achieve the equitable redistribution required, this dedicated account would need to be funded by those who benefited from the limited land market created by the Land Acts which had reserved 87% of land for white ownership and control. This could be achieved, it was argued, by the imposition of a ‘wealth tax’ similar to the equalization tax adopted to facilitate the rebuilding of bombed housing stock in the Federal Republic of Germany in the aftermath of World War II. While the idea of special taxes to overcome the vast disparities created by apartheid has continued to raise interest and was used in 1994 as a once-off surcharge to cover the costs of the transition, in 1991, the reaction was immediate – the major white controlled newspapers went ballistic and within hours ANC members involved were once again receiving death threats from those who had attempted to silence opposition during the height of apartheid. Although senior ANC leaders supported the holding of a debate on the ‘wealth tax’, it also became clear that any attempt to conduct an effective redistribution of land rights would meet extremely stiff opposition from the ancien regime as well as conflict with alternative demands for resources among the ANC’s own constituencies.

While activists and lawyers in the anti-apartheid movement had long engaged the state on issues of land, in the classic cause lawyering sense of ‘speaking truth to power’ as they campaigned against forced removals, the democratic transition unsettled this paradigm. As power shifted, away from the old regime and into a contested realm of negotiations, so the role of cause lawyers was transformed. At first, the need to pursue and claim the rights of land claimants – in the return to land movement – remained a central activity, but soon, the focus began to shift towards participation in defining the future. This brought these cause lawyers into a different realm, one in which the claims of their clients had to be placed in the context of broader social policies and concerns – including the often contradictory needs of the democratic transition itself. Instead of working to secure the immediate goals of the cause as represented by their client’s claims to land, the formulation of constitutional and policy options required concern for a myriad of competing concerns, including issues of procedural fairness and feasibility – issues that are of secondary importance to those whose focus is the cause of rights claimants.

Despite the fierce public exposure which followed the proposal of a wealth tax, when formal negotiations began at Codesa in December 1991, it seemed as if the land issue would, once again, be pushed into the background as the parties clashed over the very nature of the political transition. As far as property issues were concerned, they were subsumed in the larger debate over whether the purpose of Codesa was to produce a detailed interim Constitution or broad Constitutional Principles, which would guide but not frustrate the work of a future democratically elected constitution-making body. Despite this marginalization of substantive issues in the negotiations, for land claimants and those active in support of their demands, the struggle over land and property rights continued simultaneously on two planes. First, in actual land occupations and attempts to return to land, from which communities had been forcibly removed – whether by occupation or legal and administrative negotiations with ACLA\textsuperscript{46} and the De Klerk government. Second, at the level of ideas, with debates over different policy options continuing at a series of conferences and meetings, either organized by the ANC Constitutional Committee together with various University-based institutes or directly by the academy. One of the most important of these was organized by long-time land activist Aninka Claassens through the Centre for Applied Legal Studies (CALS), to discuss “the effect that a constitutionally entrenched right to property might have on future land reform legislation and programmes”.\textsuperscript{47}

The opening of a discussion on particular options for the recognition of land rights and the consequences a property clause might have on land claims was, at this stage, a vital intervention, making it clear that the issue of land rights could not be divorced from the wider question of property. Furthermore, when this conference is placed in the context of the series of conferences, meetings, and workshops held in this period, its significance, as one in a series of intellectual loci of the South African transition, may be recognized.\textsuperscript{48} At these events, new substantive ideas were introduced into the public debate while simultaneously being framed through their presentation in

\textsuperscript{46} For a critique of the government’s Advisory Committee on Land Allocations (ACLA), see, Klug 1996, pp. 166-171.


\textsuperscript{48} These included the following conferences: ‘Towards a non-racial, non-sexist Judiciary in South Africa’, Constitutional Committee of the ANC and the Community Law Centre, University of the Western Cape, Cape Town, March 26-28, 1993; ‘Structures of Government for a United Democratic South Africa’, the Community Law Center, University of the Western Cape, ANC Constitutional Committee, Center for Development Studies, University of the Western Cape, Cape Town, March 26-28, 1992; ‘National Conference on Affirmative Action’, University of the Western Cape, ANC Constitutional Committee and Community Law Centre, Port Elizabeth, October 10-12, 1991; ‘Conference on a Bill of Rights for a Democratic South Africa’, Constitutional Committee of the ANC and the Centre for Socio-Legal Studies, University of Natal, Durban, Salt Rock, Natal, May 10-12, 1991; ‘Constitutional Court for a Future South Africa’, ANC/CALS/Lawyers for Human Rights, Magaliesberg, February 1-3, 1991; and ‘Seminar on Electoral Systems’, Centre for Development Studies (CDS)/ANC Constitutional Department, Stellenbosch, November 2-4, 1990.
the context of different international histories and examples. Among the important substantive interventions made at the CALS conference was the public floating of the suggestion for a land claims court – in the form of a report to the conference from a group of lawyers and activists from the ‘land claims movement’ who were working on this option at the behest of the ANC Land Commission.\textsuperscript{49} Other important substantive interventions at this conference included Geoff Budlender’s construction of a legal right to land for the landless,\textsuperscript{50} as well as the work of Catherine Cross, who demonstrated the continued vitality and existence of alternative understandings of land rights in opposition to the prevailing legal notions of individual private property rights.\textsuperscript{51} Presentation of Canada’s decision to preclude the explicit recognition of property rights from their 1982 Charter of Rights\textsuperscript{52} and the history of constitutional conflict over land reform in India in the post-independence years\textsuperscript{53} introduced both substantive examples of alternative approaches and provided grist for debate over the dangers of, and alternatives to, the constitutional enshrinement of property rights.

It was these interventions that forced the ANC to re-evaluate its own proposed ‘Draft Bill of Rights’. After several meetings with land activists and members of the Land Commission, Albie Sachs, then a member of the ANC Constitutional Committee, proposed new sections on Land and the Environment as well as a separate Property clause for the revised text of the ANC draft bill of rights.\textsuperscript{54} These new sections essentially expanded the ANC’s proposals making it clear that land rights would remain a central claim of the anti-apartheid movement and that the protection of property would remain subject to these claims. While property rights were given separate recognition for the first time in the new text, the text also suggested that these references

\textsuperscript{49} E. Swanson, ‘A Land Claims Court for South Africa: Report on Work in Progress’, \textit{South African Journal on Human Rights}, Vol. 8, 1992, pp. 332-343. While I participated erratically in the meetings of this group, I did submit a memorandum on the experience of the Indian Claims Commission in the United States as both an example of a land claims process and as a warning against limiting the claimants’ remedies to monetary compensation instead of the return of land which was the basic demand of claimants. In the debates that followed we were able to use the experience of the ICC to argue that cash settlements could never satisfy demands for the return of land, pointing to the fact that despite 30 years and millions of dollars Native American claims remained unsatisfied.


\textsuperscript{108} Rethinking Expropriation Law I: Public Interest in Expropriation

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to property, along with all other ‘principles governing economic life’ might be better placed outside the bill of rights in a non-justiciable section of the Constitution defined as ‘Directive Principles of State Policy’ – which is the case with similar sections of the Irish and Indian Constitutions.

By the time, this revised text was first published in May 1992 negotiations with the De Klerk government had formally broken down – collapsing Codesa into a morass of mutual recriminations.55 At the same time, the government’s land claims forum was being rejected by communities56 who were threatening to physically reoccupy their lands57 and the ANC Land Commission was being thrust into an engagement with new actors – both national and international – who had recognized the centrality of land to the struggle over property rights. The first engagement, which culminated in a meeting in December 1992, was with the Urban Foundation (UF), a policy institute funded by South African business, which asked for a meeting with the ANC Land Commission to discuss land claims and the question of creating a land claims court. At this meeting, the ANC delegation, which included members of the Constitutional Committee as well as the Land Commission and its allies in the land movement, were presented with the argument that while some form of limited land claims process might be necessary to legitimize future property relations, both the demand for land among the African majority and the reality of resource needs and allocations for future development, required that this process be tightly circumscribed. However, at this stage in the shift from pure advocacy to the responsibility of weighting alternative policy options, procedures, and consequences, the cause of the land claimants remained paramount. While the ANC-aligned participants recognized the problem of competition over resources under a future democratic government we argued that any attempt to engage in an all but symbolic process of restitution would fail to build the legitimacy the Urban Foundation and its corporate constituency seemed to recognize was needed to secure property relations in the new South Africa.

The second of these new engagements began in mid-1992 when the World Bank launched their own initiatives in South Africa. Our immediate response was to ask who had invited them to South Africa, and to reject the notion of engagement with this

57. See, letter dated July 31, 1991 from J. De Villiers, Minister of Public Works and Land Affairs, responding to a letter from lawyers representing a claimant community and stating in part, “I do appeal to you to advise your clients not to take the law into their own hands because that would unnecessarily complicate consideration of possible claims. It would only serve to increase the temperature of the debate rather than to arrive at a solution.”
institution. Soon, however, we realized that the World Bank was developing its own strategy towards the ‘new’ South Africa\textsuperscript{58} and would continue to do so whether or not we engaged. Refusal by definition meant lack of knowledge and influence. The Bank, at the same time, had been rebuffed by other sectors of the anti-apartheid movement – particularly the urban sector activists – and responded to our own hesitations by organizing an initial seminar outside South Africa, in Mbabane, Swaziland, in November 1992. To this event they invited representatives from different South African political groupings, government and non-government bodies to discuss a set of papers prepared by the World Bank and its consultants.\textsuperscript{59}

These two engagements presented radically alternative possibilities and opportunities. While the UF was convinced that the demand for land reform among Africans was being grossly exaggerated, Hans Binswanger, the senior World Bank advisor who dominated the Swaziland seminar, presented a vision of world development dependent upon the carrying out of a successful land reform.\textsuperscript{60} While the UF suggested a limited process of restitution in order to legitimize property rights, Binswanger argued that land claims and even land invasions would drive a process of land reform and suggested that by facilitating land reform the government would be providing an essential catalyst for sustained economic development. Although the ANC Land Commission remained extremely skeptical of the equities of the World Bank’s proposals – for a market driven reform focused on small-scale producers – we realized immediately that the World Bank’s position could be deployed as a way to keep the issue of land reform on the political agenda. With this aim we encouraged Hans Binswanger to persuade the De Klerk government that land reform was an essential part of South Africa’s political transition. At the same time, we introduced Binswanger to members of the ANC’s leadership, including the Constitutional Committee, facilitating ANC agreement to engage with the World Bank on these issues.

This engagement was pursued through the newly formed Land and Agricultural Policy Centre (LAPC) and was structured by the tension between the ANC’s historic concerns about the role of the Bretton Woods institutions and by our concerns to retain some influence over the Bank’s activities in the political transition. As we began to negotiate our working relationship with the Bank’s representative, Robert Christiansen, I attended a meeting of NGOs in Johannesburg at which Martin Khor of the


\textsuperscript{60} This paper was eventually published as: Binswanger and Deininger, ‘South Africa Land Policy: The Legacy of History and Current Options’, World Development, Vol. 21, Issue 9, pp. 1451-1475.
Malaysian-based Third-World Network and representatives of a World Bank monitoring group from Washington D.C. explained the structure and workings of the institution. Although we had already experienced the dramatic impact interest by the Bank could have on an issue, the understanding we gained from these activists of the manner in which the Bank’s mission is operated convinced us of the need to engage the Bank closely and to retain some influence over the Bank’s own information gathering and analytical process.

While the World Bank both wanted and needed our endorsement of their plan to prepare a Rural Restructuring Program (RRP) for South Africa, we demanded that the initial research work be conducted by and remain under the control of South Africans. This was made possible through the creation of terms of reference for the preparation of a series of background reports that would form the basis of the preparation of the RRP. The resulting aide memoire was concluded on June 15, 1993 in which Christiansen committed the Bank to a process that would ‘be fully transparent, consultative, and collaborative at all stages’.61 To this end, various South Africans were asked to head different aspects of the research, including the legal team, which had to prepare a report on the Constitutional requirements of a land restitution and reform process. Later, as a member of the World Bank’s mission to South Africa in late 1993, I participated in the formulation of the Bank’s proposal for a Rural Restructuring Program for the country. While there were many parts of the report with which to disagree, its importance from the perspective of the ANC Land Commission lay in its clear assertion that both land restitution and land reform were central to rural restructuring.62 Furthermore, even though our argument that a constitutionalized property right would impede land redistribution was excised at the last moment, in favor of the Bank’s ideal of a market-driven process, the report contained a clear statement to the effect that land restitution and even redistribution were so important that in the event of market failure, government intervention would be both justified and necessary.63 Here then the rigors of policy formulation, in which arguments of feasibility and consequence begin to predominate, begin to shift the ground upon which the

63. When the World Bank’s Rural Restructuring Programme was presented in South Africa at the LAPC organized Land Redistribution Options Conference in October 1993, it had to compete with a range of suggestions and received serious academic and political criticism. As a result the program never gained a life of its own but became yet another source of the smorgasbord of alternatives both enabling and constraining the options available to policy makers in the new South Africa. It’s most enduring impacts may be its endorsement of land restitution and reform on the one hand and the emphasis upon the market in achieving these reforms.
cause lawyer stands. Instead of speaking truth to power, the task becomes one in which the participants seek to establish a new truth (or policy) through which democratic power might be exercised.

But here there is the danger of running ahead. Prior to the beginning of substantive constitutional negotiations in early 1993, the ANC and government still held dramatically alternative notions of how property should be constitutionally protected. On the one hand, the ANC was willing to protect the undisturbed enjoyment of personal possessions, so long as property entitlements were to be determined by legislation and provision was to be made for the restoration of land to people dispossessed under Apartheid. The Government’s proposals, on the other hand, aimed at protecting all property rights and would only allow expropriation for public purposes and subject to cash compensation determined by a court of law according to the market value of the property. In response, the ANC suggested that no property clause was necessary.

As negotiations with the De Klerk regime gained momentum in 1993 conflict over the property clause began to focus on specific issues. Although the ANC had initially insisted that an ‘interim’ constitution contain only those guarantees necessary to ensure a level political playing field, the momentum for entrenching rights could not be slowed, and before long we recognized that we were in the process of negotiating a complete Bill of Rights. It was in this context that the apartheid government insisted that property rights be included in the ‘interim’ constitution and that the measure of compensation include specific reference to the market value of the property. In response, the ANC insisted that the property clause not frustrate efforts to address land claims and that the state must have the power to regulate property without being obliged to pay compensation unless there was a clear expropriation of the property. Although the regime agreed that explicit provisions guaranteeing and providing for land restitution should be included, its negotiators insisted that such provisions should not be located within the property clause. Instead, it was proposed that if they were to be included, they should be incorporated into the corrective action provisions of the equality clause.

Mass action played an important part in the ANC-alliance’s campaign to shape the transition, and various forms of public display of claims, outrage, and shows of

64. See, Article 13, ANC Draft Bill of Rights: Preliminary Revised Version (February 1993).
66. As late as October 1995 the Draft Bill of Rights being considered by the Constitutional Assembly’s Theme Committee 4 included as Option 2, ‘No property clause at all’. Constitutional Assembly, Theme Committee 4, Draft Bill of Rights, 9 October 1995. See also, Constitutional Assembly, Constitutional Committee Sub-Committee: Draft Bill of Rights, Volume One, Explanatory Memoranda, 9 October 1995, pp. 126-140, which includes a discussion of the nature of the right to property in international law.
strength were employed by groups on all sides to ensure that their concerns or demands were placed on the agenda at the multi-party talks. Marked by protests, demonstrations, campaigns, and even an invasion of the World Trade Center in Kempton Park, the site of the multi-party negotiations, mass participation in the constitution-making process exhibited both a diversity of claims and a degree of popular frustration with an undemocratic negotiating process. Among these were representatives of communities who were forcibly removed under apartheid, who marched on the World Trade Center protesting the proposed constitutional protection of property, which they saw as an entrenchment of the apartheid distribution of property, and demanding constitutional recognition of their right to return to their land.67

Answering these demands and conflicts, the interim 1993 Constitution provided a separate institutional basis for land restitution, which was guaranteed in the corrective action provisions of the equality clause,68 and compromised on the question of compensation by including a range of factors the courts would have to consider in determining just and equitable compensation.69 Significantly, as Matthew Chaskalson argues, the final outcome in terms of the specific wording adopted was as much a result of serendipity, legal ignorance, and the particular quirks and concerns of the individual negotiators, as the logical product of an informed or even interest-based political debate and compromise.70 This is demonstrated most aptly in the choice of the terminology of public purpose over public interest in the expropriation clause despite agreement among the parties to give the state as much leeway as possible in this regard.

However, even then, the substance of the outcome reflects both the general contours of the political conflict over the property clause and the bounded alternatives available to the parties – from the recognition of existing property rights on the one hand, to the recognition of land claims on the other. Significantly, the factors to be considered in the determination of just compensation reflect this outcome. On the one hand, they were directed at the problem of land claims and included: “the use to which the property is being put, the history of its acquisition, the value of the investments in it by

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67. A march on the World Trade Center in June 1993 in which a land rights memorandum was delivered to the negotiators, was followed by a march in central Pretoria in September 1993 in which about 600 people from 25 rural communities threatened to reoccupy land from which they had been removed by the apartheid government as a way of highlighting their demands for the unconditional restitution of land, the establishment of a land claims court and guaranteed security of tenure for farm workers and labor tenants. The Transvaal Rural Action Committee which organized the march also called for the rejection of the proposed property clause in the constitution. Adrian Hadland, ‘Demonstrators hand govt land ultimatum’, Business Day, 2 September 1993.
those affected, and the interest of those affected”, while on the other hand, at the insistence of the ancien regime and making possible the inclusion of other factors, it enshrined ‘market value’. This compromise marked both the success and limit of those cause lawyers and activists committed to securing land for the dispossessed and it was under this constitutional regime that Mandela’s government and South Africa’s first democratic parliament began to address land claims. Acting in terms of the specific clauses of the 1993 Constitution, which provided for the establishment of a land claims process, parliament passed the Restitution of Land Claims Act in 1995 setting up regional Land Claims Commissions and the new Land Claims Court.

Despite predictions that there would be very little change in the Constitution during the second phase of the constitution-making process, particularly on such sensitive issues as the property clause and the Bill of Rights, the property issue, in fact, once again became one of the irresolvable lightning rods in the Constitutional Assembly. Although the committee charged with reviewing the Bill of Rights was at first reluctant to change the formulation of the 1993 compromise, challenges centered on the question of land restitution and reform once again forced open the process. In this case, the impetus came from a Workshop on Land Rights and the Constitution organized by the Constitutional Assembly’s subcommittee, Theme Committee 6.3, whose task it was to resolve issues related to specialized structures of government such as the Land Claims Commission and Land Court provided for in the 1993 Constitution. Focusing on the land issue this meeting once again brought together those committed to the cause of land redistribution and raised the problem of property rights in the Constitution. While some participants again raised the question about whether there should be any property protection within the final Constitution, the major change from the period in which the 1993 Constitution was negotiated was that the participants in this workshop, even those representing long established interests like the National Party and the South African Agricultural Union, now agreed on the need ‘to rectify past wrongs’ and for land reform. Disagreement here was over the means. The South African Agricultural Union, for example, continued to assert that “it should be done in a way without jeopardizing the protection of private ownership”, while the

National Party now embraced the World Bank’s proposals, arguing that land reform should “be accomplished within the parameters of the market and should be demand driven”.

The outcome of this workshop and the submissions made to Theme Committee 6.3 was a report to the Constitutional Assembly that both challenged the existing 1993 formulation of property rights and called for a specific land clause to provide a “constitutional framework and protection for all land reform measures”. While Theme Committee 4, which was responsible for the Bill of Rights, had without controversy proposed a property clause that merely incorporated the 1993 Constitution’s restitution provisions into the property clause itself, the report on Land Rights threw the proverbial cat among the pigeons. Some objected to Theme Committee 6.3 even discussing property rights, while others sensed an opportunity to re-open the debate on property rights and once again questioned their very inclusion in the Bill of Rights. As a result, the Draft Bill of Rights published by the Constitutional Assembly on October 9, 1995 included an option that there be ‘no property clause at all’.

It was in this context that an alternative option, a property clause including within it specific land rights as well as a sub-clause insulating land reform from constitutional attack began to gain momentum. While a strategy to insulate land restitution and land reform from constitutional attack had been implicit from early on in the debate, it was now suggested in a submission to Theme Committee 6.3 which proposed that the property clause include a specific provision insulating state action aimed at redressing past discrimination in the ownership and distribution of land rights. The negotiators were able to rely on this formulation as a compromise between those demanding the removal of the property clause and those, like the Democratic Party, who remained opposed to even a social democratic formulation modeled on the German Basic Law. Still the debate raged on and the draft formulations of the property clause continued to evolve. Political agreement on the property clause was only finally reached at midnight on April 18, 1996, when subsection 28(8), the ‘affirmative action’ or insulation sub-clause of the property clause was modified so as to make it subject to section 36(1), the general limitations clause of the Constitution.

The final property clause thus reflects both the democratic origins of the Constitutional Assembly as well as the continuing influence of the cause lawyering community in this

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area. It guarantees not only the restitution of land taken after 191378 and a right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws or practices,79 but also includes an obligation on the state to enable citizens to gain access to land on an equitable basis.80 Furthermore, the state is granted a limited exemption from the protective provisions of the property clause so as to empower it to take “legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination”.81

Despite agreement in the Constitutional Assembly the property clause was presented to the Constitutional Court as violating the Constitutional Principles and therefore as one of the grounds for denying certification of the Constitution. Two major objections were raised: first, that unlike the interim Constitution the new clause did not expressly protect the right to acquire, hold, and dispose of property; second, that the provisions governing expropriation and the payment of compensation were inadequate. The Constitutional Court rejected both of these arguments. First, the Court noted that the test to be applied was whether the formulation of the right met the standard of a ‘universally accepted fundamental right’ as required by Constitutional Principle II. Second the Court surveyed international and foreign sources and observed that

[i]f one looks to international conventions and foreign constitutions, one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions contain no protection of property at all.82

In conclusion, the Court argued that it could not “uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CPII”.83 The second objection met the same fate with the Court concluding that an “examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists”, and thus the “approach taken in NT 25 [new text section 25] cannot be said to flout any universally accepted approach to the question”.84

79. Section 25(6) 1996 Constitution.
80. Section 25(5) 1996 Constitution.
81. Section 25(8) 1996 Constitution.
83. Id. para. 72.
84. Id. para. 73.
6.6 Expropriation and the Issue of ‘Willing-Buyer, Willing-Seller’

As the ANC – now the ruling party in South Africa – moved towards its National Conference at the end of 2012, there were repeated calls for greater government intervention in the distribution of property, particularly land. In the lead-up to the organization’s mid-year policy conference, which produced a draft policy document for the National Conference, there were repeated calls from various ANC constituencies, the youth league and trade unions85 in particular, for a constitutional amendment to remove what they understood to be a constitutional requirement of ‘willing-buyer, willing-seller’ that they blamed for the slow pace of economic transformation and land reform in particular. In response to these calls the official opposition, the Democratic Alliance issued a press statement warning that the ANC government was “contemplating dramatic changes to the Constitution ... which threatens the very foundation of our constitutional state”.86 Responding to these demands and concerns the Minister of Rural Development and Land Reform Gugile Nkwinti said the debate about changing the Constitution might be irrelevant, as “the ANC had come up with four proposals to transform land ownership in South Africa without changing the Constitution”.87 But at the same time the ANC Youth League called for “changing the Constitution to do away with land expropriation with compensation”.88

Demands for constitutional amendments and threats that such amendments will undermine South Africa’s constitutional democracy are at one level easily understood as the product of continuing contestation over the distribution of economic resources in post-apartheid South Africa. Less understandable is the focus on ‘willing buyer, willing seller’ as the target of vilification by those who feel that land reform has been hampered by the constitutional protection of property rights and as a marker of constitutional right by those who claim that the protection of property fundamentally underpins the country’s constitutional democracy. While the fact that the Constitution makes no reference to the ‘willing buyer, willing seller’ standard is reflected in the argument by Minister Nkwinti, who acknowledged that a lot more can be done by the government within the confines of the Constitution to advance the goals of land redistribution, the government’s own claims are questionable since the process of land restitution and redistribution has until now been largely carried out within the confines of a ‘willing buyer, willing seller’ market-based policy approach. The puzzle

88. Id.
then is to understand the persistence of this approach and the strength of the rhetoric that has until now undermined attempts, including legislative efforts, to shift towards a more aggressive use of state power, including the power of eminent domain, to achieve the government’s stated goals of agrarian reform.

However, once the focus shifts to the question of expropriation, the focus on ‘willing buyer, willing seller’ becomes more understandable. Although the constitution may not include a ‘willing buyer, willing seller’ standard, the apartheid era Expropriation Act 63 of 1975 does in fact include this standard as a basis for determining the compensation to be paid in the event of expropriation. While the constitution is supreme in South Africa and explicitly provides a set of criteria for determining compensation in the event of expropriation, in application the state may only exercise its power of eminent domain within the terms granted by the legislature in the expropriation act. This explains in part why the ‘willing buyer, willing seller’ standard has some resonance in the South African debate over expropriation. However, a broader view of the debate, which includes an understanding of the conflict over land in the Southern African region more generally, provides a much clearer perspective on why this standard has such resonance in the political debates over land and the possibility of constitutional change most specifically. Only once the history of struggle over land in Zimbabwe, as well as the pattern of constitutional amendment and crisis in Zimbabwe, is taken into account, does it become clear why the ‘willing buyer, willing seller’ language has such power and relevance. In this context, the possibility of constitutional change and land reform may be linked as much, to domestic law and politics, as to broader international and regional conditions that shape the ways in which constitutional options and land policy might be understood and contested.

6.6.1 A Southern African Context

While it is hardly surprising that land was at the center of anti-colonial struggles in the settler colonies of Southern Africa— including Mozambique, Namibia, South Africa, and Zimbabwe— there has been little consideration of the impact this past, and the ways it has been addressed in the post-colonial era, is having on debates over property rights in the region. It is often recognized that political events in one country have direct impacts on neighboring country’s yet discussions over constitutional change tend to treat the processes and issues as essentially legal and therefore located within the confines of each country’s legislative and political
system. Even when we recognize that policy-makers and those engaged in constitutional change might be influenced by foreign models and anti-models, it is rarely acknowledged that the terms of a constitutional debate often take place within the shadow of neighboring experiences. Still less is there an understanding of how particular phrasing may, given historical events and global perceptions, serve to trigger reactions and meanings out of proportion to any legal or constitutional meaning that might be normally associated with particular wording. In the case of land the impact of the ‘willing buyer, willing seller’ formula – once articulated as a definition of a market-based compensation standard in South Africa’s 1975 Expropriation Act – became a core element of the strategy to protect colonial property holdings in the 1979 Lancaster House Agreement91 that ended the war and led to democratic elections in Zimbabwe in 1980.

The Lancaster House Agreement included a summary of the text of Zimbabwe’s first post-independence Constitution – including a Declaration of Rights which protected property92 – and provided that there could be no amendment to specific clauses for the first 10 years of independence. The agreement led to the passage of the Zimbabwe Act 197993 through which the British parliament provided for the transition to Zimbabwean independence and the adoption of the Lancaster House Constitution as an Order in Council. The bequeathed constitution included both the guarantee of a specific number of white seats in the new Parliament and elaborated on the protection of existing property rights. The Lancaster House Constitution, which became the Zimbabwe Constitution at Independence in April 1980, specified that land could only be obtained by the new government for purposes of land reform under very strict conditions – which became known as the ‘willing seller, willing buyer’ principle. In this context, the phrase retained its reference to the market but now included a limitation on the ability of the new government to exercise its power of eminent domain, and not merely by defining the measure of compensation that would be due. This settlement was however effectively limited to 10 years since the new 1980 Constitution continued the tradition


92. Lancaster House Agreement 1979, Annex C (V)(I): “Every person will be protected from having his property compulsorily acquired except when the acquisition is in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of that or other property in such a manner as to promote the public benefit or, in the case of under-utilised land, settlement of land for agricultural purposes. When property is wanted for one of these purposes, its acquisition will be lawful only on condition that the law provides for the prompt payment of adequate compensation and, where the acquisition is contested, that a court order is obtained. A person whose property is so acquired will be guaranteed the right of access to the High Court to determine the amount of compensation.”

of parliamentary sovereignty that Zimbabwe had inherited from Britain. Unlike the post-Cold War constitution-makers who would adopt judicial review and require heightened majorities to formally amend these new constitutions, the Zimbabwe constitution was subject to amendment by Parliament and the limited power of the judiciary to interpret the rights provisions in the constitution could be easily undermined by the amending power.

When it came to land, the outcome was initially unexpected. While the Zimbabwean legislature moved fairly quickly after the guaranteed clauses lapsed to remove the ‘willing buyer, willing seller’ limitations in the constitution,94 in practice the government continued, in the name of economic stability and foreign investment, to pursue a policy of ‘willing buyer, willing seller’ as it purchased land from white farmers for purposes of its resettlement and related land reform efforts. It was only when the ruling ZANU (PF) party and its President Robert Mugabe, began to face a serious electoral challenge in the late 1990s that the slow pace of land redistribution became a focus of government rhetoric. It was in this context that Zimbabwe adopted even more aggressive policies of land acquisition that led to a wave of farm invasions and a subsequent collapse of the economy.95 While the conditions that led to economic collapse and violence are multiple and complex,96 it was the adoption of constitutional changes that revoked the duty to pay compensation altogether by tying it to the willingness of the former colonial power to offer financial aid to cover the costs of compensation that have been the focus of attention.97 The significance of the debate over promises of support and responsibility for providing funds for compensation was highlighted again in 2007 when it was revealed that the Lancaster House negotiations nearly collapsed over this issue and that the United States intervened to ensure its success.98 Furthermore, the protection of rights in rural land has been significantly reduced in the new 2013 Constitution and provisions insulating the Government’s land reform program, including prior takings of land without compensation, remain a central point of contestation in the ongoing process of constitutional and political conflict.99

6.6.2 Protection of Property and the Law of Expropriation in Post-Apartheid SA

South Africa’s final 1996 Constitution protects the rights of property holders. Section 25(1) provides that “[n]o one may be deprived of property except in terms of law of

97. See, Constitution of Zimbabwe 1980, Section 16A(1)(i) and (ii).
99. See, Constitution of Zimbabwe, sections 71 and 72, adopted by the Constitution of Zimbabwe Amendment (No. 20) Act 2013.
general application, and no law may permit arbitrary deprivation of property”. The property clause also explicitly recognizes the state’s power to expropriate property for “a public purpose or in the public interest”,100 and ‘subject to compensation’, and includes provisions that attempt to both protect land reform from constitutional challenge101 and to ensure that the payment of compensation is tied to a recognition of the history and use of the relevant property.102

In the first major case, challenging the failure of government to protect the rights of a landowner who had obtained an eviction order against thousands of settlers on his land the Constitutional Court held that the state was under an obligation to either enforce the court ordered eviction or else to expropriate the land and grant compensation to the land owner.103 In a second case, the Constitutional Court was asked to decide whether the enforcement of a tax lien against an individual through the seizing of two vehicles amounted to a taking of the property of the bank which financed the purchase of the vehicles.104 In this context, the Constitutional Court laid out an elaborate scheme for deciding whether there had been an expropriation of property. First, the Court asked whether what was taken is recognized as property for the purposes of the Constitutional protection of property. Second, if it was protected property did the actions of the government amount to a deprivation of that property? Third, if a deprivation is found then the Court will ask if the deprivation is consistent with the Constitution’s requirement in s. 25(1) that it be ‘in terms of a law of general application’ and is ‘not arbitrary’. Fourth, if the Court finds there has been a deprivation but that it was not done in a manner consistent with s. 25(1) then the Court will enquire as to

100. Section 25 of the Constitution – the Property clause – provides in section 25(2) that: “Property may be expropriated only in terms of law of general application
a. for a public purpose or in the public interest; and
b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

101. Section 25(4) of the Constitution provides that, “For the purposes of this section –
a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
b. property is not limited to land”.

102. Section 25(3) of the Constitution provides that, “The amount of the compensation and the time and manner of payment must be just and equitable reflecting an equitable balance between the public interest and the interests of those affected, having regard to the relevant circumstances, including –
a. the current use of the property;
b. the history of the acquisition and use of the property;
c. the market value of the property;
d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and,
e. the purpose of the expropriation.”

whether such a deprivation is justified as a limitation of rights provided for in section 36 of the Constitution. Fifth, if the deprivation was consistent with s. 25(1), was the property expropriated under a law of general application as required by s. 25(2). Sixth, if so, then was the expropriation ‘for a public purpose or in the public interest’ and was compensation, in which the amount, time, and manner of payment was either ‘agreed to by those affected or decided or approved by a Court’, provided. Finally, if the expropriation did not comply with the requirements of section 25(2) (a) and (b) could it nevertheless have been justified as a limitation of rights as provided for in section 36.

Despite this elaborate constitutional scheme for determining the constitutionality of any deprivation of property, the practice of expropriation continues to be governed by the pre-democratic statutory law of expropriation.105 Although no expropriation may be carried out in violation of the Constitution, the question is not whether the government is providing too little protection but rather if the statutory framework created by the Expropriation Act of 1975 does not in fact place higher burdens upon the state than required by the Constitution. Under the 1975 statute an expropriation must be “for a public purpose”106 and compensation is determined by the “amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer”, plus an “amount to make good any actual financial loss or inconvenience caused by the expropriation”.107 Public purpose is defined quite broadly in the Act as “including any purposes connected with the administration of the provisions of any law by an organ of state”.108 The net effect however is that in the case of both the reason for the expropriation, as well as the standard of compensation that should be awarded, the statute privileges the existing holders of freehold title as against both the state and the constitution’s imperative to address past dispossession by providing the state with greater latitude and taking into consideration the benefits the previous owner may have accrued in a market, access to which was racially restricted and where the state often provided subsidies and other benefits to white land owners. The most important impact this continuance of past law has had on post-apartheid land law and policy has been the continued embrace of the notion of willing-seller, willing-buyer, which is neither required by the Constitution nor has it been helpful in furthering the process of restitution – whether in its impact on the actual bargaining power of existing title deed holders or as a matter of perception among those who feel that the process of restitution and land reform has been unacceptably glacial.

106. Expropriation Act 63 of 1975, section 2(1).
107. Expropriation Act 63 of 1975, sections 12(1)(a)(i) and (ii).
108. Expropriation Act 63 of 1975, section 1, definitions: ‘public purposes’.
6.7 Conclusion: The Expropriation Bills of 2008, 2013, and 2015

In an attempt to address the inconsistency between the statutory law and what is arguably a more permissive constitutional requirement, the government first introduced a bill to reform the law of expropriation in April 2008. In its explanation for the Bill, the government argued that the new law would create a “framework to give effect to the Constitution” and in particular the state’s “constitutional obligation to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”.\(^ {109}\) The new statute would also require the recognition of unregistered rights\(^ {110}\) as well as provide new institutional mechanisms to regulate expropriations.\(^ {111}\) Significantly, the draft law also revised the standards for compensation including the range of factors that had been negotiated for during the democratic transition. Reaction to the Bill was vociferous, particularly from those interests who had fought so hard to protect their property interests during the transition from apartheid.\(^ {112}\)

Many of the objections to the proposed legal reforms mirrored those that had been rejected by the Constitutional Assembly, yet the government withdrew the Bill and political tensions continued to rise around criticisms of the slow pace of land reform as well as demands to reject the policy and practice of ‘willing seller, willing buyer’ which is rhetorically blamed for the failures of the state and market to address continuing racial inequalities in land ownership. At its June 2012 policy conference the ANC responded to these popular concerns by making a number of land related policy proposals including: replacing ‘willing buyer, willing seller’ with the ‘Just and equitable’ principle in the Constitution where the state is acquiring land for land reform purposes; expropriating without compensation land acquired through unlawful means or used for illegal purposes; and keeping Nationalization as an option.\(^ {113}\) At the same time however there continued to be more strident demands that there be a constitutional amendment to remove the ‘willing-buyer, willing-seller’ principle or even abolish the requirement that the government pay compensation for land taken in the name of redistribution.


\(^{110}\) Expropriation Bill 16-2008, Chapter 4, section 10.

\(^{111}\) See Expropriation Bill 16-2008, Chapter 3, section 6.

\(^{112}\) See, Expropriation Bill 16-2008, Chapter 3, section 6.


\(^{114}\) ANC, Recommendations from the 4th National Policy Conference June 2012, p. 37.
Responding to these internal pressures the government reintroduced the Expropriation Bill in 2013, but again it failed to progress through the legislature.

While there continue to be claims that it is the Constitution that is preventing a more effective and speedy process of land reform, there is increasing recognition that it is political failure rather than constitutional limitations that is preventing the necessary reform. Even if the demands for constitutional change were to be heeded there is increasing recognition that it is highly unlikely that the ANC would be able to unilaterally change the property provisions in the Constitution since any change to the Bill of Rights requires a two-thirds majority vote in the National Assembly and the support of at least six Provinces in the National Council of Provinces, a degree of support which the ANC no longer controls. Understanding both the limitations of constitutional change and the existing space for statutory change within the ambit of the Constitution the government reintroduced the Expropriation Bill in early 2015. Even in its revised form, the new Bill recognizes that there is broad scope for a more aggressive land reform policy within the present constitutional framework for property and land reform. The question is whether there is the political will to address the legacies of apartheid and inequality that are necessary to ensure a sustainable future for all in South Africa and not be cowed by the shadow of Zimbabwe in which both popular frustration and government failure have produced debilitating economic dislocation.
7

Reclaiming Property
Changes of Purpose or Non-Realization of Public Purpose after Expropriation

Jacques Sluysmans & Nikky van Triet*

7.1 Introduction

The literature on expropriation usually focuses on elements such as the grounds for expropriation, the expropriation proceedings proper, or the compensation for expropriation. Very seldom do scholars and practitioners look at developments after expropriation. If they do, they will often find that all the promising plans that were once the underlying scheme for a specific expropriation project were never realized: either abandoned or changed into something else entirely. These situations raise the question what the legal consequences are – or ought to be – in cases where there is a change of purpose or a non-realization of the alleged purpose (long) after the actual expropriation. Would such a development mean that a former owner can reclaim his property? Could he successfully bring forward a claim for additional compensation? Or should he just content himself with the compensation already received and leave the expropriator to do as he pleases with the acquired property?

These are the questions to be answered in this essay. In order to do so, we will briefly analyze seven jurisdictions: The Netherlands, Belgium, France, Germany, England, South Africa, and the case law of the European Court of Human Rights. What we hope to find is some common ground, some ‘core rules’ that might be labeled as ‘best practice’ or ‘good governance’ in situations of change of purpose or non-realization of public purpose after expropriation. The application of a certain practice in the majority of jurisdictions does not necessarily indicate a best practice. We will, therefore, argue in favor of best practices, not merely the most popular practices.

7.2 The Netherlands

7.2.1 General Overview

Similar to Belgian expropriation law, Dutch expropriation law is to a large extent inspired by French expropriation law. There is a good reason for this. In both the

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Netherlands and Belgium, the first ‘nation-wide’ legislation on expropriation law was introduced by the French when they brought these two countries under French rule at the beginning of the 19th century. After the French were defeated at Waterloo and finally abandoned the Low Countries, a considerable number of their laws remained intact for several years. It was only in 1841 that the Dutch drafted their own Dutch expropriation law. The Belgians made their first own legislation on expropriation in 1835. The expropriation legal professionals who drafted new legislation and decided on expropriation issues were for the afore-mentioned historic reasons well versed in French expropriation law. Consequently, the Dutch and Belgian systems came to borrow heavily from their French predecessor.

It should therefore come as no surprise that the regulations in these three countries have significant similarities in relation to possible actions in situations of changes of purpose or non-realization of public purpose after expropriation has taken place. Of the three – and indeed, we might add, of all the countries analyzed in this essay – the Dutch system of rules is the most elaborate.

Article 61 of the Expropriation Act of 1851 records the consequences of changes of purpose or non-realization of public purpose after expropriation has taken place. It stipulates that an expropriated party may reclaim his former property under specific circumstances. These circumstances are: (i) when after 3 years of the expropriation verdict, the expropriator has not commenced the work for which he expropriated, or (ii) the work has started, but has been abandoned for more than 3 years, or (iii) it is clear that the work will not be realized.

If one of these three situations arises, the expropriator must, within 3 months, offer to the previous owner the opportunity to re-acquire his former property in return for (part of) the compensation received for the expropriation. The former owner may also content himself with additional compensation. If the aforementioned offer is not made or if the parties are unable to come to an agreement, the former owner can approach the court and claim restitution or additional reasonable compensation. The court will then determine what is reasonable.

Article 61 has been part of the Expropriation Act since its inception in 1851. Initially, the *terme de grâce* for the expropriator was only a year, and the former owner’s remedies were limited to a claim for restitution. Later, in 1972, Article 61 was amended to resemble its current form by introducing the alternative possibility of claiming additional compensation instead of restitution.

From the parliamentary history, it becomes clear that the 1851 legislature took its inspiration from Belgium and France where similar regulations were already part of the expropriation legislation. The reason for introducing a restitution claim is also clearly stated. According to the 1850 government, if the work is not realized, i.e. if in hindsight there is no public interest that necessitated expropriation, the reason for expropriation becomes null and void. The Supreme Court later ruled that Article 61 is meant to protect the expropriated party against “unnecessary and untimely expropriation.”

### 7.2.2 Criteria

Article 61’s three sets of circumstances for reclaiming property seem straightforward, but have been the cause of litigation proceedings in the Supreme Court. The first issue was which specific actions on the part of or on behalf of the expropriator qualified as a ‘start of the work’. For example, is it sufficient if he applies for a building permit, or does he have to carry out physical work? The Supreme Court decided in favor of the latter point of view. In order to qualify as works as referred to in Article 61, there has to be some physical activity such as demolishing the old building, cutting trees, laying a new foundation or building a new structure.

The second question was how to deal with a change in the original plans. For example, even though the purpose of the expropriation was to build a three-story apartment building, the expropriator decides to build four stories and an underground parking area. Does that equate to a change of purpose which merits a claim for restitution under Article 61? In this instance, the Supreme Court has ruled that minor changes to the original plan are allowed. This principle has also been included in Article 61. It is unclear what will constitute a minor change. One can argue that changes that seriously impact the amount of compensation or the permissibility of the expropriation itself will not qualify.

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7. *Id*.
7.2.3 Prescription

Article 61 does not determine when the claim for restitution or additional compensation prescribes. Therefore, the courts must decide what time period is reasonable. One can reasonably expect the minimum time period to correspond with the general prescription period of Dutch civil law of 20 years. However, longer periods have also been accepted in case law.\(^{12}\)

7.2.4 Who Has a Right to Restitution/Compensation?

It is generally accepted that the right described in Article 61 is only applicable to the former owner and not to other parties who may have been expropriated, e.g. former tenants. It is also deemed necessary for the former owner to have been actually expropriated. If he has sold his property under the threat of a pending expropriation and to avoid expropriation, Article 61 offers no relief. His only option is to include similar contractual provisions for restitution in his purchase agreement with the buyer.

There is one exception to this rule. If a former owner has, during the course of actual expropriation proceedings, sold the remainder of his (non-expropriated) property to the expropriator, a claim for restitution of the expropriated property may also encompass the non-expropriated property that was voluntarily transferred. This was the outcome of one of the most famous expropriation cases of the Dutch Supreme Court, the case between Zillikens and the Province of Limburg.\(^{13}\)

Zillikens was expropriated in 1979. The object of the expropriation was 120,000 sqm (12 ha) of an estate intended for a four-lane highway. The province offered to buy the remaining 40,000 sqm (4 ha) from Zillikens, which offer was accepted and contained in the court order establishing the compensation for expropriation. In 1983, it became clear that the zoning plan for the highway would not be realized. The province abandoned the whole project to the municipality. In 1993, a new zoning plan obtained the approval of the Council of State, but according to this zoning plan, only two lanes would be realized. Zillikens took the province to court, invoking Article 61. In 2003, the Supreme Court ruled that Article 61 also covered the restitution of the additional property that was not formally expropriated, but transferred as part of the expropriation proceedings.\(^{14}\)


\(^{13}\) Supreme Court (Hoge Raad) 19 December 2003, Nederlandse Jurisprudentie, 2004, 408 (Zillikens v. Limburg).

\(^{14}\) Supreme Court (Hoge Raad) 19 December 2003, Nederlandse Jurisprudentie, 2004, 408 (Zillikens v. Limburg).
7.2.5 Compensation Issues

In the case of restitution, it goes without saying that a portion of the compensation for expropriation should be returned to the former expropriator. This portion should correspond with the market value of the expropriated property at the time of expropriation (plus compensation for the decrease in value of the non-expropriated, remaining property\textsuperscript{15}). If the value of the property has decreased, the amount of compensation to be refunded will be reduced accordingly. If the value has increased, then the surplus above the value at the time of expropriation falls to the previous owner.\textsuperscript{16}

However, case law reveals that restitution is not always feasible. In 1932, Frits Philips and a few of his friends bought pastures near the city of Eindhoven for the use of their aeronautical club. The following years saw the gradual development of the civilian airport called Welschap. On the eve of World War II, the air force permanently occupied a section of the airport. Since then the Eindhoven Airport consists of a civilian and a military portion. In the year 2000, the municipality of Eindhoven expropriated property belonging to a certain Roymans and others for the extension of the military portion of Eindhoven airport. However, following the expropriation it took more than 3 years before works were carried out. Moreover, and significantly, it was not the municipality that started those works, but the State of the Netherlands, more specifically the Ministry of Defense to which the property was transferred by the municipality as part of an intricate scheme of contracts.

The former owners, Roymans, took both the municipality and the State to court and claimed the return of the expropriated property. They invoked the provisions of Article 61, as the municipality had failed to commence the works for which expropriation was granted within the legally prescribed period of 3 years. The district court and the appeal court ruled that an action for return of property could only be brought against the original expropriator. Since the municipality had transferred property to the State, the action could not succeed and Roymans had to be content with additional compensation. The Supreme Court confirmed this decision.\textsuperscript{17}

The Court of Appeal in Arnhem in the aforementioned saga of Zillikens \textit{v. the Province of Limburg} clarified the way in which compensation is to be calculated. The Appeal Court ruled that Article 61 protects a property owner against untimely expropriation. It is therefore reasonable that the calculation of compensation is based on the

\textsuperscript{15} Supreme Court (\textit{Hoge Raad}) 20 July 1999, \textit{Nederlandse Jurisprudentie}, 2000, 61 (Bakkeren \textit{v. Rotterdam}).

\textsuperscript{16} Supreme Court (\textit{Hoge Raad}) 5 April 1978, \textit{Nederlandse Jurisprudentie Onteigening}, 1978, 5 (\textit{Amsterdam \textit{v. Koster}}).

\textsuperscript{17} Supreme Court (\textit{Hoge Raad}) 25 February 2011, \textit{Nederlandse Jurisprudentie}, 2011, 292 (\textit{Roymans \textit{v. Eindhoven \\& State of the Netherlands}}).
assumption that expropriation usually takes place approximately a year before the actual works commence. The value of the expropriated property at the time of expropriation is compared to the value it had 1 year before the works commenced.18

7.2.6 Conclusion

The Dutch Expropriation Act of 1851 contains a provision on how to deal with cases of change of purpose or non-realization of public purpose after expropriation. A former owner has a right to either restitution or additional compensation, but only in cases where his former property was actually (formally) expropriated. The right to restitution is exercised on a fairly regular basis and results in successful claims.

7.3 Belgium

7.3.1 General Overview

In Belgium, the possibility to claim restitution of expropriated property has been part of the expropriation law since 1835. This provision was added in Article 23 of the Expropriation Act of 17 April 1835 by way of amendment. It appears that the authors of the amendment provisions took their inspiration from Articles 60 and 61 of the French Act of 7 July 1833.19

As in Dutch law, the restitution provision was included in the expropriation law to cater for instances where expropriation was allowed for a specific work in the public interest, and that work was not realized. If the public purpose is not achieved the expropriation is retrospectively invalid.

7.3.2 Criteria

In order to successfully invoke the right to restitution, the property has to be acquired through an ‘expropriation decree’ (that is, as a result of formal expropriation proceedings) or under an immediate threat of expropriation (that is, a voluntary transfer to avoid a formal expropriation). Moreover, the expropriating authority must have abandoned the purpose for which the property was expropriated.

It may be difficult to prove an ‘immediate threat of expropriation’ if a claim for restitution is filed several years after a transaction was concluded. It is therefore

suggested to specifically mention in the agreement or deed of transfer that the sale of the property took place only because of the threat of expropriation. Alternatively, parties should simply include a claim for restitution in the agreement itself. On this point, Belgian law differs significantly from Dutch law, where – as a rule – only property that was formally expropriated may be reclaimed under Article 61 of the Dutch Expropriation Act.

The second criterion, namely the original purpose of expropriation, is the topic of the most debate, as it proves difficult to determine exactly whether the property has been developed according to the original purpose and/or whether the expropriating authority has abandoned this purpose. This is especially so, as the Belgian law does not require the works to be realized within a limited period of time, as is the case in the Dutch and French systems. However, the fact that many years have passed after expropriation without the purpose being realized, can be an indication that the purpose will not be realized at all.

Apart from the two criteria mentioned above, two additional elements should be considered. First, the previous owner must not have abandoned his claim for restitution and, secondly, the restitution must not have been excluded by law. It is possible to abandon a claim for restitution. However, such an abandonment should be explicit and cannot be inferred. Proof of abandonment is most likely to be found in purchase agreements or deeds of transfer of property acquired in order to avoid formal expropriation. It is difficult to imagine a situation where a specific declaration of abandonment is made once actual expropriation proceedings have been finalized.

The Belgian expropriation law consists of a variety of different acts. Contrary to, for example, the Netherlands there is not a single expropriation act that encompasses all the rules regarding expropriation. Specific laws stipulate that in specific circumstances a claim for restitution is barred. Article 23 does not apply in those situations. It is beyond the scope of this article to elaborate on the possibility that the right to restitution, more specifically the applicability of Article 23, is excluded by law.

7.3.3 Prescription

There are two prescription periods. According to Article 23, the expropriator should give notice of the fact that the acquired/expropriated property will not be used for the

20. Id., p. 248.
22. District Court Antwerp 4 August 1876, Pas., 1878, III, 23.
intended public purpose. If such a notice has been given, the former owner has 3 months to declare whether he is willing to repurchase his former property. If he fails to do so, he will forfeit his right to restitution.

There is also a more general prescription period of 10 years. It starts at the moment of explicit or implicit acknowledgment by the expropriating authority that the purpose will not be realized.

7.3.4 Who Has a Right to Restitution/Compensation?

The former owner has a claim for restitution. If there is more than one owner, all the previous owners must bring a joint application for restitution and only to obtain the whole of the expropriated property.

Unlike in the Netherlands, it is not necessary that the property is formally expropriated. As described before, a sale concluded in order to avoid expropriation also qualifies as a situation that may later give rise to a claim for restitution.

7.3.5 Compensation Issues

In terms of Article 23 of the Expropriation Act of 17 April 1835, the value of the property that is to be restituted will be established by the court, unless the previous owner is willing to repay the compensation received for the expropriation. Naturally, this refund does not include those portions of the compensation that are not related to the value of the property, e.g. compensation for loss of income or relocation. The refund can never exceed the amount of compensation initially received, but it can be less. The previous owner is also entitled to reimbursement of all the legal and other costs incurred to effectuate his claim for restitution.24

The right to restitution can only be invoked against the original expropriator. Once this expropriator has sold and transferred the property to a third party, the original owner can only claim (additional) compensation from the expropriator.25 In this respect, the Belgian system is similar to the Dutch system.

7.3.6 Conclusion

In Belgium, the Expropriation Act of 1835 explicitly opens the possibility of restitution of property that was expropriated or sold under the threat of expropriation in cases of change of purpose or non-realization of public purpose after expropriation. Only a

former owner has a right to restitution. The right to restitution is hardly ever exercised, since it seldom results in successful claims.\footnote{According to Verbist 2015, supra note 2, p. 55 ‘an update of the outdated legal rules would seem appropriate’ in Belgian expropriation law.} This lack of success is mainly due to the fact that there is no timeframe within which the expropriator has to realize the public purpose and it is therefore rather difficult to prove that this purpose will never be realized.

7.4 France

7.4.1 General Overview

France has \textit{le droit de rétrocession}, laid down in Article L12-6 of the \textit{Code de l’expropriation pour cause d’utilité publique}.\footnote{Article L 421-1 of the new Code taking effect on 1 January 2015.} Former owners can file a claim for restitution if the purpose of expropriation has not been realized within five years or has ceased to be realized. The Article contains an important bar against invoking the right: if a new declaration for public purpose (\textit{déclaration d’utilité publique}: DUP) has been issued, the claim cannot succeed.

The current Article L12-6 has a long history. In the Expropriation Act of 7 July 1833, the inspiration for the current Article 23 in the Belgian Expropriation Act, the so-called \textit{droit de remise} was introduced. Its purpose is to provide a counterbalance to the executive powers of the public authorities with regard to expropriation. After several amendments, the Article took its final form in 1960 by expanding its scope and changing the prescription period from 10 to 30 years. It is interesting to note that, apart from ensuring an additional guarantee of compensation for sentimental value of the property and other sacrifices made for the public use, the Article has another purpose, namely, to punish the expropriator in case of needless expropriation.\footnote{J. Lemasurier, \textit{Le droit de l’expropriation}, Economica, Paris, 2005, p. 552.} This purpose is not explicitly mentioned in the parliamentary history of the similar provisions in the Dutch and Belgian legislation on expropriation.

The former landowner will not be able to enforce his right if (i) the expropriated building was destroyed; (ii) a public facility has since been established (a public facility is protected by the principle of intangibility) or (iii) the expropriated asset was transferred to a third party. If he cannot regain his property, the expropriated party can claim damages in the ordinary civil courts.

The proceedings for restitution of the property can be complex, due to the jurisdiction of different judges. Apart from the judge of \textit{le droit commun}, the administrative judge
and the expropriation judge may also have jurisdiction, which can lead to difficulties in appeal.\textsuperscript{29} The European Court of Human Rights has sentenced France for permanently depriving a former owner of the right to regain possession after the expropriated property was sold, and for the lengthy restitution proceedings, which was, amongst other things, attributable to the different jurisdictions.\textsuperscript{30}

7.4.2 Criteria

The condition to invoke the right to restitution is that the public purpose was not realized, or that the realization has ceased to exist. This may not seem very different from the Netherlands and Belgium. However, there is an important hurdle for a successful claim that sets French law apart from these two countries. This is the aforementioned possibility for the administration to issue a new declaration of public purpose (d\textsuperscript{é}claration d’utilité publique: DUP). With this declaration, the administration can easily frustrate the exercise of the right by resetting the 5-year term in which the property has to be used by the public authorities.\textsuperscript{31} Recently, the possibility to issue a new DUP has raised the question of compliance with the Constitution. This question was answered by the Constitutional Council in February 2013.\textsuperscript{32} The scope of the test includes the principal values deduced from the Constitution, the Declaration of the Rights of Man and the Citizen (hereafter, the Declaration) and treaties which France has signed, such as the European Convention on Human Rights.\textsuperscript{33} The question (a so-called question prioritaire de constitutionnalité: QPC) was submitted from the Court of Cassation to the Constitutional Council. The following situation had led to the submission of the question. In 1995 in the city of Quillan in Aude, expropriation proceedings commenced for the realization of a naval base which led to the expropriation of the property and compensation for the owner. However, the naval base was never built and the former owner invoked the first paragraph of Article L12-6 that granted him the right to restitution.

In the proceedings before the court of first instance, the administration made an appeal to the newly issued declaration of public purpose in 2003. Not only does this declaration frustrate the invocation of the right to restitution, but it can also be issued

\textsuperscript{29} Id., pp. 556-557.
\textsuperscript{30} Guillemin v. France, ECtHR (1997), No. 19632/92.
\textsuperscript{31} Lemasurier 2005, supra note 28, pp. 559-560.
\textsuperscript{33} This includes the first Article of the first protocol of the ECHR, in which the right to property is ensured. The complainant however did not make an appeal to this Article.
years after the expropriation, even after a request to restitution has been made by the expropriated party. Furthermore, there is no limit on the number of times it can be (re)issued. The expropriated party asked for a QPC regarding the claim that this exception in the first paragraph constitutes a violation of Article 17 of the Declaration in which the right to property is ensured.

The objection was raised that by simply issuing a new DUP the right to restitution can be frustrated, thereby violating the right to property. Special attention in this regard was paid to the fact that there are no limits to when or how many DUPs can be issued for the same piece of property.

The Council makes it clear that the goal of the requirement of public purpose is to ensure that the instrument of expropriation is not used frivolously. As a consequence of the requirement, once a public purpose is established and the execution of the public work is delayed or another public purpose has arisen, the legislator is incentivized to limit the possibilities for the expropriated party to frustrate this public purpose by invoking the personal right to restitution (paragraph 5 and 6 of the QCP).

In this light, the Council refers to the possibility of administrative action against the DUP. Administrative courts and notably the Council of State (the highest administrative court in France) will indeed annul a DUP that has been granted with the sole intention of frustrating a claim for restitution. It is thus up to the administrative judge to prevent abuse of the DUP. The fact that the legislator has limited the right to prevent the invocation of the rétrocession becoming an obstacle to the realization of a public project that has been delayed or has been replaced by a new project, does not deny the expropriated party his constitutional rights contained in Article 17 of the Declaration. The protection of property is a constitutional value, the right to restitution is not.

7.4.3 Prescription

According to Article L12-6, the right to restitution expires 30 years after the transfer of property has taken place. The expropriating authority is required, within five years following the transfer of property, not only to assign the property to the use given in the public utility order (or at least to start works accordingly), but also to maintain the intended use for a period of 30 years. During this period the expropriated party

34. Court of Cassation (Cour de Cassation) 17 March 1999, no. 98-14751.
35. Court of Cassation (Cour de Cassation) 26 November 1965, no. 63-13099.
36. Council of State (Conseil d’Etat) 12 May 2004, no. 253586. This abuse of procedure, however, is very hard to prove.
can assert his rights, except if the expropriating authority cancels these rights, by proposing to the former landowner to waive them.

7.4.4 Who Has a Right to Restitution/Compensation?

The Expropriation Code explicitly states that the right to restitution is restricted to the former owner and his legal successors under a universal title. Third parties and usufructuaries have no rights to bring a claim for restitution. Although the law refers to expropriated property, case law has recognized the right of restitution for former owners of property that has been voluntarily transferred after the issuing of a declaration of public purpose.

Restitution cannot be claimed if expropriation took place d’emprise totale and parts of the expropriated property remain available after the public purpose has been realized. In other words, no claim for restitution can be made for property that has become superfluous after realization of the public project. If the expropriated property was too big, there is little one can do about it if the right to restitution cannot be invoked for the entirety of the formerly owned land.

7.4.5 Compensation Issues

Restitution refers to a new transfer of property, not an annulment of the expropriation. Therefore, the originally received compensation does not have to be refunded, but the property has to be repurchased. If the price cannot be agreed upon, the expropriation judge has the jurisdiction to determine the price. Due to the non-retroactive character of the transaction, the judge will only consider the current value of the property. This means that an increase in value is to the benefit of the expropriator. Where the property has been developed by the expropriator and the development is of no use to the former owner, he will still have to pay the price according to the current value. The previous owner is not entitled to reimbursement of the legal and other costs he incurred to effectuate his claim for restitution. Furthermore, he will not receive any compensation where the property has decreased in value.

As in the Netherlands and Belgium and according to case law based on a literal interpretation of the Code, the claim for restitution can only be brought against the original expropriator. Property that has been sold to a third party is the most common obstacle for a claim for restitution.

38. Id., in which she refers to a wide selection of case law.
7.4.6 Conclusion

Although the right of rétrocession may seem solid, this is hardly the case. Not only can the right be frustrated by a new declaration of public purpose, but the legislator has also not placed any further restrictions on this declaration. Furthermore, property that has been sold to a third party constitutes a common obstacle. The actual proceedings are not very favorable to the previous owner, due to its possible length and complexity. Therefore, it can be argued that the right to regain expropriated property is largely theoretical, not practical.

7.5 Germany

7.5.1 General Overview

Like in Belgium, there is not only one expropriation act in Germany containing all expropriation law. On the federal level, the German Basic Law (Grundgesetz, the constitution) and the Federal Building Code (Baugesetzbuch) are the most important. Article 14 part 3 of the Basic Law lays down the requirements for the valid expropriation of property. Expropriations have to be authorized by or in terms of a valid law, the expropriation must be undertaken for a purpose that is in the public interest and the law in question has to determine the nature and extent of the compensation to be paid for the expropriation.\textsuperscript{40} The public interest requirement has been fleshed out by case law and means that expropriation must be the only solution to meet a public need. The expropriation must also be proportionate. It is from this public interest requirement that the right of Rückenteignung\textsuperscript{41} is deduced. The public interest requirement implies that property that was expropriated for a public necessity that was never realized should eventually be returned to the original owner, even if compensation was paid for it.\textsuperscript{42} This was first recognized in a judgment of the Federal Constitutional Court, the Bundesverfassungsgericht (BVerfG), in 1974.\textsuperscript{43} In this case, the road for which the expropriation occurred was never built.

\textsuperscript{40} A.J. van der Walt, Constitutional Property Clauses. A Comparative Analysis, Juta, Cape Town, 1999, p. 147.
\textsuperscript{41} Contrary to what the term might imply, there is no actual reverse-expropriation but a restitution.
\textsuperscript{42} Van der Walt 1999, supra note 40, p. 149.
\textsuperscript{43} BVerfG 38, 175. The Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) claimed it did not have the authority to decide there was a right to Rückenteignung because the exact content and conditions of its enforcement were not clear. The BVerfG states in §30 that although it is up to the legislature to lay down the exact terms and conditions, this is not an excuse for the BVerwG: richterlichen Rechtsfindung ist keine unüberwindliche Schranke gesetzt.
Article 14 of the Basic Law can only be invoked if the expropriation was actually executed under the Basic Law. The Basic Law is not the only source of the right to restitution. This right can be found in several codifications, of which §102 and 103 of the Federal Building Code are the most important. Therefore, the Basic Law functions as a safety net in instances where an owner cannot invoke a specific law.

The purpose of Rückenteignung is the reinstatement of the original constitutionally guaranteed condition of protection against unnecessary expropriation, which is generally achieved by restitution of the reclaimed property. It can also mean a revocation of rights in rem or an elimination of other limitations on property rights. It is, as De Witt c.s. point out, a claim for a reverse transaction under the law of obligations.

7.5.2 Criteria

The right of restitution can be invoked if the purpose of the expropriation is not realized. It can also be invoked if, for other reasons, the expropriated property is no longer necessary to realize the plan. However, there is no right of restitution if the original purpose is realized, but later abandoned. Codifications regarding restitution also refer to situations where the right is excluded. Restitution is not possible if the person whose land was expropriated had himself acquired the land through expropriation in accordance with the provisions of the Federal Building Code or of the Procurement of Building Land Act (Baulandbeschaffungsgesetz). It is similarly excluded if expropriation proceedings have been initiated for the land in accordance with the Federal Building Code in favor of another party prepared to build on the land, and the former owner of the expropriated land is unable to provide evidence of an intent to utilize the land for the required purpose within an appropriate period (§102 part 2).

The Federal Building Code also mentions two non-mandatory exceptions, regarded as general principles of expropriation law. If there has been a material change to the

44. H.J. Papier, ‘Art. 14’, in T. Maunz et al. (Eds.), Grundgesetz Kommentar, Verlag C.H. Beck, München, 2002, pp. 310-311. This excludes certain expropriations. See Federal Constitutional Court (BVerfG) 9 December 1997, 1 BvR 1611, 94 and 31 March 1998, 1 BvR 2366, 97 in which the Court ruled that the protection of property guaranteed by Article 14 does not apply to property that was expropriated in the German Democratic Republic within a legal framework that did not provide the protection of Article 14.
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land\textsuperscript{50} or where compensation wholly or substantially in the form of land has already been granted, the expropriator may refuse restitution (§102 part 4).\textsuperscript{51}

7.5.3 Prescription

Legislation, most notably the Federal Building Code, provides a clear prescription period. The timeframe for making a claim under the Building Code is two years (§102 part 3, first sentence), starting from the moment that it has been made clear that the purpose of the expropriation will not be realized. With regard to claims based on Article 14 of the Basic Law, this is not as clear-cut. There is no firm limitation to the period in which the claim can be invoked. This lacuna is addressed in case law, not only with regard to the limitation period but also with regard to the terms of compensation.\textsuperscript{52}

7.5.4 Who Has a Right to Restitution/Compensation?

The right to restitution is reserved for former owners. If a private contract to transfer land (\textit{Grundstucksubertragungsvertrag}) has been concluded to avert expropriation, the former owner cannot claim restitution, as there has not been an actual expropriation and therefore no public purpose that needs to be realized. Furthermore, the safety net of Article 14 of the Basic Law is not applicable, because there is a private contract.\textsuperscript{53} The fact that the contract was solely agreed upon to avoid expropriation, makes no difference. The private party will have to seek relief in the civil courts.\textsuperscript{54} However, in more recent judgments, the Federal Court of Justice has admitted that there is an omission in the contract when the parties have explicitly stated the transaction was made to avert expropriation, but have neglected to include terms on how to proceed when the purpose of the transfer is not realized. In that case, the contract may be interpreted in such a way that the former owner has the same rights as he would have had if the property was transferred in an actual expropriation. This may even be the case if it is not explicitly stated that the contract was agreed upon to avert expropriation, but the motivation can be clearly deduced from the overall context of the agreement.\textsuperscript{55}

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\textsuperscript{50} Test: when there is no longer an ‘annähernde Identität’ between the ‘old’ and the ‘new’ property. For example due to border changes or a realization of a development plan.

\textsuperscript{51} For example, in Federal Administrative Court (BVerwG) 1987, 49, and 50, the court rejected restitution based on Article 14 of the Basic Law due to a material change of the land.

\textsuperscript{52} Umbach & Clemens 2002, supra note 45, p. 1048, Federal Constitutional Court (BVerfG) 38, 175 (185).

\textsuperscript{53} German Supreme Court for Civil Matters (Bundesgerichtshof), 84, 1.


\textsuperscript{55} \textit{Id.}, p. 297.
7.5.5 Compensation Issues

In case of restitution based on the Federal Building Code, §103 states that the previous owner is liable to pay compensation to the party disadvantaged by such restitution for any loss of a right. If the former owner has been compensated for other property loss upon the initial expropriation, this compensation has to be repaid to the extent that such loss is reversed by the restitution. The compensation to be made to the property owner must not exceed the standardized market value applicable to the initial expropriation. Any expenses incurred which have resulted in an increased property value are to be taken into account. §121 further states that in the case of an application for restitution being rejected or withdrawn, the costs are borne by the applicant (the former owner). Where the application for restitution is successful, the costs shall be borne by the party affected by the restitution.

7.5.6 Conclusion

The scattered nature of the German restitution system makes it hard to define a single right to restitution. A lot is dependent on the circumstances under which the expropriation took place, such as the legal basis and the cooperation of the expropriated party. Even though there are safety net proceedings in the German constitution, these can only be invoked under limited circumstances. Furthermore, restitution based on the Basic Law suffers from a lack of complementary legislation. Therefore, it relies on case law to fill in the lacuna. This creates some uncertainty for expropriated parties due to the lack of clear and uniform proceedings.

7.6 England

7.6.1 General Overview

In England and parts of Wales, there is not one specific Article containing a right of restitution. Instead, a set of rules, The Crichel Down Rules (hereinafter: the Rules), is used in which the right to repurchase is found. The current and revised Rules were published in 2004. Strictly speaking, the Rules, first published as a Treasury Circular

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56. As can be read in rule 2, the Rules also apply to land in Wales acquired by and still owned by a UK Government Department. This same rule provides that the Scottish government has its own Crichel Down Rules, which have been adapted in 2011: Planning Circular 5/2011 Disposal of surplus Government Land – The Crichel Down Rules.

in 1954 after the Crichel Down affair in that year,58 apply only to Government Departments (rule 1). However, the usage is also recommended for, but not binding on, local authorities, statutory bodies and bodies in the private sector to which public sector land holdings have been transferred (rule 4). Originally, the Rules only applied to land that was agricultural at the time of the acquisition. Since 1981, it is applicable to all land. An important difference with the countries discussed above is that the former owner has to wait until the Government Department wants to dispose of the land. The right does not automatically arise after a given amount of time. Perhaps this has to do with the fact that different reasons are given for the original philosophy of the Rules. The general understanding is that the rationale underlying the Rules is one of fairness and justice that should result in an opportunity for the expropriated party to repurchase his land.59 However, it can be asked to what extent the outcome of the proceedings is fair, especially considering that the proceedings are often regarded to be an irritation rather than a central concern.60

7.6.2 Criteria

The right to repurchase arises if land acquired by or under the threat of compulsion (rule 7) ceases to be necessary for the purpose of the compulsory purchase. The administration then has to give priority rights to the expropriated party or his successors in title to buy the land back at current market value. The ‘threat of compulsion’ means that the Rules also apply to voluntary transfers that have taken place ‘under the shadow’ of compulsory purchase. A threat of compulsion will be assumed in the case of a voluntary sale if power to acquire the land compulsorily existed at the time, unless the land was publicly or privately offered for sale immediately before the negotiations for acquisition (rule 7).

The right is not applicable if there has been a material change in character of the whole of the expropriated land (rule 10). In one instance where an airbase had been built on

58. J.A.G. Griffith, ‘The Crichel Down Affair’, The Modern Law Review, Vol. 18, No. 6, 1955, pp. 557-570. Land was acquired by the Air Ministry to use during World War II as a bombing range. After the war, the former owners sought to repurchase the land. The Air Ministry, however, decided to transfer the land to the Commissioners of Crown Lands (one of whom was the Minister of Agriculture) to maximize production and to lease it out to one pre-selected tenant. This decision met with a lot of protest and in April 1954 led to the establishment of a public inquiry. As a consequence, Dugdale (Minister of Agriculture) accepted full ministerial responsibility and resigned from Government. In his resignation speech, he set out the main principles for future disposals of surplus land. These principles were applied retrospectively to Crichel Down.


60. Id., p. 33.
agricultural land, the landowners’ challenge failed. The rules refer to certain examples, like dwellings or offices that have been erected on open land, mainly open land that has been afforested or where substantial works to an existing building have effectively altered its character. When deciding whether any works have materially altered the character of the land, the disposing department should consider the likely cost of restoring the land to its original use. Rule 11 further states that when only part of the land for disposal has been materially changed in character, the general obligation to offer it back will only apply to the part that has not been changed. There are also exceptions to the general obligation due to a multitude of limited time windows set out in rule 14. Finally, in rule 15 seven further exceptions are mentioned. In R v. Trent Regional Health Authority, ex parte Westerman Ltd. (1995) an appeal was made in terms of the exception of avoidance of fragmented sales. This invocation was not submitted: the disposing authority had to offer the land back to a consortium of previous owners.

The widely recognized problem with the Rules is that they are merely non-statutory guidelines for the administration to restitute or resell land. Moreover, they are not

61. R v. Secretary of State for Defence, ex parte Wilkins & Ors (2000) 40 Estates Gazette 180 in which the question had to be answered whether material change was to be assessed in relation to the whole of land or individual parcels. This case is also an example of how the courts state that the importance of the Rules and the need to adhere to them ‘cannot be underestimated’. It is however important to state that during this time no judicial review and/or human rights grounds existed.


63. The exceptions are as follows: (i) where it is decided on specific Ministerial authority that the land is needed by another department; (ii) where it is decided on specific Ministerial authority that for reasons of public interest the land should be disposed of as soon as practicable to a local authority or other body with compulsory purchase powers; (iii) where the disposing body is of the opinion that the area of land is so small that its sale would not be commercially worthwhile; (iv) where it would be mutually advantageous to the department and an adjoining owner to effect minor adjustments in boundaries through an exchange of land; (v) where it would be inconsistent with the purpose of the original acquisition to offer the land back; (vi) where the disposal is either (I) a site for development or redevelopment which has not materially changed since acquisition and comprises two or more previous land holdings, or (II) a site which consists partly of land which has been materially changed in character and partly of land which has not, and there is a risk of fragmented sale of such a site realizing substantially less than the best price that can reasonably obtained for the site as a whole, and (vii) where the market value of land is so uncertain that clawback provisions would be insufficient to safeguard the public purse and where competitive sale is advised by the department’s professionally qualified valuer and specifically agreed by the responsible Minister.

64. They are, however, mentioned in case law: B. Denyer-Green, Compulsory Purchase and Compensation, Taylor & Francis Ltd., London, 2009, p. 101. In R v. Commission for New Towns ex p Tomkins & Anr [1989] 58 Property and compensation reports 57, it was also mentioned that even if the rules did not exist “common fairness demands that the former owner should have a preferential claim to buy back the land which he had been compelled to sell, provided he is able and willing to pay the full market price at the time of repurchase, that price reflecting the development potential of the land.”
the only rules that government and other bodies have to consider when retransferring land. For example, in the case of local government, the principles are subject to the Local Government Act 1972, Section 123. Primary legislation including local government legislation on the disposal of property, governmental policy statements and regulations on disposal are deemed to override the rules.

7.6.3 Prescription

As mentioned above, the right to repurchase does not come into existence after a certain amount of time. The initiative must come from the current owner of the property. This obligation does not exist if certain time limits, laid down in Rule 14, are applicable. The general obligation to offer back will not apply in case of (i) agricultural land acquired before 1 January 1935; (ii) agricultural land acquired on or after 30 October 1992 which becomes surplus, and available for disposal more than 25 years after the date of acquisition, and (iii) non-agricultural land which becomes surplus, and available for disposal more than 25 years after the date of acquisition.

7.6.4 Who Has a Right to Restitution/Compensation?

Rule 13 states that the ‘former owner’ may, according to the circumstances, mean former owner or former long leaseholder, and his or her successor. ‘Successor’ means the person on whom the property, had it not been acquired, would clearly have devolved under the former owner’s will or intestacy and may include any person who has succeeded, otherwise than by purchase, to adjoining land from which the land was severed by that acquisition.

7.6.5 Compensation Issues

The actual repurchase proceedings are covered in rules 20-25. The former owner has to be given a notification and a proposal to buy back his former property for a price fixed by the relevant department’s professionally qualified, appointed surveyor. The former owner then has 2 months to decide if he wants to buy back the property. If the former owner does not want to buy the land or does not respond, the land can be sold on the open market (of which the former owner should be informed). If he does wish to purchase the land, there will be a period of 2 months to come to an agreement about the terms other than value and a further 6 weeks to negotiate.

the price. When no agreement is reached within these periods, the property is also sold on the open market.

7.6.6 Conclusion

Although clear proceedings are set out in the Rules, there are several disadvantages which take away a large part of the effectiveness of the Rules. First of all, the applicability of the Rules is uncertain. In combination with other rules for different governmental departments, this can often lead to conflict and tension when trying to meet the different requirements. Furthermore, some rules are complex (‘the Rules have been poorly drafted and lack clarity’) and the precise authority is unclear. They exist only as non-statutory guidelines, which means the Rules give former owners no rights, as such, which can be asserted and protected by law. Also the documentation of the transactions is not properly recorded, there is no clear definition of what constitutes a ‘disposal’, ‘surplus’, ‘material change’, and therefore different authorities can have differing views about those aspects. Finally, the strict time limits as set out in the Rules are thought to be too tight and the proceedings as set out are regarded as imposing costs and delays.

7.7 South Africa

In South Africa the current legislation on expropriation, the Expropriation Act 63 of 1975, does not contain any section that answers the question whether expropriation can be reversed if the original purpose is abandoned or significantly changed. It should be noted that the draft Expropriation Bill that was made public in March 2013 brings no change in this respect.

The question whether there is some legal basis for a claim for restitution was brought before the KwaZulu-Natal High Court in the case of Harvey v. Umhlatuze Municipality and Others. In this case, the municipality had planned to develop a certain area for

70. Id., p. 19.
71. Id., p. 19.
72. Id., pp. 28-29. A former owner can only challenge a decision by a disposing organization by way of judicial review but if that succeeds this will not inevitably result in the land being offered back. It only means that the disposing organization has to take a new decision in accordance with the rules. Furthermore, the former owner can only do this if he knows a transfer has occurred.
74. Id., pp. 24-25.
75. Id., p. 37.
76. 2011 (1) SA 601 (KZP) South African Law Reports KwaZulu Natal High Court Pietermaritzburg.
use as a public open space with recreational facilities. Harvey’s property was expropriated for this purpose and he was paid an agreed compensation. When the plans to develop the area for this purpose proved to be unfeasible, the municipality changed its plans and decided to use the area for a residential development for which purpose the area was also rezoned. Harvey took the position that property can only be legally expropriated for a public purpose or in the public interest. That would mean that in case the public purpose ceased to exist or was abandoned by the expropriator, the expropriation was no longer legally (and constitutionally) sustainable when faced by a claim to the property by the original owner.

The High Court judge Moodley makes a tour d’horizon among various legal systems, including South Africa, the United Kingdom, France, Sweden, the United States, and Canada. He concludes — rightly so — that in virtually all these jurisdictions the raison d’être for the expropriation is for some public purpose, use, interest, benefit, or necessity. He also observes that in many of the jurisdictions specific provision is made in the statutory legislation and in administrative rules for expropriated property to be returned to the original owner if it is not used for the purpose for which it was expropriated, or if such purpose is abandoned. However, Moodley observes, the South African legislature has thus far not enacted any statutory provision entitling a person to reclaim property expropriated from him if the purpose for which it was expropriated is not realized, although in the ‘new constitutional era’ many laws dealing with property rights have been adopted or changed. Therefore, it seems as if the legislature has intentionally refrained from introducing a statutory provision as mentioned before.77

The Court’s reluctance to introduce a new rule with serious consequences without a proper statutory framework is understandable. We therefore agree with Van der Walt that a change in legislation will probably be necessary to give a former owner the right to claim restitution of expropriated property if the purpose for the expropriation becomes impossible or is abandoned.78

In this light, however, it seems to us a missed opportunity that the proposal for the new South African Expropriation Act does not include any Article that may provide the statutory framework that is currently lacking. Given the fact that many jurisdictions provide such a framework,79 it begs the question why the South African

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77. We believe that Moodley (in §137) leaves open the possibility of accepting a claim for restitution in a case where an authority expropriates land for a stated purpose and never even commences to use it for that purpose or uses it for a different purpose or was mala fide from the outset, but the Harvey case is — according to him — no such case. The claim for restitution is therefore dismissed.

78. Van der Walt 1999, supra note 40, p. 499.

legislature has apparently decided not to open the possibility of reclaiming expropriated property in cases of change of purpose or non-realization. In our opinion, there is no satisfactory answer to that question.

It should be noted that, compared to the aforementioned countries, South Africa is in a unique position given its apartheid history, especially with regards to land matters. It is possible that the legislature is concerned that a restitution right will chill efforts to effect transformative land redistributive plans by strengthening the property rights of former owners. However, we see no compelling reason why such a legitimate concern should stand in the way of introducing a right to restitution. Firstly, there is no indication that the legislature has seriously considered introducing a restitution right but refrained from doing so for fear that it might interfere with projects for land distribution. There has been no apparent consideration of this question, although the aforementioned recent case law provides cause for such consideration. Secondly, in cases of expropriation for reasons of land restitution the purpose of expropriation is simply a reversal of ownership. There is no project that has to be carried out on the expropriated land. We therefore fail to see how a court could come to the conclusion that in this type of case the original purpose of the expropriation has not been reached or fallen away. Thirdly, even if there was such a risk, it does not follow that a right to restitution should be denied altogether. It would be perfectly possible and acceptable to limit the scope of the restitution right to only certain situations of expropriation that are less politically sensitive, thereby excluding the land redistribution cases. This is in line with the recommendations already proposed by Slade with regard to the current Expropriation Act of 1975. As Slade points out, a right to restitution, albeit within certain limits, would “prevent the state from using a valid public purpose as a smokescreen to use the property for a different purpose after the property has been expropriated”.80

7.8 European Court of Human Rights

It can be difficult for courts to carve out a system of restitution or compensation in the absence of legislation. However, there is no justification for refusing to introduce a system in which a former owner has the right to claim restitution of expropriated property if the work for which the expropriation took place becomes impossible or is abandoned.

This also seems to be the position of the European Court of Human Rights in its decision in the case of Beneficio Cappella Paolina v. San Marino.81 Beneficio is a San Marinese church institution. On 7 March 1985, the San Marinese government issued an

81. ECtHR (2003), No. 40786/98.
expropriation order in respect of certain plots of land belonging to the church. The latter was awarded approximately 60,000 Euros in compensation. The land, which was earmarked for urban development projects that were scheduled for completion by 31 December 1987, was only partially used. On 16 February 1987, the applicant church applied to the government seeking to recover possession of the unused land. The government refused the application on the ground that the land in question could still be used in the interests of the community.

The ECtHR considered it a problem that the national law of San Marino did not provide a former owner with the means to achieve restitution of property that was expropriated, but not used. In the original French wording it reads:

Néanmoins, la Cour considère que l’utilisation partielle des terrains expropriés pose un problème quant au respect du droit de propriété eu égard (…) à l’absence en droit d’une disposition prévoyant la restitution des terrains expropriés et non utilisés.

The Court clearly considers problematic the fact that part of the expropriated property of the Beneficio is not used for any public purpose without the former owner having a legal possibility of reclaiming this apparently unnecessarily expropriated property. Referring to the case of Motais de Narbonne v. France82 the Court ruled that the refusal to restitute part of the expropriated property – given the fact that part of the property has not been used for works in the public interest – constitutes a violation of Article 1 of the First Protocol.

It should be noted however that in later decisions the European Court does not repeat its aforementioned opinion that the lack of a right to restitution in case of non-realization poses a problem. For instance, in Vassallo v. Malta83 the Court considers that the lapse of 28 years from the date of the taking of the property without any concrete use having been made of it, in accordance with the requirements of the initial taking, raises an issue under Article 1 of Protocol No. 1, in respect of the public interest requirement. However, it is only in combination with the fact that to date, 37 years after the taking, the former owner did not receive any compensation for the expropriation of the property that the Court considers that the requisite balance has not been struck.

7.9 Conclusions

We have attempted to compare the rules of several, often widely differing, jurisdictions relating to restitution after expropriation. Some of those jurisdictions, such as the Netherlands, Belgium, and France, stem from a similar legal history and therefore

82. ECtHR (2002), No. 48161/99.
83. ECtHR (2011), No. 57862/09. See also, Keçecioğlu a.o. v. Turkey, ECtHR (2008), No. 37546/02.
show some resemblances. Others have developed their own, rather unique way of dealing with the problem of non-realization after expropriation.

What we can establish, though, is that there is some shared opinion that if the project for which expropriation took place is significantly changed or abandoned, and therefore *ex post facto* a lack of public purpose arises, the former owner should be able to reclaim his property or at least have the possibility to receive additional compensation. Of the various jurisdictions we analyzed, it is only South Africa where the former owner has no remedy in cases where expropriated land is not used for the public purpose underlying the expropriation. It appears that only a lack of statutory foundation stands in the way of implementing the aforementioned opinion in (case) law. We would therefore dare to conclude that a statutory possibility for an expropriated party to reclaim property in case of change or abandonment of public purpose can be deemed a ‘core principle’ of international expropriation law.84 For this reason, it is, in our opinion, a missed opportunity that the new draft for a South African expropriation bill does not seem to strive to repair this legal defect.

INTRODUCTION

How can the Constitution protect landowners from the government without disabling the machinery that protects ownership itself? The Supreme Court’s exactions jurisprudence can be understood as an attempt to confront this challenge. The Court has sought to subject some local land use actions to heightened scrutiny as a matter of federal constitutional law, while leaving the superstructure of zoning, permitting, and taxation in place. The difficulties with this approach became apparent in Koontz v. St. Johns River Water Management District.

The Court’s exactions jurisprudence, set forth in Nollan v. California Coastal Commission, Dolan v. City of Tigard, and now Koontz, requires the government to satisfy demanding criteria for certain bargains – or proposed bargains – implicating the use of land. But the Court has left the domain of this heightened scrutiny wholly

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1. I do not mean to suggest that all or even any of the justices would frame the enterprise in quite this way, only that the pattern of decided cases reflects a struggle prompted by these competing goals.

2. The Court has grounded this selectivity intensified scrutiny in the unconstitutional conditions doctrine – a foundation that is notoriously unstable.

3. Even if most of the garden variety land use regulations and taxes falling into this latter category could ultimately survive heightened scrutiny, the exercise of applying such scrutiny would be undesirably costly for both courts and local governments.


undefined. Indeed, the Koontz majority eschewed any boundary principle that would hive off its exactions jurisprudence from its land use jurisprudence more generally.

At first blush, the fact that exactions always involve actual or proposed land use ‘bargains’ might seem to mark out a clear and well-defined arena for heightened scrutiny. But in fact, virtually every restriction, fee, or tax associated with the ownership or use of land can be cast as a bargain. The point is not limited to land use law. Virtually all governmental restrictions and impositions relating to economic activity, head taxes aside, can be cast in conditional terms, as they are premised upon choosing to sell, earn, employ, and so on. To retain its commitment to heightened scrutiny for a subset (and only a subset) of land use controls, the Court must construct some stopping point. Ideally, a boundary principle would be relatively easy to apply and would track relevant normative considerations reasonably well. In the exactions context, however, markers that can even minimally approximate these criteria are in short supply – and the Court thinned its options further in Koontz. Choosing an approach going forward requires examining not only the impact of heightened scrutiny on land use bargains but also the collateral damage that the rule in question may do to takings law and other constitutional doctrines, including the broader doctrine of unconstitutional conditions.

8.2 Takings, Due Process, and Exactions

Koontz arose out of a conflict between Coy Koontz, a Florida landowner, and the St. Johns River Water Management District (‘District’), a regional water authority. Koontz had purchased a 14.9-acre tract of land near Orlando in 1972. The land was mostly wetlands, though it also contained some forested uplands. Florida law required Koontz to obtain permission from the District before filling any wetlands. In 1994, Koontz applied for a permit from the District to develop the northern 3.7 acres of his parcel, virtually all of which were wetlands. He offered to dedicate a conservation easement covering the remaining 11 acres. In the past, the District had required owners seeking permission to fill wetlands to preserve 10 acres of wetland for every acre they filled. In keeping with this general practice, the District proposed that Koontz either reduce the size of his development to a single acre (dedicating a conservation easement for the remainder of the property) or, alternatively, that he develop the 3.7 acres as he proposed, but pay to improve the drainage on additional.

District-owned land.10 The District also indicated that it was willing to entertain alternative proposals from Koontz.11

Koontz rejected the District’s proposal, and the District denied the permit. Rather than go back to the bargaining table, Koontz filed a lawsuit in state court. He claimed that the conditions for permit approval contained in the District’s proposal violated the Takings Clause.12 Among other things, Koontz challenged the District’s suggested swap of development approval for wetlands protection or mitigation as an unlawful ‘exaction.’ This exactions claim is different from a claim that the permit denial itself took Koontz’s property. Instead of challenging the regulatory burden that a denial would impose, Koontz’s exaction theory contested the legality of the bargain the District was trying to strike. In order to understand how the mere attempt to bargain with a property owner – without any property changing hands – might violate the Takings Clause, I must briefly explore the contours of the Supreme Court’s regulatory takings jurisprudence.

8.2.1 Takings and Due Process

In considering whether a regulation of land constitutes a taking of property requiring just compensation, the Supreme Court usually adheres to the analysis laid out in Penn Central Transportation Co v. New York City.13 The Penn Central factors include the “economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations” and the “character of the governmental action.”14 The focus of this default regulatory takings inquiry, as the Court made clear in Lingle v. Chevron USA, Inc.,15 is the severity of the burden the regulation imposes on the property owner.16 The unanimous Court in Lingle contrasted this burden-focused inquiry with a means-ends style inquiry into the rationality of government regulation. The latter, the Court said, falls within the province of the Due Process Clause and, in undertaking it, courts should be highly deferential to the elected branches.17

10. Koontz, 133 S.Ct., at p. 2593.
11. Id.
12. Koontz sued under Fla Stat § 373.617(2), which provides a cause of action for damages if a state action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”
16. As the Lingle Court explains, “severity of the burden” represents a common thread running through all of its regulatory takings jurisprudence, one that can be used to test how closely a given governmental act approximates a physical appropriation, and to assess the distributive fairness of the imposition.” Id., at pp. 538-539; see Id., at pp. 539-540, 542-543.
17. Id., at pp. 543-545. “The inquiries serve different purposes as well. A violation of the Due Process clause leads to the invalidation of the enactment, whereas a Takings Clause violation represents an otherwise legitimate governmental act that can be fully validated by the payment of just compensation.” Id., at p. 542.
The Court has carved out from its default *Penn Central* takings analysis two *per se* rules governing discrete categories of regulation. First, in *Loretto v. Teleprompter Manhattan CATV Corp*, the Court held that a permanent physical invasion of property authorized by the government necessarily constitutes a taking.¹⁸ In subsequent cases, the Court has characterized the state appropriation of discrete pools of money, such as the interest from a specific account, as *Loretto*-type takings.¹⁹

The Court created a second *per se* regulatory takings rule in *Lucas v. South Carolina Coastal Council*.²⁰ In that case, the Court held that a regulation is a *per se* taking (and not subject to the *Penn Central* analysis) when it permanently deprives an owner of all economically viable use of her property – unless the rule does no more than codify limitations on owners’ rights already built into ‘background principles’ of state property law, such as nuisance.²¹ The *Loretto* and *Lucas* exceptions to *Penn Central* are consistent with the Court’s characterization of the takings inquiry in *Lingle*: their focus is on the burden a government action imposes on owners.

The Court’s takings framework is not a model of clarity or coherence. It can be (and has been) assailed on normative, logical, and administrability grounds. I will not delve into those criticisms here, but will instead accept these principles as given for purposes of addressing one particularly problematic corner of the doctrinal picture: exactions.

8.2.2 Enter Exactions

Sitting uncomfortably with *Lingle’s* takings/due-process typology is the Court’s treatment of claims that the government has conditioned development approval on exactions of constitutionally protected property rights from the landowner. In *Nollan v. California Coastal Commission*,²² the plaintiffs owned a small beachfront home in California. They wanted to demolish the existing home and build a new, larger home on their lot. California law required them to obtain permission from the Coastal Commission before they could undertake their project. The Commission refused to grant the *Nollan*’s permission to build unless they would give the state a lateral easement allowing the public to cross over the portion of their property adjacent to the mean high tide line.²³ The Supreme Court concluded that the exaction was unconstitutional.²⁴

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¹⁸ 458 U.S. 419 (1982), at p. 441.
²¹ Id., at pp. 1029-1031.
²³ Id., at pp. 827-829.
²⁴ See Id., at pp. 841-842.
held that the demanded easement did not share an ‘essential nexus’ with the goal the Commission would have (legitimately) advanced by simply denying the requested permission to expand the house.

In *Dolan v. City of Tigard*, the Court added to *Nollan*’s ‘essential nexus’ inquiry the requirement that the burden of the condition imposed upon development permission be roughly proportional to the harm that would be caused by permitting the development to go forward. The plaintiff in *Dolan* owned a small hardware store. When she applied for a permit to expand the store and pave her parking lot, the city conditioned approval of her application on her dedication of a piece of her property to the city for use as a flood plain (subject to a recreational easement) and bicycle path. The Court conceded the existence of a nexus between the city’s demands and the impacts of the plaintiff’s expanded use of her property on stormwater runoff and traffic. But it nonetheless held that the city had violated the Takings Clause because it had failed to establish that its exaction was proportional to the impacts the plaintiff’s proposed expansion would cause.

The ‘essential nexus’ and ‘rough proportionality’ tests established in *Nollan* and *Dolan* together produced an inquiry, ostensibly operating under the Takings Clause, that is noteworthy in two respects. First, it scrutinizes the fit between means (the condition imposed by the government) and ends (mitigation of the harm caused by the proposed development). Importantly, it does not evaluate the burden imposed on the landowner by the underlying regulatory regime from which she is seeking relief. This would appear to place the test in the domain that the Court identified in *Lingle* with the Due Process Clause, not the Takings Clause. Second, the exactions inquiry

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26. Id., at p. 391.
27. See Id., at pp. 379-381, 393-394.
28. See Id., at pp. 388, 394-395. The Court left ambiguous whether it is the harm eliminated by the exaction that must be proportional to the harm the development causes or whether it is the cost of the exaction (to the landowner) that must be proportional to those harms.
29. See *Lingle*, 544 U.S., at pp. 542-543. This is not to say that the determination that an owner has been singled out to bear an unfair burden – an inquiry that that Court in *Lingle* identified with the Takings Clause – does not involve any questions of fit. After all, to determine that a given burden is unfairly placed on a landowner, we need to know something about the reasons why the government has imposed it. A landowner whose use constitutes the equivalent of a nuisance, for example, might fairly be required to bear burdens that would not be appropriate for another landowner – a point the Court made explicit in *Lucas v. South Carolina Coastal Council*: “The ‘total taking’ inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, the social value of the claimant’s activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.” 505 U.S. 1003 (1992),
involves a level of scrutiny of the proffered ends and chosen means that would be highly unusual in the due process context. The court in *Dolan* specifically opted for the ‘rough proportionality’ language in order to make clear that the inquiry was to be more searching than the usual ‘rational basis’ review. Moreover, it placed the burden of establishing compliance with the exactions test squarely on the government’s shoulders, thereby inverting the traditional presumption of constitutionality of properly enacted regulations.

The Court has characterized its exactions jurisprudence as an application of the unconstitutional conditions doctrine. That doctrine limits the ability of the government to condition its grant of a discretionary benefit to a claimant on the claimant’s waiver of some constitutional right that the government would not be entitled simply to override. For example, the government cannot condition its grant of employment — something it is

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30. Governmental acts directed at social and economic goals receive rational basis review unless they implicate fundamental rights or involve suspect classifications. Such review requires only that the act be rationally related to a conceivable governmental purpose (not necessarily the one that actually animated the governmental body). While it is possible that a governmental act that “fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause,” *Lingle*, 544 U.S., at p. 542, the test is a deferential one that does not put the government to its proof in establishing how well, or even if, the legislation serves particular goals.


entitled under normal circumstances to withhold – on an applicant’s waiver of his First Amendment right to choose his own religion. In the exactions context, the constitutional right at issue has been located in the Takings Clause. As the court put it in Koontz, by conditioning development approval on the landowner’s conveyance of some property interest to the government, “the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.”

8.2.3 The Scope of Scrutiny

Nollan and Dolan sparked two axes of disagreement among the lower courts about the reach of the exactions doctrine. First, courts split over whether Nollan/Dolan heightened scrutiny applied to exactions in which the government demands a cash payment rather than a dedication of an interest in land in exchange for development permission. Second, they divided over whether the exactions doctrine applies only to so-called ad hoc or ‘adjudicated,’ exactions, that is, exactions whose terms are worked out on a case-by-case basis in negotiations with landowners. Courts and commentators usually contrast adjudicative exactions with exactions that are more ‘legislative’ in character. A legislative exaction is one in which the

35. Koontz, 133 S.Ct., at p. 2594.
38. Cases holding that Nollan and Dolan do not apply to ‘legislative’ exactions include McClung v. City of Sumner, 548 F3d 1219, at pp. 1227-1228 (9th Cir 2008); St. Clair County Home Builders Association v. City of Pell City, 61 S3d 992, at p. 1007 (Ala 2010); Greater Atlanta Homebuilders Association v. Dekalb County, 588 SE2d 694, at p. 697 (Ga 2003); San Remo Hotel v. City and County of San Francisco, 27 Cal 4th 643, at pp. 671-672 (2002); Krupp v. Breckenridge Sanitation District, 19 P3d 687, at pp. 695-696 (Colo 2001); Curtis v. Town of South Tomaston, 708 A2d 657, at pp. 659-660 (Me 1998); Parking Association of Ga., Inc v. City of Atlanta,
state’s conditions on development are spelled out in advance in a generally applicable formula or schedule.

Before Koontz, the Supreme Court had not intervened to decisively resolve either debate. On at least two occasions, however, it had used dicta to describe its exactions cases as having involved ad hoc state demands that owners turn over tangible interests in land. In City of Monterey v. Del Monte Dunes at Monterey Ltd, the Court defined ‘exactions’ as “land-use decisions conditioning approval of development on the dedication of property to public use”. Later, in Lingle, the Court suggested that the reach of Nollan / Dolan scrutiny was limited to ‘adjudicative land use exactions,’ in which the state demands – in exchange for development permission – that the property owner hand over an interest in land that, if imposed directly, “would have been a per se physical taking.” This dicta in Lingle appeared to put the Court in the camp of the lower courts that had declined to apply Nollan and Dolan to so-called ‘legislative’ exactions (exactions that operate according to a predetermined formula or schedule) and on the side of those lower courts that had declined to apply Nollan and Dolan to exactions of money.

8.2.4 The Koontz Decision

In Koontz, the Supreme Court definitively rejected the notion – hinted at in Del Monte Dunes and Lingle – that the Nollan / Dolan test applies only to exactions of physical interests in land. Koontz had prevailed in the state trial court and intermediate appellate court on an exactions theory, but the Florida Supreme Court had reversed, finding Nollan and Dolan inapplicable based on its interpretation of the scope of the Supreme Court’s exactions doctrine. Relying on the limiting language in Del Monte Dunes and Lingle, the Florida Supreme Court concluded that Nollan and Dolan do not apply to exactions of money and, in addition, do not apply when an agency denies the requested permit (as opposed to granting the permit subject to certain conditions).

The U.S. Supreme Court rejected both of these limits on Nollan and Dolan. All of the Justices agreed that, contrary to the Florida Supreme Court’s holding, permit denials as well as conditional permit grants are subject to exactions scrutiny. In the majority’s words,

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40. Id., at p. 702.
41. 544 U.S., at p. 546.
42. See McClung, 548 F3d, at pp. 1226-1228 (relying on Lingle to limit Nollan and Dolan analysis to adjudicated land use exactions); Wisconsin Builders’ Association v. Wisconsin Department of Transportation, 702 NW2d 433, at pp. 446-448 (Wis App 2005) (same).
[a] contrary rule would be especially untenable … because it would enable the government to evade the limitations of Nollan and Dolan simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court’s approach, a government order stating that a permit is ‘approved if’ the owner turns over that property would be subject to Nollan and Dolan, but an identical order that uses the words ‘denied until’ would not.44

The justices split over the question whether a demand for money fell within the boundaries of Nollan and Dolan. The five-justice majority opinion by Justice Samuel Alito held that the Court’s exactions jurisprudence reached demands for money. The dissenters, led by Justice Elena Kagan, rejected this position.

In reaching its conclusion, the Koontz majority had to navigate around the Court’s 1998 decision in Eastern Enterprises v. Apfel.45 In Eastern Enterprises, a plurality of the Court had concluded that retroactively imposing liability on a former coal operator for retired coal miners’ medical benefits violated the Takings Clause.46 However, the four dissenters in Eastern Enterprises, along with Justice Anthony Kennedy (who concurred in the judgment on due process grounds), took the position that the Takings Clause did not apply at all when government imposes general obligations to pay money.47 As Justice Kennedy put it, “the Government’s imposition of an obligation … must relate to a specific property interest to implicate the Takings Clause.”48 Kennedy thereby distinguished cases like Brown v. Legal Foundation of Washington,49 in which the government had seized interest earned on specific accounts.

The concern with applying the Takings Clause to more generalized obligations to pay money was, as Justice Stephen Breyer noted in his dissenting opinion, the difficulty of distinguishing such obligations from taxes, which have long been understood to lie beyond takings scrutiny.50 “If the Clause applies when the government simply orders

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44. Koontz, 133 S.Ct., at pp. 2595-2596. The dissent agreed. See Id., at p. 2603 (Kagan dissenting).
46. Significantly, the plurality did not conclude that the imposition of retroactive liability constituted a per se regulatory taking under Loretto or Lucas. Instead, it found a taking only after applying the multifactor Penn Central analysis. Eastern Enterprises, 524 U.S., at pp. 529-537.
47. Id., at pp. 554-558 (Breyer dissenting); Id., at pp. 543-545 (Kennedy concurring in the judgment and dissenting in part).
48. Id., at p. 544 (Kennedy concurring in the judgment and dissenting in part).
50. Eastern Enterprises, 524 U.S., at p. 556 (Breyer dissenting). Although Richard Epstein has famously argued that takings analysis should apply to taxes, this approach has not been pursued by the judiciary or political branches. See R.A. Epstein, Takings: Private Property and the Power of Eminent Domain, 1st edn, Harvard University Press, Cambridge, MA, 1985, p. 95 (casting all regulations, taxes, and changes in liability rules as ‘takings of private property prima facie compensable by the state’); Id., at p. 283
A to pay B,” he asked, “why does it not apply when the government simply orders A to pay the government, i.e. when it assesses a tax?”

Courts and commentators alike have read Eastern Enterprises to mean that general obligations to pay money do not fall within the ambit of ‘private property’ protected by the Takings Clause. In Koontz, the majority did not reject this reading of Eastern Enterprises – unsurprising, given that Justice Kennedy joined the Koontz majority. Instead, Justice Alito seized on Justice Kennedy’s specific language in Eastern Enterprises to argue that, unlike in Eastern Enterprises, “the demand for money at issue [in Koontz] did ‘operate upon … an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment”. As a consequence, the majority argued, “the demand for money burdened petitioner’s ownership of a specific parcel of land” and takings scrutiny was appropriate.

8.3 Normative Foundations for Exactions Law

At first blush, the Court’s exactions jurisprudence seems to occupy a well-bounded territory: Heightened scrutiny only applies when the government attempts to bargain with a landowner over the grant of a permit (or some other land use privilege). But this apparently straightforward means of firewalling off the domain of Nollan and Dolan depends on a doubtful proposition: that land use ‘bargains’ (understood broadly as land use regulations that are somehow conditional in their application to particular landowners) can be readily picked out from land use controls more generally. For several reasons, including some exacerbated by Koontz itself, deal-spotting is not so simple.

Discretionary, conditional, or negotiated applications of land use laws are not aberrations that stand out against a backdrop of well-ordered, prospectively announced, and uniformly imposed land use regulations. Instead, land use control typically proceeds in a piecemeal fashion. Land use deal making frequently takes the form

54. Koontz, 133 S.Ct., at p. 2599.
embodied in the Court’s exactions cases: regulators have discretion to block a project or permit it to go forward, and they bargain with the landowner over the terms on which they will approve the project. As a consequence, the exactions test already potentially covers a large portion of land use regulation. But even in the absence of such explicit bargaining, most if not all land use law can be framed as deal making given that the laws are conditional in nature and subject to frequent and fine-grained revision.56

It is possible, and indeed likely, that the law reached its present form only after lawmakers engaged in a great deal of bargaining with affected landowners, bundling burdens with benefits in ways that look very much like the paradigmatic exaction. For example, Lynne Sagalyn describes how, in the 1980s, New York City consulted with private developers, civic groups, and non-profit foundations as it attempted to facilitate the redevelopment of Times Square.57 As Sagalyn put it,

> the political problem of rebuilding West 42nd Street involved an extraordinarily delicate act of balancing the city and state’s aggressive plan for large-scale ground-up development … with its other goals for preserving the historic midblock theaters and their symbolic sense of place … while accommodating the intense community and business concerns of Clinton and the Garment District….58

And land use ordinances also frequently embed conditional elements that leave significant discretion to local governmental actors, whether explicitly or through the use of open-textured terms subject to official interpretation. The zoning code for the City of Puyallup, Washington, for example, is not unusual in specifying that, in considering an application for any conditional use, “[t]he hearing examiner shall have the authority to impose conditions and safeguards as he/she deems necessary to protect and enhance the health, safety and welfare of the surrounding area.”59 Such a provision is nothing if not an invitation to bargain over what conditions the city will impose in exchange for official approval.

The foregoing discussion above establishes only that the domain of exactions is not self-limiting as a conceptual or practical matter – not that it cannot be somehow limited. The difficulty lies in finding a coherent way to identify what is in and what is

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56. Jurisdictions vary in their approaches to piecemeal changes as well as to the enterprise (and indeed necessity) of comprehensive land use planning. Nonetheless, all jurisdictions incorporate some flexibility into their land use control regimes, and hence afford some degree of discretion to local decision-making bodies.


58. *Id.*, at p. 101.

out of the realm of elevated scrutiny, given the conflicting goals of protecting landowners from the government and protecting them from each other. A principle for setting the boundaries of heightened scrutiny should ideally have two features: it should be relatively clear (so that one can tell at the outset what is included), and it should bear some relationship to what it is that makes exactions normatively problematic. Tradeoffs between the two goals may be necessary; a less good normative fit may be tolerated to produce a much more administrable test, or a less tractable test might be selected if it aligns much better with underlying normative concerns.

In crafting tools to define the reach of heightened exactions scrutiny it is helpful to start by asking a question that the Court in *Koontz* (and, for that matter, in *Nollan* and *Dolan*) largely ignored: what is it that is problematic about exactions in the first place? A land use exaction is, at its heart, a conditional regulation of land use. But why and how does conditionality raise constitutional worries? The question takes us back to the doctrine of unconstitutional conditions.

### 8.3.1 Exactions as Unconstitutional Conditions in Land Use

In a previous article, Lee Fennell identified three possible problems with the conditional grant of governmental benefits: (1) ‘receiving forbidden goods,’ in which the government uses the leverage provided by conditionally applicable laws to obtain legal entitlements that it is not authorized to receive; (2) ‘bargaining with the opponent’s chips,’ in which the government confiscates entitlements belonging to an individual for the sole purpose of selling them back to that individual; and (3) ‘appropriations from third parties,’ in which the government obtains desired benefits by trading away entitlements belonging to third parties whose interests are not represented in the negotiation.

The first problem (receiving forbidden goods) can be illustrated by a governmentally initiated bargain that would require a person to change her religion in order to receive government benefits. A commitment to change one’s religion is not something the government is authorized to receive from any citizen. This problem, however, is not really implicated by individually negotiated, conditional land use laws. We do

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60. These two criteria echo in some measure Frank Michelman’s pairing of ‘settlement costs’ and ‘demoralization costs’ in his analysis of compensable takings. F.I. Michelman, ‘Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law’, *Harv. L. Rev.*, Vol. 80, No. 6, 1967, pp. 1214-1215. Just as bright-line rules that mark out distinctive, easily identified cases help to limit the costs of settling up over compensable takings, so too would a clearly articulated boundary around heightened scrutiny reduce the costs of administering the system. And just as one would wish for the cases identified for compensation to track normative concerns like demoralization, so too would one wish for the region of heightened scrutiny to align with relevant normative criteria.

not normally think of it as improper to sell or give property to the government. Indeed, unlike other contexts in which the unconstitutional conditions doctrine might apply, the Constitution itself explicitly envisions property rights as subject to (involuntary) alienation to the state for public use upon the payment of just compensation.

The second potential problem (bargaining with the opponent’s chips) is readily illustrated by a gunman who threatens ‘your money or your life’ – entitlements that both belonged to the victim before the gunman came along. Translated into the land use context, this concern about illicit appropriations can be more directly addressed by applying a standard takings analysis to the regulation that keeps the landowner from being able to develop as of right. The Nollan/Dolan analysis, however, like unconstitutional conditions doctrine generally, typically proceeds on the assumption that the government can lawfully decline to waive the land use restriction in question. If this is so, then there has been no preliminary grab of entitlements, but rather only a legitimate governmental act in restricting development. Moreover, even if there had been an illegitimate confiscation of land use rights, nexus and proportionality review would hardly solve the problem.

Only the third problem (third party effects), is arguably addressed by the nexus and proportionality doctrine. In theory, these limits could ensure that the actual costs of development are properly remediated through connected and commensurate concessions, rather than left to fall on third parties while the government reaps (or confers on others) unrelated benefits. But this is not the typical exactions case. Exactions claims under Nollan and Dolan are brought by regulated landowners, not by neighbors who were unrepresented in the negotiations and who object to the bargain that was struck.

There is a fourth possibility, which one might understand as straddling the boundary between the second and third categories: that conditional regulations are objectionable because of the potential they create for government favoritism or even outright corruption. The prototypical exaction – the government’s demand for a payment or other concession from a landowner in exchange for regulatory relief – is structurally very similar to the prototypical bribe. The key distinction between the two is the end to which the regulator directs the payment or concession from the landowner. If the regulator directs the payment towards the pursuit of a legitimate public purpose, demanding it does not amount to soliciting a bribe. If the regulator directs the

63. See e.g., Fennell 2000, supra note 61, at p. 53 (observing that the fact that a misappropriated good can only be swapped for connected and proportionate benefits does not do anything to address the initial misappropriation).
demanded payment to her own (or some favored third party’s) private benefit, then it becomes ‘corruption’.64

As with the ‘bargaining with the opponent’s chips’ scenario, improper government favoritism requires the existence of legal roadblocks in order to thrive. Roadblocks generate the possibility for government favoritism and corruption when removing them is both highly discretionary and privately beneficial.65 And, as with the ‘appropriations from third parties’ scenario, government favoritism and corruption have harmful effects on disfavored third parties. The two scenarios come together in the following way: the government places roadblocks in front of landowners that it fully expects to remove at some price, but the price that it charges any particular landowner will determine whether that landowner foots more or less than her share of the costs associated with development.66 The focus of this objection, however, is not only on distributive consequences, but also on the nature of the government action.

The structural similarity between exactions and corruption is the marker of a larger problem, one that exactions may raise even in the absence of any evidence of government corruption or favoritism. The problem stems from the very flexibility that the exactions device is designed to create, which may operate in tension with principles of rule of law.

8.3.2 Rule of Law

Theorists working in divergent political and philosophical traditions have emphasized the importance of the rule of law.67 The most influential accounts focus on

64. See e.g., S. Rose-Ackerman, *International Handbook on the Economics of Corruption*, 1st edn, Edward Elgar, Cheltenham, UK and Northampton, MA, 2006, p. xvii (“In the most common [corrupt] transaction a private individual or firm makes a payment to a public official in return for a benefit”).
66. The question of what constitutes a party’s proper share is itself subject to debate. See e.g., J.L. Sax, ‘The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?’, *Vt. L. Rev.*, Vol. 34, No. 1, 2009, pp. 163-165 (examining the different fairness intuitions that follow from a resource allocation rule based on space, rather than time).
several distinctive features deemed vital to law’s ability to sustain a society of free and equal persons. The rule of law fosters freedom by increasing the predictability and intelligibility of the regulatory landscape within which the citizen operates and by constraining officials from exercising unfettered discretion. Rawls argues that the rule of law “constitute[s] grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties.” Scott Shapiro summarizes this line of thought nicely when he says that the rule of law “enables members of the community to predict official activity and hence to plan their lives effectively,” and, at the same time, “constrains official behavior and hence protects citizens from arbitrary and discriminatory actions by officials.”

In addition to asserting its intrinsic connection to equality and liberty, theorists have posited that adherence to the rule of law generates a number of consequential benefits. Some have argued, for example, that excessive disregard of the forms of legality has a corrosive effect on citizens’ respect for the law and on their willingness to follow it. Others have argued that the rule of law fosters the kind of stability and predictability necessary for economic development.

Lon Fuller’s discussion of the ‘inner morality of law’ is typical in terms of the formal features it identifies as crucial to the rule of law. Fuller identifies eight ways that state action may deviate from the rule of law. Those are: (1) a failure to generate generally applicable rules (‘generality’), “so that every issue must be decided on an ad hoc basis;” (2) a failure to publicize the law; (3) excessive use of retroactive legislation;
(4) the use of rules that are not intelligible; (5) the enactment of rules that contradict one another; (6) use of rules that are beyond the power of the regulated party to follow; (7) changing rules too frequently; and (8) permitting “a failure of congruence between the rules as announced and their actual administration.”

Several of these deviations are present in the exactions context, particularly where the terms of exactions are not spelled out in advance or, in other words, where they are negotiated with landowners on a case-by-case basis. To the extent that different developers are offered different deals in exchange for regulatory relief, there is a failure of generality. When the terms on which the state actor is willing to grant regulatory relief is communicated to different developers privately, there is a failure of publicity. To the extent that exactions rely on frequent changes in the applicable zoning law, there may be excessive instability. And, where developers are frequently offered regulatory relief on an ad hoc basis, there can be a pervasive failure of congruence between the rules on the books and the way the rules are actually applied.

Understanding heightened scrutiny for exactions through the lens of a concern with the rule of law has the virtue of tying the third-party appropriations threatened by land use regulatory bargains to the landowners most likely to become actual Nollan/Dolan claimants: relatively inexperienced developers who feel abused by the land use process. Their objection, on this view, is not to land use regulations as such, but to the degree of regulatory discretion surrounding land use bargains. Excessive discretion renders the law opaque to the unsophisticated and permits officials to strike vastly different deals with different landowners, demanding much less from favored landowners in exchange for the waiver of regulatory burdens. This differential

74. Fuller 1969, supra note 71, at p. 39. Fuller’s list is perhaps the best known of the ‘laundry lists’ of principles generated to capture formal requirements of the rule of law. See Waldron 2010, supra note 67, at *3.

75. There is also a form of retroactivity at work in exactions, insofar as changes in conditions or requirements deviate from what was required at earlier points, when the property was purchased or when expectations were formed. To some extent this is an inherent feature of the need to apply law that is responsive to changing conditions to an enduring asset; it is not unique to the exactions context. However, the concerns associated with retroactivity gather added force in the exactions context if the rules for obtaining a permit can be unexpectedly changed in ways that are known (and indeed designed) to disadvantage particular parties based on their past conduct (here, investments in land).

76. For a discussion of the types of plaintiffs who have appeared in (and who might be expected to appear in) exactions cases, see e.g., Eagle 2014, supra note 4, at *15-17.

77. Note, however, that the facts in Nollan itself do not fully square with this interpretation, insofar as the same lateral easement condition was consistently required of other landowners along the same stretch of beachfront. See Nollan, 483 U.S., at 829 (observing that the Commission reported similarly conditioning “43 out of 60 coastal development permits along the same tract of land”; of the others, “14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property”).
treatment smacks of arbitrariness and can easily shade into favoritism and corruption. Lurking in the background is the possibility that favored landowners may have become so for improper reasons.78 Even when nefarious behavior is absent, the existence of bargaining around the law on the books may create the impression among outsiders that mischief is at work.

By imposing the limits of nexus and proportionality in its exactions cases, the Court might be understood as attempting to structure bargaining between governments and developers in ways that increase the conformity of that bargaining to the formal requirements of the rule of law. On this account, the exactions criteria impose (admittedly broad) outer limits on the relative disadvantage that favorable land use deals (which are obviously not going to be challenged by the favored developers) can afflict on disfavored landowners. The exactions test might thereby act as a crude price cap on the waiver of discretionary land use regulations.79 Arguably, this cap attacks both the corruption problem (by reducing the value of the bargain-for discretionary override) and the horizontal equity problem (by limiting the potential gaps in burdens the state can impose on permit applicants).

This rule-of-law account of the exactions jurisprudence mirrors discussions of eminent domain’s public use requirement, especially following Kelo v. City of New London.80 Arguments about public use in the economic redevelopment context have frequently cited the danger of governmental favoritism towards powerful and well-connected

78. Jeremy Waldron has defended the notion of official discretion as consistent with the rule of law. See e.g., J. Waldron, ‘The Rule of Law in Public Law’, New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper, Nos. 14-40, 2014, at *10-11, online at <http://ssrn.com/abstract=2480632> (visited June 14, 2015). As Waldron notes, however, discretion is a matter of degree. The sort of discretion at work in a great deal of land use law is discretion of the most unbridled sort. And so it is not necessary to disagree with Waldron to think that the Court’s exactions jurisprudence might be normatively grounded in concerns about the degree to which the operation of land use regulation in practice falls short of the requirements of the rule of law.

79. The ‘rough proportionality’ portion of the test seems most plausibly related to this price-capping function, but the ‘essential nexus’ requirement could make regulatory burdens easier to evaluate by limiting the complexity, reach, and heterogeneity of deal making in a given context.

80. 545 U.S. 469 (2005). In Kelo, a group of property owners challenged New London, Connecticut’s use of eminent domain as part of an economic redevelopment scheme. See Id., at pp. 473-476. The property owners argued that taking property that was not blighted to give to private developers for the purpose of economic development was not a valid ‘public use’. See Id., at pp. 475-476. The Supreme Court rejected the challenge, affirming prior cases holding the Takings Clause’s ‘public use’ requirement to permit the state to pursue through the use of eminent domain any public purpose (including economic development) that it could legitimately pursue through other means. See Id., at pp. 483-484. See also Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), at pp. 240-243; Berman v. Parker, 348 U.S. 26 (1954), at pp. 33-36. As Justice Sandra Day O’Connor put it for the unanimous Court in Midkiff, “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.” 467 U.S., at p. 240.
private interests to justify limiting the scope of eminent domain. This focus is also consistent with the general thrust of substantive due process review, which aims to root out situations in which the government acts arbitrarily and in ways that cannot be justified (even minimally) by reference to permissible government purposes. The Court has employed a similar approach in its equal protection jurisprudence. A conclusion that government policy or distinction is not rationally related to a permissible government purpose, like a finding of no public use in eminent domain, often implies that government is impermissibly serving some private agenda (such as corruption or animus) at the expense of the public good. Rule-of-law concerns, broadly construed, seem to offer a theoretically grounded normative explanation for the Nollan/Dolan inquiry.

It is not entirely clear that these concerns map well onto the way that inquiry has been structured. The Nollan/Dolan inquiry does not target favoritism directly. It does not engage in the sort of comparative analysis that one would expect from an inquiry motivated by horizontal equity. Instead, in considering challenges by disfavored developers, the Nollan/Dolan analysis focuses on nexus and proportionality within the challenged deal only. Moreover, even if nexus and proportionality would produce a general tendency toward more equal deal making when consistently applied

81. For example, in a summary of the anti-Kelo backlash 5 years after the case was decided, the property-rights litigators at the Institute for Justice framed the conflict in terms of unequal political influence: The parties who gain from eminent domain abuse—in particular, local government officials and financially powerful private business interests—have disproportionate influence in the political arena. Not surprisingly, those groups have fought hard against eminent domain reform in virtually every state where it has been proposed. Given their tremendous influence, as well as the fact that ordinary home and business owners do not have lobbyists or special access, the question that the critics should be asking is: ‘How on earth did the Kelo backlash meet with such success?’ Five Years after Kelo: The Sweeping Backlash against One of the Supreme Court’s Most-Despised Decisions, Institute for Justice, 2010, at *5, online at <www.ij.org/images/pdf_folder/private_property/kelo/kelo5year_ann-white_paper.pdf> (visited November 11, 2013).

82. The similarity—both in terms of normative underpinnings and legal content—between the substantive due process and equal protection inquiries is most apparent in the so-called ‘class of one’ equal protection cases, where the claimant alleges she has been singled out arbitrarily for adverse treatment. See for example, Village of Williambrook v. Olech, 528 U.S. 562 (2000), at p. 564 (“[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination” (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1927), at p. 445). But see Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008) (refusing to apply a ‘class of one’ analysis to situations in which government action is necessarily ‘subjective and individualized’ as in the context of public employment).

83. See J. Waldron, ‘The Concept and the Rule of Law’, Ga. L. Rev., Vol. 43, No. 1, 2008, pp. 31-32 (suggesting that an ‘orientation to the public good’ is a necessary feature of law; thus, “we might say that nothing is law unless it purports to promote the public good” even if it does not always manage to do so).

84. Arguably, evidence about other, more favorable deals might come in as part of the consideration of the proportionality prong of the test.
to all development-related deals, there is reason to doubt such consistency will actually obtain. Significantly, the kinds of developers who seem most likely to be Nollan/Dolan claimants are relatively inexperienced, one-time players, not the kinds of sophisticated repeat-actors interested in maintaining favorable relationships with local governments.

In addition, certain features associated with rule of law may clash with normatively valuable aspects of the way that land use control is carried out – or indeed with other rule-of-law principles. Perhaps the largest concern with using a rule-of-law approach to mark out the edges of heightened scrutiny is its potential tendency to swallow the entire field of land use control. I have already shown how bargains permeate the whole of land use regulation, and I have emphasized the conditionality and tentativeness inherent in the state’s approach to a resource as unique, enduring, and essential as land.

The effect of applying heightened exactions scrutiny too broadly would be to reduce flexibility in land use regulation. While this might produce some benefits, it would not be an unmitigated good. Efforts to specify and address all variations and contingencies in advance can make lawmaking unnecessarily cumbersome and costly. At the same time, inflexibly applying a single set of land use rules to every parcel itself risks undermining the rule of law by treating differently situated people the same. Moreover, as even Fuller recognized, blanket rules that are a poor fit for individualized conditions can spur frequent amendments (instability) or encourage gaps between the law on the books and law as applied (incongruence). Fuller’s account of rule of law also suggests a crucial and robust role for market institutions and exchange – one in which heterogeneity of interests makes possible gains from trade. The inefficiencies that may be associated with blocked bargains between landowners and governments can threaten rule-of-law values by generating pressure (in the form of unexploited surplus) for illicit deals.

85. See Gowder 2014, supra note 73, at *11-14. Of course, this possibility focuses our attention on the question of how to identify the sorts of differences that the law can appropriately take into account when justifying differential treatment. For instance, it would seem appropriate for the law to treat two parcels differently because of their drainage characteristics, but not because of the racial makeup of the residents of the neighborhood. See Id., Identifying policy-relevant differences requires adopting or developing a theory of the kinds of ‘public reasons’ on the basis of which the state is entitled to act. Such an undertaking, which in turn requires grappling with competing accounts of what is entailed by state rationality and nonarbitrariness, is beyond the scope of this paper. Related questions often arise in tax policy discussions. See L. Murphy & T. Nagel, The Myth of Ownership: Taxes and Justice, 1st edn, Oxford University Press, New York, NY, 2002, p. 12 (referencing “the principle that like-situated persons must be burdened equally and relevantly unlike persons unequally”).

86. See Fuller 1969, supra note 71, at p. 39.

87. Id., at pp. 22-24.
As this discussion suggests, rule-of-law considerations in the abstract cannot tell us where to strike the balance between flexibility and predictability. But these considerations can tell us what sort of inquiry is required. This, in turn, can help us identify the best doctrinal hook for the analysis and, as important, can point up the shortcomings of existing approaches.

8.4 Searching for Limits within Koontz

Before Koontz, the unconstitutional conditions doctrine and substantive takings law seemed to embed constraints on the reach of Nollan and Dolan. A claimant seeking heightened means-ends exactions scrutiny would first need to clear two preliminary hurdles. For starters, she would need to show that the government was attempting to bargain – expressly offering to release the landowner from a discretionary regulatory burden in exchange for some valuable concession by the landowner. Second, she would have to show that the concession sought by the government was one that would, on its own, violate the Takings Clause if simply imposed by the state.

Lingle and Del Monte Dunes further hinted that only those land use interactions that cleared these two hurdles in the clearest and most prototypical way – bargains initiated through an ad hoc or adjudicative process to appropriate tangible interests in real property – would trigger Nollan/Dolan scrutiny. The ad hoc element would have limited the exactions doctrine to the most unambiguous of bargains; those that were available only to particular landowners on an individually negotiated, case-by-case basis. Limiting the doctrine to demands for physical interests in real property would have reserved heightened exactions scrutiny for bargains involving the clearest, most easily identifiable type of takings: per se Loretto takings, which the Court has deemed so uniquely intrusive as to justify categorical treatment.

In Koontz, however, the Court jettisoned the requirement of a physical exaction and remained conspicuously silent (despite prodding from the dissent) about where it stood on the legislative/adjudicative distinction. With one limit clearly off the table.

88. Shapiro 2011, supra note 68, at p. 398: “Legal systems have no choice but to decide how to balance the needs for guidance, predictability, and constraint on the one hand against the benefits of flexibility, spontaneity, and discretion on the other. Legal systems, therefore, not only must heed the Rule of Law but also must have views about how the Rule of Law itself is best heeded.”

89. See Lingle v. Chevron, 544 U.S. 528 (2005), at p. 538 (“The Court has held that physical takings require compensation because of the unique burden they impose .... “). Although limiting qualifying burdens to physical takings might seem arbitrary, it tracks a quirk in the underlying takings jurisprudence: the categorical treatment that permanent physical occupations receive under Loretto, which diverges dramatically from the Penn Central treatment that usually governs regulatory takings inquiries, as well as from the treatment that most monetary burdens had received prior to Koontz.
and the second deferred to another day, what can one discern from the Koontz opinion about the boundary principles it meant to apply? To appreciate where Koontz leaves us, it is helpful to briefly consider two dimensions along which boundaries on the scope of heightened scrutiny might be constructed: (1) the nature of the concession or burden that the government asks the landowner to accept; and (2) the nature of the interaction or bargain between the government and the landowner.

As Figure 1 illustrates, burdens can be arrayed along a spectrum that runs from general obligations (a requirement to pay or spend money) to the taking of specific assets (e.g., taking over an access easement). Bargains can be arrayed along a spectrum from individualized (ad hoc deals) to formulaic (e.g., tax schedules). The facts of Nollan and Dolan fall in Cell I in this schematic; they involved exactions that would otherwise be per se takings of land, and were carried out through an individualized administrative or adjudicative process. The Court in Koontz expressly extended the reach of heightened scrutiny into (at least) Cell II by making a general obligation to spend or pay money, when tied to land, a qualifying burden type. The Koontz majority also indicated that it did not mean to extend heightened scrutiny fully into Cell IV, the domain of ordinary taxes. But because it did not explain why, it is uncertain whether all formulaic monetary impositions would be exempt from Nollan/Dolan analysis. The status of Cell III—formulaic applications that burden specific assets—also remains unclear after Koontz.

8.5 A Way Forward?

Koontz left the Court’s exactions and takings jurisprudence in a confused and unsustainable state that will demand further elaboration (or amendment) in coming Terms. What path can, will, or should the Court take? The framework presented in Figure 1 above can help to structure the inquiry. The Court might keep in place its existing pattern of decisions and construct boundaries around the domain of heightened scrutiny that would exempt all legislative enactments (Cells III and IV) or just formulaic monetary impositions (Cell IV). Or, it might draw lines along different dimensions

90. See Koontz, 133 S.Ct., at pp. 2598-2603. Significantly, the facts of Koontz suggest that the monetary impositions at issue might well be categorized as falling within Cell IV, and not Cell II. After all, the District’s demands were based on policies it had implemented in negotiations with other landowners seeking permission to fill wetlands. See note 9 and accompanying text. Moreover, although the Court clearly treated the remediation conditions set by the District as monetary in nature, the fact that they involved spending money on discrete projects rather than paying it to the government could move the case closer to Figure 1’s top row.

91. Koontz, 133 S.Ct., at pp. 2600-2602.

92. An example would be a legislative enactment that dictates the dedication of a certain portion of property for public use. See, for example, Parking Ass’n of Georgia v. City of Atlanta, 450 SE2d 200 (Ga 1994), cert. denied, 515 U.S. 1116 (1995) (Atlanta City ordinance requiring owners of surface parking lots to set aside 10% of the area for landscaping and provide one tree for every eight parking spaces).
and split up one or more of Figure 1’s cells. More radical (and much less likely) alternatives would involve the Court overruling past decisions to bring all of the quadrants in Figure 1 either inside or outside the domain of heightened scrutiny.93

One possible distinction the Court might adopt would limit exactions scrutiny to burdens that are imposed on a discretionary, piecemeal (i.e. adjudicative) basis.94 This approach would omit from heightened scrutiny any exactions or conditions that are imposed through a broad, prospective (i.e. legislative) enactment. The Koontz majority, perhaps unsurprisingly, did not focus on this distinction between so-called legislative and adjudicative exactions. Addressing the distinction was not strictly necessary to resolve the case, and doing so would have likely made it impossible for Justice Alito to hold together a majority.95 But a newly constituted majority (perhaps containing some of the Koontz dissenters) might well choose the clarity and relative boundedness of this alternative over the morass of uncertainty left behind in Koontz. Although the

93. Domains exempted from heightened exactions scrutiny would not, of course, be exempted from all review. Rather, they would remain subject to due process and takings challenges, as well as to challenges based on other constitutional provisions.
94. See 133 S.Ct., at p. 2608 (Kagan dissenting).
95. Justice Thomas, part of the five-justice Koontz majority, had previously suggested in a dissent from a denial of certiorari that he viewed the legislative-adjudicative distinction as constitutionally irrelevant. See Parking Ass’n of Georgia v. City of Atlanta, 450 SE2d 200 (Ga. 1994), cert. denied, 515 U.S. 1116 (1995), at p. 1118 (Thomas dissenting) (“The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference”).

<table>
<thead>
<tr>
<th>Burden Type</th>
<th>Specific Assets</th>
<th>General Obligation</th>
</tr>
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<tbody>
<tr>
<td>I. Nollan/Dolan Facts</td>
<td>Per Se Taking of Land Individualized Bargain</td>
<td>II. Monetary Ad Hoc Monetary Obligation Individualized Bargain</td>
</tr>
<tr>
<td>III. Legislated In-Kind Taking of Specific Assets Formulaic Schedule</td>
<td>IV. Prototypical Tax Monetary Obligation Formulaic Schedule</td>
<td></td>
</tr>
</tbody>
</table>

Figure 1  Burdens and Bargains

Bargain Type

- Individualized
- Formulaic
distinction involves difficulties of its own some sort of legislative/adjudicative distinction might keep Nollan and Dolan from becoming the basis for completely open-ended heightened scrutiny.

The distinction between legislative and adjudicative state action is an appealing one for a number of reasons. First, it is well established in both the case law and legal commentary. In a well-functioning democratic system, extensive political checks attend legislative enactments, and these arguably make it less necessary (and indeed, inappropriate) to add intrusive judicial checks. This is the usual explanation for why legislative enactments not burdening fundamental rights or employing suspect classifications are afforded the most deferential standards of judicial review.96 The same justifications for judicial deference would seem to apply in the exactions context.97 In San Remo Hotel v. San Francisco, the California Supreme Court argued that

[a] city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition in the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.98

As I have discussed, the line between broadly applicable, legislative acts and more individualized, adjudicative land use bargains also coheres with what seems normatively problematic about some exactions. Although legislative acts often emerge from bargains between landowners (or coalitions of landowners) and government actors, the result appears to be (at least at first glance) a generally applicable law that similarly situated landowners will be able to enjoy (or under which they would chafe) equally. Such legislatively enacted bargains do not implicate concerns with the rule of law to the same degree as bargains that are available only to specifically favored (or disfavored) landowners. To return to Fuller’s criteria, exactions promulgated through a legislative process meet the requirements of generality, publicity, prospectivity, and

96. See Bi-Metallic Investment Co v. State Bd. of Equalization, 239 U.S. 441 (1915) (contrasting broadly applicable legislation, where reliance on political checks is appropriate, with case-by-case, adjudicative decisions).
97. See e.g., McClung v. City of Sumner, 548 F3d 1219, at p. 1228 (9th Cir 2008) (arguing that the concerns raised by legislative exactions are better addressed through the “ordinary restraints of the democratic process” (internal quotation marks omitted), quoting San Remo Hotel v. City and County of San Francisco, 27 Cal 4th 643, at p. 671 (2002). Although the Supreme Court expressly cited McClung’s refusal to extend exactions scrutiny to monetary exactions with disapproval in Koontz, see 133 S.Ct. 2586, at p. 2594, the Ninth Circuit’s decision was also grounded in its distinction between legislative and adjudicative exactions. Because the Supreme Court did not address the adjudicative/legislative distinction in Koontz, the latter ground for the McClung holding appears to remain intact after Koontz.
congruence. And, as long as the law is not amended too frequently, they may satisfy the requirement of stability as well.

More pragmatically, drawing the line between legislative and adjudicative exactions would successfully immunize taxes, broadly applicable fees, and many aspects of zoning from heightened scrutiny. Thus, if the distinction is judicially administrable, it could help stave off the concern that Koontz has so expanded the exactions doctrine that every land-related decision has become susceptible to heightened judicial scrutiny. And it would do so in manner broadly consistent with the decided cases to date.99

There are some problems with the legislative/adjudicative distinction, however. Perhaps most importantly, the boundary between the categories of legislative and adjudicative is not nearly as clear-cut in the local government arena as it may be in other contexts.100 It is far from clear on the facts of Koontz itself, for example, whether the exaction in that case was legislative or ad hoc in character.101 The fluidity between the categories may spark concerns about gamesmanship by local governments.

Consider the typical zoning code, which most people would treat as a legislative enactment. In the usual Euclidean zoning law, the kind at work in virtually every community in the United States, the municipality divides its land up into various zones. These can vary in number, from as few as three or four to well over a hundred. Within each zone, certain uses are permitted as of right, certain uses are prohibited, and others are permitted with special approval, provided certain conditions are met.

In one sense, the zoning law operates through generally applicable provisions: all those who fall within the same zoning category are subject to the same regulations. But the higher the number of zones, the more that uniformity claim breaks down (Imagine a city with a different zoning classification for each parcel). And, of course, along the boundaries between zones, the lawmaker has to make highly individualized judgment calls about which individual parcels to include within which classification in a way that puts enormous pressure on the distinction between legislation and adjudication.

99. Arguably, it is not fully consistent with Nollan, which seemed to involve a policy of requiring lateral easements from all beachfront owners in a particular area. See 483 U.S., at p. 829. However, the facts in Nollan are susceptible to an interpretation in which the exaction in that case is individualized, notwithstanding some degree of standardization across property owners. Certainly this is the way the case was characterized by the Court in Lingle. See 544 U.S., at p. 546 (“Both Nollan and Dolan involved Fifth Amendment takings challenges to adjudicative land-use exactions[,]”).
101. See note 90.
There is another way that the Court could keep its commitment to elevated scrutiny for most exactions without endangering taxes and fees. It could construct a test that effectively immunizes from heightened scrutiny only those conditional burdens that fall within Cell IV of Figure 1: ones that use a formulaic schedule to impose purely monetary burdens on landowners. To trigger heightened scrutiny, then, a landowner could show either that the government was engaging in an individualized deal with her (involving any sort of concession) or that it was requiring some in-kind concession (whether through a legislative or adjudicative process).

Such an approach would not exempt the sorts of Cell III legislative enactments at issue in *Parking Association of Georgia v. City of Atlanta*102 – a city ordinance that required surface parking lot owners to provide a specified quantum of landscaping.103 It would, however, exempt property taxes, standardized permitting fees, and so on. This would help to address some of the concerns that the *Koontz* decision introduced. But what should remain problematic from the Court’s perspective is the extension of scrutiny into the Cell III box. Virtually all of zoning law resides there (to the extent it is not captured in Cell I). Heightened scrutiny applied to everything but taxes would upend the generally deferential treatment that land use controls receive, unless it were coupled with some other boundary principle. The Court resisted such an open-ended extension of heightened scrutiny in *Del Monte Dunes*.104

Expanding heightened scrutiny to reach in-kind regulatory burdens that are legislatively applied would also have the interesting consequence of encouraging price schedules to stand in for contextualized, qualitative evaluations and in-kind adjustments. Thus, if a side-yard requirement would receive heightened scrutiny under this approach (because it conditions permission to build on leaving an area unbuilt, albeit legislatively), a local government could instead put a price on the right to the right to build closer to the lot line. This could effectively make zoning more alienable by replacing property rules with liability rules – a result many law and economics scholars would find attractive, but that others might view with concern.105 By extending heightened scrutiny so deeply into the heartland of land use, the Court could

103. It is possible, however, that such burdens might be deemed insufficient to trigger *Nollan/Dolan* analysis for another reason: that they do not amount to takings on their own. While it is true that the ordinance in *Parking Association of Georgia* required physically placing one tree for every eight parking spaces, it would seem that landscaping requirements, including the placement of privately owned trees, would be no different from the requirement of a smoke alarm that the *Loretto* Court suggested would not be a taking. See *Loretto*, 458 U.S., at p. 440.
prompt changes – perhaps unintended ones – in the way that land use control is carried out.

The Court need not approach each of our Cells in Figure 1 as an all-or-nothing proposition, of course. There are any number of ways that the spectrums of concessions and interactions could be divided up, and features other than the ones emphasized in the figure – between specific assets and general obligations, and between individualized and particularized bargains – could play a role in marking out the exactions that would trigger *Nollan/Dolan* scrutiny.

There are certainly alternatives to distinguishing between ad hoc and adjudicative exactions. The Court might, for example, draw the line between taxes and everything else, protecting only the former from heightened scrutiny. Heightened scrutiny applied to everything but taxes would upend the generally deferential treatment that land use controls receive, unless it were coupled with some other boundary principle. The Court resisted such an open-ended extension of heightened scrutiny in *Del Monte Dunes*.

Another possibility would be for the Court to give up on the exactions project understood as heightened scrutiny for a discrete subset of land use regulations. It could do this by either extending heightened scrutiny to all land use regulation, a path that seems neither likely nor particularly well suited to the federal courts. Alternatively, it might abandon the exactions project altogether, at least as a matter of takings jurisprudence. If it opted for this latter approach, it would retain the power to police land use regulators through the more deferential standards of due process. Even if the Supreme Court were to adopt a more deferential stance towards exactions, the state courts remain free to scrutinize exactions under state law.

8.6 Conclusion

In *Nollan* and *Dolan*, the Court started down a path that, if followed beyond a certain point, cannot be reconciled with broad judicial deference to garden-variety land use controls. When a particular fact pattern is placed in the *Nollan/Dolan* box, it receives astonishing treatment: the government must prove that the burdens it has imposed are logically related to and proportionate to the costs of the permitted development. Applying this approach to all of land use would mean that zoning and much else would either disappear or become prohibitively expensive to administer. This presumably would be unacceptable to the Court and to most property owners. Yet *Koontz* heedlessly lurched toward this unwanted endpoint, knocking over barriers that it

found logically unconvincing, unaccountably confident that its exactions jurisprudence would obviously and automatically spare all ‘good’ land use regulations.

The result is a doctrinally disordered decision. It is entirely possible, perhaps even likely, that some of the worst on-the-ground impacts will be significantly buffered. Nevertheless, Koontz embodies a tension that the Court cannot ultimately avoid addressing – one over the best way to reconcile fundamentally inconsistent strands of property rights protection. I hope that by conveying something of this tension here, I have added to an understanding of the contradictory dictates of property protection itself – whether or not the Court manages to address them in a satisfying way.
THE PUBLIC PURPOSE FOR THE EXPROPRIATION OF LAND
A FRAMEWORK FOR ASSESSING ITS DEMOCRATIC LEGITIMACY

Björn Hoops*

9.1 Introduction

The expropriation or compulsory acquisition of land¹ entails that (a part of) the right of ownership of land is taken away by the state from a natural or legal person and transferred to the state or another natural or legal person. This severe consequence of expropriation is the reason why constitutions around the world subject this form of state action to high legal hurdles. One of these legal hurdles is the requirement that the expropriation of land must serve a specific public purpose.² The public purpose requirement may be named and structured differently throughout the world,³ but always represents the benefit of expropriation for the larger society. Therefore, it justifies, under certain circumstances, the sacrifice that the holder of the property rights has to make.

The expropriation of land creates tension between members of society because property rights are taken away from one member for the benefit of other members. The public purpose can resolve this tension because constitutions around the world show that it is commonly accepted throughout most societies that expropriation is justified if it is carried out for a public purpose and if certain additional conditions are met. The public purpose, however, poses the problem that it mostly does not have a fixed, commonly accepted content. Rather, state institutions define the public purpose for which land is to be expropriated. The procedure in which the purpose of the expropriation is determined must therefore be shaped in such a way that the members of society accept or ought to accept it as a public purpose. Members of democratic societies only accept or

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¹ In this contribution, the term ‘expropriation’ also refers to compulsory acquisition under English law.
² See, for example, Art. 14 (3) of the German Basic Law of 23 May 1949 (Grundgesetz; GG).
³ Art. 14 (3) of the German Basic Law refers to the public good (Allgemeinwohl), Section 25 (2) of the South African constitution refers to both public purpose and public interest, Art. 14 (1) of the Dutch Basic Law refers to public interest (algemeen belang), and the Fifth Amendment of the Constitution of the United States refers to public use. See Section 9.4 for remarks on the dogmatic structure of the public purpose requirement in German, English and South African law.
ought to accept the public purpose if it has a certain kind of legitimacy, namely, democratic legitimacy. Therefore, the procedure must comply with democratic standards.

This contribution seeks to establish a framework for the assessment of the democratic legitimacy of the public purpose for which land is expropriated. For this purpose, I use examples from English, German and South African law of Acts of Parliament that effect or authorize the expropriation of land. I analyze how these legal systems ensure that the determination of the public purpose is democratically legitimate. Furthermore, I conclude the analysis with some comparative remarks on the basis of the functional approach to comparative law.4

The above-mentioned legal systems are examined because they have different legal foundations. The constitution of the United Kingdom consists of various written sources, such as judgments, statutes, and treaties, as well as unwritten sources.5 By contrast, Germany and South Africa only have a single written constitutional document (with schedules).6 Furthermore, the primary source of English constitutional and administrative law is the un-codified common law that is based upon custom and the case law of the courts,7 whereas German constitutional and administrative law is almost exclusively based upon a written constitution and statute law that is interpreted by the courts. South African law is a mixed jurisdiction, and its administrative law also includes an un-codified common law comprising influences from 17th century Roman-Dutch and English law.8 This contribution only includes examples from these jurisdictions, but does not provide an analysis of all Acts of Parliament that provide for the power to expropriate.

The contribution is structured as follows. In the second section, I set out why lawyers should examine the democratic legitimacy of expropriation. In the third section, I provide a definition of democratic legitimacy and the sources thereof. In the fourth section, I briefly discuss the dogmatic differences between the public purpose requirements in the examined legal orders and define the common object of the analysis in the form of a comparative term ‘public purpose’. The subsequent sections analyze how the sources of democratic legitimacy legitimize the legal acts that determine the public purpose. I first consider Acts of Parliament in section 9.5 and then

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administrative decisions based upon those Acts in the sections 9.6 to 9.8. The following aspects of these legal acts are scrutinized: the position in the state system of the entity that adopted the legal acts, in particular how that entity is accountable to the electorate; the extent to which the legal act defines the public purpose; the procedure that led to the legal act and its participatory elements, in particular, as to who is provided with how much information, who has access to the procedure, and the form of participation. The role of the courts in judicial expropriation and in the judicial review of expropriation decisions and its implications for the democratic legitimacy of the public purpose, however, are not the subject of this contribution.9


10. See, for instance, Art. 20 (1) of the German Basic Law.

purpose to the legislature and the expropriation authority. The extent of this freedom, of course, varies from jurisdiction to jurisdiction. This freedom reduces the constitutional protection and legal certainty provided by the public purpose requirement. This gap of protection needs to be filled. To make sure that the determination of the public purpose complies with procedural and substantive democratic standards, in other words to make sure that it is democratically legitimate, may be a suitable way to ensure the protection of citizens and the acceptability of state action.

Thirdly, a lack of democratic legitimacy may have a considerable negative impact on social cohesion and the implementation of state measures. An extreme, yet illustrative example would be the demonstrations against a construction project in Stuttgart, Germany, in 2009 and 2010. The construction did not require an expropriation of land, but changes of the use of land and alterations to buildings. The City of Stuttgart, the State of Baden-Württemberg, and the Deutsche Bahn AG, the German state-owned railway company, completed their preparations to move the central station of Stuttgart underground and to convert state-owned land used for railway purposes into land for housing and recreational purposes.

Heavy debate ensued around insufficient public participation in the decision-making process, the costs of the project, which had been estimated to be significantly lower, the profit that banks and companies would make from the redevelopment, and the damage that would be done to the city’s park during the construction works. The crucial aspect is that this debate only became so heated long after all necessary administrative procedures had been completed and long after those who had the statutory right to have their say had had the opportunity to be heard. For instance, the BUND (Bund für Umwelt und Naturschutz Deutschland), an NGO, had been heard during the official planning procedure, yet called for protests. The demonstrations resulted in heavy clashes between the protestors and the police. The protests only ceased after a mediation process broadcast on German TV that ended on 30 November 2010 with a non-binding arbitral award.

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The fact that a considerable number of people did not accept the administrative decision to approve the construction project suggests that this administrative decision lacked democratic legitimacy to a significant extent. This is despite the fact that certain people had the opportunity to have their say and that the decision was adopted in accordance with all statutory requirements. One lesson to be learnt would be that more attention should be paid to the way in which decisions of state institutions are democratically legitimized and what kind of participation mechanisms are employed to ensure this legitimacy. The goal of such a learning process would be to avoid the delay, the unrest, and the loss of trust that we saw in Stuttgart.

9.3 Democratic Legitimacy

Democratic legitimacy consists of two elements, legitimacy and democracy. The term legitimacy is not a clear-cut concept and still frequently undergoes significant changes. Philosophers, political scientists and sociologists have so far failed to resolve, to put it in the words of Bekkers and Edwards, “[…] Babel-like confusion of definitions, perspectives and interpretations”.16 Similar confusion persists as to the concept of democracy. This contribution therefore cannot provide a comprehensive overview of all concepts of democratic legitimacy. In the following sections the concepts of legitimacy, democracy, and democratic legitimacy are defined as they are applied in this contribution to the different legal acts that determine the public purpose of the expropriation.

9.3.1 Legitimacy

The common ground regarding legitimacy is that legitimacy is closely linked to the exercise of authority. When an entity exercises its authority, it seeks to compel the members of a society to behave in a certain way. The members of a society, however, will only feel bound to comply if there is a reason that makes the exercise of authority acceptable, in other words, legitimate. Below, these reasons are referred to as the sources of legitimacy and are described as legitimizing the exercise of authority.

There is a distinction between a descriptive and a normative concept of legitimacy. The descriptive concept of legitimacy refers to a freely formed conviction of a member of society that the exercise of authority is lawful, just, or rightful and should therefore be followed.17 This concept must be distinguished from obedience that

is enforced through threat, duress, and punishment, which cannot be considered legitimate.\textsuperscript{18} Scholars have proposed different sources of this conviction. Weber identified three sources of descriptive legitimacy: charisma, tradition, and legality.\textsuperscript{19} Charisma refers to the ability to create emotional affection to those who exercise authority. Tradition legitimizes an order that has continuously existed for a long time and is entrenched in social custom. Legality can serve as a source of legitimacy if authority is exercised in accordance with the law, i.e. accepted norms and procedures.\textsuperscript{20} Easton replaces legality with ideology. Ideology can serve as a source of legitimacy if the exercise of authority reflects the shared moral convictions of the members of a society.\textsuperscript{21}

The normative concept of legitimacy does not seek to answer the question whether or not the members of society actually accept the exercise of authority. This concept is rather based upon the notion that the exercise of authority will be acceptable and therefore legitimate if it complies with certain normative standards.\textsuperscript{22} These standards usually reflect moral or legal value judgments. According to this concept the exercise of authority can thus be legitimate even though the members of society do not accept it and \textit{vice versa}.

\subsection*{9.3.2 Democracy}

For centuries, there has been a controversy among philosophers and political scientists about what democracy is and what is characteristic of a democratic state. There are two major groups of democratic theories, namely the liberal and the republican theories. The liberal democratic theories find their foundation in the works of Hobbes and Locke.\textsuperscript{23} They originated from a liberal school of thought that advocated individual self-determination and sought to protect the freedoms and rights of individuals from any kind of governmental intervention.\textsuperscript{24} According to liberal theories of

\begin{thebibliography}{99}
\bibitem{Luhmann} The concept of legality has been further developed by Luhmann. In his book on procedural legitimacy (\textit{Legitimation durch Verfahren}), he asserts that the quality of the decision-making process in which all concerned social groups are involved and compliance with the applicable norms contribute to the legitimacy of the decision. See, N. Luhmann, \textit{Legitimation durch Verfahren}, Luchterhand, Neuwied 1968, p. 28.
\end{thebibliography}
democracy, the state’s primary task is to guarantee and protect individual rights and interests from both state intervention and private threats. The exercise of authority must be subjected to constitutional constraints, and the political decision-making process must include features that protect minorities, such as vetoes and unanimous voting. Furthermore, affected groups must have access to the political decision-making process.

The roots of the republican democratic theories can be traced back to Aristotle. According to republican theories, the people practice (collective) self-government through public deliberation and representatives that are accountable to the electorate. Democratic authority must be exercised to promote the public good, through restrictions to the freedoms and rights of individuals, where necessary.

The model of representative democracy features characteristics of liberal and republican origin. Liberal elements are the basic human rights and other constitutional constraints to the exercise of authority. By contrast, the exercise of state authority for the public good by representatives that are elected by the people and can be voted out of office is originally republican. Representation and elections as an accountability mechanism, however, can also be traced in liberal theories.

9.3.3 Democratic Legitimacy

In the first place, democratic legitimacy is a normative concept. It includes standards as to how authority should be exercised in a democratic state. In general, whether or not an order complies with these standards, does not indicate whether the people that are subject to that order actually accept it. In Western democracies in particular, however, democratic standards make up part of the shared beliefs of most of the members of society. If Easton’s theory of descriptive legitimacy is applied, this would mean

25. Scharpf 2009, p. 6; this is a requirement that can be traced in protective liberal theories: Held 1996, pp. 88 and 95.
30. Id.
31. Id., p. 7.
33. Schröder 2003, p. 68; and Peter 2009, p. 56.
that compliance with democratic standards makes the people accept the exercise of authority and that non-compliance deters acceptance.\textsuperscript{35} The demonstrations in Stuttgart support this reasoning. The protestors felt that they had not had proper opportunities to express their views in the decision-making process. That is why the decision-making process did not comply with (the protestors') democratic standards and why the protestors did not accept the decisions taken by the authorities.

Here, democratic legitimacy is construed as a normative concept that does not take account of the actual acceptance of an order. In the literature different concepts of normative democratic legitimacy have been proposed, and the discussion goes beyond the distinction between liberal and republican theories of democracy. The concepts range from pure proceduralism to pure instrumentalism and include various ones that combine elements from both extremes. To proceduralists a decision-making process that complies with democratic standards is essential to the democratic legitimacy of the outcome of that process, whereas the outcome is less important.\textsuperscript{36} The democratic standards that proceduralist scholars assert should be applied to that process vary significantly.\textsuperscript{37} Proponents of aggregative democratic theories emphasize that the voting process has to be fair and inclusive.\textsuperscript{38} Proponents of deliberative democratic theories assert that the vote must be preceded by fair public deliberations to which the people that are concerned by a decision have equal and fair access.\textsuperscript{39} Instrumentalists view a democratic decision-making process as a means (amongst others) to achieve a good outcome, such as distributive justice. Only if this good outcome is achieved will the measure be legitimate in the eyes of instrumentalists.\textsuperscript{40}

The normative standards that are applied here are not exclusively based upon either extreme. Rather, three sources of democratic legitimacy are considered that combine these approaches. The first source, which is of republican origin, is the input from the people themselves through participation and elections. This input must be imbedded in a fair, inclusive and, if deliberative theories are taken into account, deliberative procedure. The more the procedure complies with these standards, the more input legitimacy it will generate. If the people are represented, the same applies to the procedure in which representatives participate.\textsuperscript{41} The second source is the output generated by a political decision. It particularly refers to how effectively a measure contributes to the common good

\begin{thebibliography}{10}
\bibitem{} Peter 2009, p. 65 \textit{et seq.}; see about the limitations of this approach: Estlund 2008, p. 65 \textit{et seq.}
\bibitem{} Peter 2009, p. 7 \textit{et seq.}
\bibitem{} Peter 2009, p. 62.
\bibitem{} Bekkers \& Edwards 2007, p. 44.
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and to what extent the measure answers to the needs and wishes of the people. Moreover, output legitimacy is also generated by the right of the people to hold the representatives accountable for their policies, e.g. by voting them out of office. The first and the second source are intertwined because the input from the people shapes the output and determines to a certain extent the responsiveness to the wishes of the people.

The third source is the protection of fundamental rights, offered by the decision itself or during the decision-making process. That the protection of fundamental rights enhances the democratic legitimacy of a decision follows from the theory of Grundrechtsdemokratie (Basic rights democracy). The roots of that theory can be traced in both liberal and republican notions of democracy. Republicans assume that the protection of fundamental rights is a necessary condition of popular sovereignty. Liberals assert that popular sovereignty gives rise to the obligation of the state to protect the fundamental rights of its citizens.

In the following sections, for each legal step towards expropriation more specific democratic standards are developed on the basis of literature. These democratic standards are subsequently applied to the examined legal act.

9.4 The Dogmatic Structure of the Public Purpose Requirement

In the jurisdictions examined in this contribution, the public purpose justifies the expropriation of land and is a constitutional requirement for the legality thereof. Despite this similar function, however, the public purpose requirement knows diverse dogmatic structures in German, English, and South African law.

Article 14 (3) of the German Basic Law (Grundgesetz) requires that an expropriation serve the public good, which is the German equivalent of public purpose. The German Federal Constitutional Court divides this requirement into two steps. First, Parliament selects the legitimate goals and projects for which land can be expropriated.

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42. Id., p. 45.
43. Id., p. 45 et seq.
44. Goodin 2004, p. 90 et seq.
47. See note 46.
For instance, Parliament may authorize an authority to expropriate land for the improvement of the infrastructure by means of roads. Often, a planning authority subsequently concretizes the legitimate goals and projects and lays them down in a plan. The second step is that Parliament or an expropriation authority applies a three-step proportionality test to the specific project, consisting of the suitability, necessity, and proportionality in the narrow sense of the project in relation to the pursued legitimate goal. Proportionality in the narrow sense requires that benefits of the project outweigh its disadvantages, such as its adverse effects on the environment and other public interests as well as the expropriation of private property. Outside the dogmatic structure of the public good requirement, there is another three-step proportionality test that concerns the relationship between the expropriation and the project. This dogmatic structure can also be traced in Acts of Parliament that authorize expropriation in German law.

Compulsory acquisition under English law first has to serve a legitimate public purpose. English administrative law has not incorporated a proportionality test. Rather, the courts apply an irrationality test to administrative action. Under the Human Rights Act of 1998, however, the English courts also have to guarantee property rights as required under Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This entails that the English courts must apply a proportionality test to a specific compulsory acquisition of property. This test may or may not form part of the dogmatic structure of the public purpose requirement.

Under South African law, Section 25 (2) of the South African Constitution requires that the expropriation serve a public purpose or the public interest. The project that is realized by means of expropriation not only has to serve a purpose or interest that qualifies as public. Given the unique economic, historical and social context of South African law, the determination of the public purpose or public interest, in the words of Van der Walt, also

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49. BVerfG, Judgment of 17 December 2013, NVwZ 2014, 211, 216 et seq.
52. See, for instance, §§ 85(1) lit. 1, 87(1) of the Federal Building Code (Baugesetzbuch).
53. The public purpose requirement is not constitutionally entrenched. It is, however, assumed that Parliament would not carry out or authorize compulsory acquisition if the compulsory acquisition did not serve a public purpose. See, B. Denyer-Green, Compulsory Purchase and Compensation, 10th edn, Estates Gazette, London 2013, p. 17.
55. See, for instance, High Court of Justice, Queen’s Bench Division, Judgment of 27 September 2006, Pascoe v. The First Secretary of State [2006] EWHC 2356 (Admin).
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[...] requires a suitable balancing between its protective and its reform purpose [of Section 25; the author], [...] that the interpretation of legislation and the development of the common law are shaped by the spirit, purport and objects of the Bill of Rights, which includes the central values of human dignity, equality and freedom; [...].56

Also, Section 36 (1) stipulates that the expropriation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This provision requires a proportionality enquiry in which the authority considers less invasive means and balances the benefits of the expropriation against its adverse effects.57

The public purpose requirements in the examined jurisdictions thus differ considerably from each other. Hence, the assessment of the democratic legitimacy of the public purpose first requires a definition of what is meant by public purpose in this contribution. Here, the public purpose is an autonomous term, meaning that its definition is independent from the terms used in the legal orders examined in this contribution. It is not a normative term because it does not have an ascertainable substantive content to which the content of the public purpose in the examined jurisdictions could be compared. Rather, it is a comparative descriptive term that poses questions and serves as an instrument to find out how these questions are answered in the examined jurisdictions.

Let us define a public purpose as a contribution to the well-being of society. Generally, in the examined jurisdictions, two steps seem to be taken to examine what contributes to the well-being of society. First, the project for which land is to be expropriated and the legitimate goal of this project are determined. One may think of the abovementioned example of the road that serves the improvement of the infrastructure. Secondly, the project and the legitimate goal are put into their economic and social context, i.e. their positive and negative impact on public and private interests, to determine whether the expropriation indeed contributes to the well-being of society. They may be contextualized by means of the balancing test described by Van der Walt, or proportionality tests that may or may not comprise a suitability test, a (strict) necessity test, and a balancing of interests.

Therefore, the public purpose poses two questions. How are the project and the legitimate goal of the project defined? How are the project and the legitimate goal put into their economic and social context? In what follows, all the actions of state institutions that answer either of these two questions are examined as to their contribution to the democratic legitimacy of the public purpose.

56. Van der Walt 2011, p. 55.
In all examined jurisdictions, the expropriation of property rights not only has to serve a public purpose, but must also be permitted by an Act of Parliament. Article 14 (3), 2nd sentence, of the German Basic Law stipulates that expropriation “[…] may only be ordered by or pursuant to a law […]”. The Federal Constitutional Court interprets the term ‘a law’ strictly. It solely refers to an Act passed by the Federal legislature or a state legislature. This Act of Parliament can provide a foundation either for statutory expropriation or for administrative expropriation. Statutory expropriation refers to expropriation that is ordered by an Act of Parliament itself; administrative organs need not take steps to effect the expropriation.

By contrast, administrative expropriation consists of at least two stages. First, an Act of Parliament authorizes an administrative organ to expropriate. Thereupon, the administrative organ takes the decision to expropriate property pursuant to that Act of Parliament. In those cases, the principle of specificity (Bestimmtheitsgebot) requires that the Federal or state legislature specify sufficiently the legitimate goals and the projects for which property can be expropriated. The people must be able to deduce from the expropriation statute for which purposes their property can be expropriated, as follows from principle of the clarity of norms (Normenklarheit).

One of the main pillars of English constitutional law is the supremacy of Parliament. This also includes the power to acquire compulsorily private property. Parliament has therefore the exclusive power to carry out compulsory acquisition (statutory

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60. Papier, Maunz/Dürig, GG, Art. 14, No. 550. Expropriation may only be ordered by an Act of Parliament under certain conditions because the owner would otherwise be deprived of the protection afforded by an administrative procedure. It will only be permissible if administrative expropriation leads to a considerable delay in the implementation of urgently required measures. See, BVerfG, Judgment of 18 December 1968, NJW 1969, 309, 312. There is some debate in the literature about whether these strict requirements still apply. See, Papier, Maunz/Dürig, GG, Art. 14, Nos. 556 et seq.
61. Papier, Maunz/Dürig, GG, Art. 14, No. 549. On the different legal acts that an authority may adopt in order to expropriate after the authority has been authorized by Parliament: Papier, Maunz/Dürig, GG, Art. 14, No. 551.
64. Dicey 1897, p. 38. This supremacy is based upon common law and entails that Parliament can make any law and that there is no body, except for Parliament itself, that can override its decision. This is, of course, without prejudice to international obligations of the United Kingdom.
expropriation) and to authorize an administrative organ to acquire compulsorily (administrative expropriation) in order to promote the public good.  

The South African Constitution provides for the state’s power to expropriate in Section 25 (2). This provision reads as follows: “Property may be expropriated only in terms of law of general application for a public purpose or in the public interest [...]”. It does not explicitly state that an Act of Parliament is required as a basis for expropriation. “[L]aw of general application” does not only refer to an Act of Parliament, but also to other sources of law, such as the South African common law.  

There is, however, no authority in South African common law that other legal sources than an Act of Parliament would validly authorize a state authority to expropriate. Therefore, property can only be expropriated upon statutory authorization. The most common form of expropriation in South Africa is administrative expropriation.  

9.5.1 Democratic Legitimacy and the Act of Parliament

The requirement of an Act of Parliament as the basis for expropriation has two implications for the democratic legitimacy of the public purpose. First, it enhances the protection of the property rights of the potential expropriatee because the public purpose is determined by the representation of the people, the members of which are directly elected by, and accountable to, the people. The protection of the property rights, in turn, enhances the democratic legitimacy of the determination of the public purpose.

The exercise of popular sovereignty by the people is the most important source of democratic legitimation. The proponents of different democratic theories, e.g. the theories of aggregative democracy and the theories of deliberative democracy, may argue about the intensity and quality of the decision-making process, but a popular vote generally remains the essential democratic act. Parliamentary elections are a particular form of the exercise of popular sovereignty. Therefore, they confer a

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70. Van der Walt 2011, p. 456.
71. Cf. Peter 2009, p. 2 et seq. and p. 31 et seq.
tremendous amount of input legitimacy upon the members of Parliament. Subsequent parliamentary elections function as accountability mechanisms and, therefore, generate output legitimacy.

Through parliamentary elections, the people empower the members of Parliament to adopt decisions on their behalf. Therefore, the second implication of an Act of Parliament for the democratic legitimacy of the public purpose is that Parliament can give the input and output legitimacy that it has received from the people to its own decisions.73

To what degree Parliament’s decisions are democratically legitimate, however, not only depends upon the (quality of the) parliamentary elections, but also upon several other factors. To name but three: the fairness of the parliamentary procedure, the effective representation of the interests of different groups in accordance with their share in the electorate, and the quality of the (public) discussions preceding the decision making.74 The public discussions play a role for three reasons. First, they enable the people to participate in the parliamentary process, thereby generating input from the people. Secondly, as the theories of democracy suggest, the public discussions also create output legitimacy. Republican theorists would view these discussions as an accountability mechanism, and liberals would regard them as a means to mediate the interests of different groups.75 Hence, they improve the responsiveness of Parliament to the needs of the people. Thirdly, if experts participate in these discussions, they may help to enhance the quality of the decision and may therefore generate further output legitimacy.76

The crucial question is the extent to which this Act gives its own legitimation to the public purpose for which property rights are eventually expropriated. In cases of statutory expropriation, only Parliament determines the public purpose, and the democratic legitimacy of the public purpose will therefore entirely depend upon the democratic legitimacy of the Act of Parliament. In other cases, the degree of democratic legitimation that the public purpose receives depends upon the extent to which Parliament specifies the public purpose in its Act.

73. Id., p. 66.
74. Bekkers & Edwards 2007, p. 44. Some scholars have pronounced doubts about whether political parties in Western democracies can still ensure that the interests of the different groups are represented effectively and in accordance with their share in the electorate. See Bekkers & Edwards 2007, p. 49. On problems related to representation in general: J. O’Neill, ‘Representing People, Representing Nature, Representing the World’, Environment and Planning C: Government and Policy 2001, pp. 483-500 and in particular pp. 489 et seq.
The reason for this is linked to two sources of democratic legitimacy, namely, the input and the protection of fundamental rights. The more Parliament specifies the public purpose for expropriation and the less it leaves the determination thereof to administrative authorities, the more the requirement of an Act of Parliament will actually protect the potential expropriatee. Furthermore, if Parliament lays down a more specific project as well as a more specific legitimate goal and contextualizes the project and the legitimate goal, the public purpose is determined to a larger extent by the directly elected representatives of the people. Therefore, it will receive more legitimation from the Act of Parliament.

9.5.2 Application to Examples

In what follows, a few examples of parliamentary Acts that form a basis for administrative expropriation are analyzed as to their implications for the democratic legitimacy of the public purpose for which property is eventually expropriated. The examined Acts are of particular relevance to land use planning.

9.5.2.1 German Law

In the field of urban planning, the most important German Act of Parliament that provides a basis for administrative expropriation is the Federal Building Code (Baugesetzbuch; BauGB). In § 85 (1) BauGB, the Act provides for a numerus clausus of goals for which property rights can be expropriated. That means that, without prejudice to other Acts, property rights cannot be expropriated for other purposes.\(^77\) In addition to this, § 87 (1) BauGB stipulates that, if one of the purposes listed in § 85 (1) is applicable, the expropriation authority has to scrutinize whether expropriation for that purpose is required for the public good.\(^78\) This examination requires that the expropriation serves a legitimate goal and is the least invasive means, and that the expropriation authority balances the public interest in the project against the private interest of the expropriatee in the property.\(^79\) Furthermore, § 87 (2) BauGB obliges the expropriation authority to acquire the concerned land on the private market on reasonable terms.

The German legislator has laid down specific purposes in § 85 (1) BauGB. An example of particular importance to practice is § 85 (1) lit. 1 BauGB. This provision reads as

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\(^78\) Battis, Battis/Krautzberger/Löhr, BauGB, § 87, No. 2.

follows: “Expropriation may only take place under this Act in order to use a plot, or to prepare a plot for use in accordance with the designations contained in the binding land-use plan”. The binding land-use plan is adopted for each municipality by its municipal council and stipulates the use of the land.80

Subject to § 87 (1) and (2) BauGB, the competent authority can thus expropriate property rights in order to change the use of the land if the current use deviates from the use prescribed by the binding land-use plan. In this Act of Parliament, the German legislator has thus defined a specific ground for expropriation that is only applicable if there is a binding land-use plan and if expropriation serves to implement it. Furthermore, it follows from the jurisprudence of the German Federal Constitutional Court that the projects laid down in the binding land-use plan must serve the legitimate goal of urban development.81

The public purpose is thus specified considerably by Parliament. The conclusion would be that the public purpose receives a significant amount of legitimation from the parliamentary decision. It must be conceded, however, that the content of the binding land-use plan is not determined by Parliament. Instead, the municipal council determines it on the basis of an overall balancing of interests,82 meaning that the municipal council to a great extent defines and contextualizes the project for which land is to be expropriated. The democratic legitimacy of the public purpose will thus to a great extent depend upon the democratic legitimacy of the municipal council and upon how specific the binding land-use plan is. The democratic legitimacy of the binding land-use plan is discussed in section 9.8. Furthermore, the expropriation authority also partially contextualizes the project.

9.5.2.2 South African Law

An example from South African law is the Expropriation Act83 that, even though it was adopted in 1975 during the Apartheid era, is still of great importance to the field of planning. Section 2 (1) of that Act stipulates that “[…] the Minister may, […] expropriate any property for public purposes or take the right to use temporarily any property for public purposes”. This provision does not add anything to the constitutional safeguard of the public purpose requirement. Section 1 of the Act defines the public purpose as “[…] any purposes connected with the administration of the provisions of any law by an organ of State; […]”.

80. §§ 9 and 10 BauGB.
82. §§ 1(7), 9 and 10(1) BauGB.
83. Act 63 of 1975. On 4 September 2014, the South African government approved an Expropriation Bill that has been introduced in Parliament to replace the old Expropriation Act. There are also other Acts of Parliament that provide a basis for expropriation: Gildenhuys 2001, p. 55 et seq.
The Expropriation Act leaves the determination of the public purpose to a great extent to the competent administrative authority. Furthermore, the expropriation authority has to contextualize the legitimate goal of the expropriation in accordance with Section 36(1) of the Constitution. Therefore, the Act cannot be said to contribute to the democratic legitimacy of the public purpose for which the property rights are eventually expropriated. If an Act of Parliament, however, specified more narrowly the purposes in terms of Section 1 of the Expropriation Act, Parliament would give more democratic legitimacy to the public purpose.

9.5.2.3 English Law

In England (and Wales), the Town and Country Planning Act 199084 is central to land use planning by boroughs, counties and districts. It provides several bases for compulsory acquisition. Here, only Section 226 (1) is analyzed. Section 226 (1) authorizes a local authority, such as the directly elected council of a metropolitan district,85 “[…] to acquire compulsorily any land in their area if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land”. In Section 226 (1A) the Act further stipulates that the compulsory purchase must promote or improve the economic, social, or environmental well-being of the area concerned. Development is defined in Section 55 (1) as “carrying out of building, engineering, mining, or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land”. The Act does not define the other terms relevant to the determination of the public purpose.

Compared to Section 2 (1) of the South African Expropriation Act, this provision provides for more specific, yet still abstract legitimate goals that the compulsory acquisition has to serve. The definitions of these abstract objectives, however, are either very wide or non-existent. This leaves a lot of scope for the specification of legitimate goals and projects. This scope is supplemented by the margin of appreciation that Section 226 (1) grants to the expropriation authority. Furthermore, it is for the expropriation authority to conduct the proportionality tests under the Human Rights Act of 1998. § 85 (1) lit. 1 BauGB, by contrast, hardly leaves any scope for interpretation.86 The German expropriation authority, however, would still have to apply § 87 (1) BauGB, which delegates a part of the contextualization to the expropriation authority. The conclusion would be

84. Section 337 (3) of the Town and Country Planning Act 1990 stipulates that the Act only applies in England and Wales.
86. Besides, the German Federal Constitutional Court consistently holds that it is very doubtful that ‘economic development’ and ‘creation of employment’ constitute sufficiently specific public goals. See, BVerfG, Judgment of 17 December 2013, ZUR 2014, 160, 163; BVerfG, Judgment of 24 March 1987, BVerfGE 74, 264, 287.
that the Town and Country Planning Act contributes to the legitimacy of the determination of the public purpose, but not as much as § 85 (1) lit. 1 BauGB.

9.6 The Expropriation Authority

In cases of administrative expropriation, the competent authority scrutinizes whether the constitutional and statutory requirements of a public purpose for expropriation are met. What implications the competent authority will have for the democratic legitimacy of the public purpose, depends upon two factors. First, it depends upon how specific the legitimate goal was laid down in the Act of Parliament and to what extent Parliament contextualized the legitimate goal and the project. Secondly, notwithstanding participation mechanisms other than elections, it depends upon the position of the competent authority in the state system.

9.6.1 Democratic Legitimacy and the Expropriation Authority

The decisions of organs that are directly elected by the people are more directly legitimized through the input from the people. These organs are also more directly accountable to the people because they can be directly voted out of office, which generates output legitimacy.

The complexity of problems and the enormous number of citizens in contemporary states require the delegation of power to representatives and specialized entities. The more often power is delegated, however, the more indirectly the original input from the people legitimizes decisions. The conclusion would be that the members of administrative organs appointed by a directly elected organ are only indirectly legitimized by popular decision. Therefore, their decisions are more indirectly legitimized than the decisions of directly elected organs. Furthermore, without prejudice to participation mechanisms other than elections, the output legitimacy of their decision is also problematic. The reason is that they are not directly accountable to the people because the people cannot vote the office holders out of office directly.

The position of the authority in the state system may also give rise to governance problems that pose a threat to the output legitimacy of the expropriation decision and may, therefore, reduce the quality of the decision. Authorities at lower levels of the state

87. Estlund 2008, p. 65; and Bekkers & Edwards, p. 43 et seq.
system are often more prone to corruption and dispose of less expertise than authorities at higher levels of the state system. More distant authorities at higher levels of the state system, however, often lack responsiveness to the needs of the people. This aspect cannot be not considered in the following analysis because it is an empirical finding that cannot be generalized. At the same time, it should be borne in mind when scrutinizing the democratic legitimacy of a public purpose in a specific case.

9.6.2 German Law

An analysis of the parliamentary Acts in the different jurisdictions examined here shows that different choices have been made as to the competent authority. The German § 104 (1) BauGB stipulates that the expropriation authority is the higher administrative authority. This is a state authority, not a federal authority. State legislation determines which administrative organ is the higher administrative authority. In most states, the higher administrative authority is established by an Act of Parliament and is accountable to a state Ministry. Its position in the state system is between the state Ministries and lower administrative authorities, such as the local tax authorities. The office holders are not appointed and dismissed by Parliament, but by the authority itself under the supervision of a state Ministry. Moreover, the authority is not bound by instructions given by the Ministry. The competent authority is thus an organ that is only very indirectly legitimized by, and very indirectly accountable to, the people. Its determination of the public purpose will not substantially contribute to the democratic legitimacy of the public purpose.

This finding does not seem to be of great importance as § 85 (1) lit. 1 BauGB does not leave a lot of scope for interpretation and concretization, and the main task of the expropriation authority is to determine whether the narrow requirements of that provision are met. However, § 87 (1) BauGB requires the authority to contextualize the project by scrutinizing whether the implementation of the binding land-use plan

91. See for these two aspects: L.J.A. Damen et al., Bestuursrecht, Deel 1, 4th edn, Boom, The Hague 2013, p. 42 et seq.
92. Battis, Battis/Krautzberger/Löhr, BauGB, § 104, No. 1. If there is no higher administrative authority in a German state, the supreme federal state authority is competent according to § 206 (2) BauGB. The supreme federal state authorities are the state government, the minister-president, and the state Ministries. These authorities are appointed either by the state Parliament or by organs that are appointed by the state Parliament.
93. See, for instance, § 14 of the State Administration Act of Baden-Württemberg (Landesverwaltungsgesetz, LVG BW).
94. See, for instance, § 10 LVG BW.
95. See, for instance, § 3 LVG BW.
would be a suitable, necessary, and proportionate in the narrow sense means to realize its legitimate goal. The outcome of that examination does not seem to be sufficiently legitimized by the competent authority.

9.6.3 South African Law

Section 2 (1), read in conjunction with Section 1, of the South African Expropriation Act stipulates that the Minister of Public Works can expropriate property for a public purpose. The Minister is appointed and dismissed by the President, who is, in turn, elected by Parliament. The Minister is accountable to Parliament. The decisions of the Minister, including the determination of the public purpose, are thus only indirectly legitimized by the people because the Minister is appointed by the President who is elected by the members of a directly elected body. Furthermore, the Minister is only indirectly accountable to the people because only the President can dismiss the Minister. This little degree of legitimation seems very problematic since the Minister has to apply the very broad term ‘public purpose’ to a specific case.

9.6.4 English Law

Section 226 (1) of the Town and Country Planning Act 1990 designates the ‘local authority’ as the authority competent to expropriate. Sub-Section 8 clarifies that county councils, district councils, and the councils of London boroughs and county boroughs are local authorities in terms of Sub-Section 1. These councils are directly elected by the people living in the respective council’s area. This provides the determination of the public purpose with direct democratic legitimation because the decision is taken by a council, the members of which are directly elected, and through elections directly accountable to the people. In contrast to the German and the South African approach, the English approach provides for a competent authority that substantially contributes to the democratic legitimation of the public purpose.

Before the compulsory purchase can be effected, it must be authorized by the Secretary of State. The Secretary of State is appointed by the Crown upon request by the

98. The provincial executive committee mentioned in Section 1 no longer exists after the Provincial Government Act 69 of 1986 was repealed. The Expropriation Act, however, has not been amended to reflect this change. Therefore, ‘executive committee’ must be interpreted as referring to the executive council of a province. See, Gildenhuys 2001, p. 51.
99. Section 91 (2) of the South African Constitution.
100. Section 86 (1) of the South African Constitution.
101. Section 92 (2) of the South African Constitution.
102. See, inter alia, Sections 7 (1) and 8 (1) of the Local Government Act 1972.
103. Section 226 (1) of the Town and Country Planning Act 1990.
Prime Minister. S/he is accountable to Parliament, but Parliament cannot compel the Minister to resign. Rather, the Secretary of State is dismissed by the Prime Minister. After a vote of no confidence in the House of Commons against the UK government, the Secretary of State resigns alongside the other members of the Cabinet. As an indirectly legitimized body, the Secretary of State cannot substantially contribute to the democratic legitimacy of the compulsory purchase.

9.7 Democratic Legitimacy and Participation in the Expropriation Procedure

The legitimacy of the public purpose also depends upon the public participation in the administrative procedure that leads to the determination of the public purpose. Public participation refers to the contributions to, and comments on, a proposed decision of a state organ by the public. In an ideal situation it enhances the democratic legitimacy of the public purpose for which the property rights are expropriated for three reasons. First, it generates a certain amount of input legitimacy, depending on the degree and quality of the input of the people. Secondly, if the procedure gives the expropriatee (and others) the opportunity to express their view on the matter and to discuss the plan of the administrative organ, public participation contributes to the protection of the expropriatee’s fundamental right to hold property. Thirdly, if the procedure provides the competent authority with relevant information about the matter and the wishes of the public, participation raises the quality of the decision and the responsiveness to the needs of the public, which generates output legitimacy.

Moreover, public participation also has an impact on the descriptive legitimacy of the public purpose. People are more likely actually to accept the outcome of a procedure if they have had a proper opportunity to express their view in this procedure.

The beneficial impact of participation, however, is limited by the fact the expropriation of land is proposed by the authority. If the people took the initiative and shaped the

originally proposed decision themselves, the democratic legitimacy of the decision would be significantly greater, both from a normative and descriptive perspective.\footnote{107} Here, the limitations of non-empirical legal research in this context should be pointed out. The benefits of participation and its impact on the democratic legitimacy of a decision to expropriate depend upon the equal representation of all affected groups, their ability to participate effectively in a participation process and the proper implementation of the legal framework.\footnote{108} Non-empirical legal research, however, cannot assess whether all people can participate effectively, are equally and effectively represented and how a statutory provision on public participation is put into practice. Therefore, the following Sections are based upon an ideal situation in which the people are able to participate effectively and the examined statutory provisions are put into practice properly. Readers should bear in mind, however, that this ideal situation hardly ever occurs in practice.\footnote{109} For the sake of completeness, the following Sections also contain references to factors that may generally pose obstacles to successful participation processes in practice.

There are three aspects that determine the impact of the participation mechanism on the democratic legitimacy of the public purpose. These aspects are the transparency of the procedure, the question how many and which people have access to the procedure and the form of participation that determines the degree of popular input. The obligation to give reasons, which can ensure that the competent authority actually take account of the input from the people,\footnote{110} is discussed together with the form of participation. In the following Sections the participation mechanisms under the


\footnote{110} Besides the quality of the decision the obligation to furnish reasons can also enhance to the descriptive legitimacy of the expropriation decision because the people are more likely to accept a decision if the decision is properly justified in comprehensible language. Furthermore, reasons can provide a basis for judicial review. \textit{See}, C. Hoeeter, Administrative Law in South Africa, 2\textsuperscript{nd} edn, Juta, Cape Town 2012, p. 463 et seq.
German Federal Building Code and the German Administrative Procedure Act, the English Acquisition of Land Act 1981111 and the South African Promotion of Administrative Justice Act112 are scrutinized as to these aspects.

9.7.1 Transparency

Transparency refers to the access to information about the facts underlying the procedure and the details of the decision-making process.113 Transparency is a necessary condition for effective participation. Only if the information is available, will the public be able to detect incomplete information, unfair treatment and errors in the reasoning of the administrative organ and to base their views upon all the available information.114 In addition to the available information it also has to be considered to whom information is provided and whether the state authorities actively provide information or can wait for the citizens to request information.

9.7.1.1 German Law

If the competent German authority plans to expropriate property in accordance with § 85 (1) lit. 1 BauGB, § 29 (1), 1st sentence of the Administrative Procedure Act (Verwaltungsverfahrensgesetz, VwVfG) obliges the competent authority to allow participants in terms of § 13 VwVfG115 “[...] to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests”. Furthermore, § 25 (1), 2nd sentence VwVfG provides that the competent authority shall “give information regarding the rights and duties of participants in the administrative proceedings”. This provision also refers to participants in terms of § 13 VwVfG.116 The administrative authority is only obliged to give information upon request.117 It is disputed whether or not the information only concerns procedural rights of the participants in the specific administrative procedure or also substantive rights of the participant.118

111. Section 35 (3) of the Acquisition of Land Act 1981 stipulates that, unless stipulated otherwise, the Act only extends to England and Wales.
112. Act 3 of 2000. As the South African Expropriation Act remains silent as regards these aspects, this Act is applicable. See, Hoexter 2012, pp. 367 and 409.
114. Id., p. 3; and Gutmann & Thompson 1996, pp. 47 and 95.
But, who are these participants? Participants are usually persons listed in § 13 (1) VwVfG or persons whose legal interests may be affected by the procedure and who are recognized as participants by the competent authority in accordance with § 13 (2), 1st sentence VwVfG. Yet, § 106 BauGB is a lex specialis of § 13 VwVfG and defines the term ‘participant’ as applied to expropriation procedures.119 § 106 BauGB refers to the applicant, mostly the municipality in the area of which the land is located, the owner, the holders of other real rights on the land and certain holders of personal rights. It does not generally refer to a group of persons whose rights may be affected during the procedure and in particular not to the general public.

The conclusion would be that the Administrative Procedure Act provides that participants must be informed upon request about the subject-matter on the basis of § 29 (1), 1st sentence VwVfG and their procedural rights on the basis of § 25 (1), 2nd sentence VwVfG. This information is restricted to the expropriatee and other participants listed in § 106 BauGB. However, the Federal and State Information Freedom Acts (Informationsfreiheitsgesetz) grant everyone access to information upon request, subject to narrow exceptions. The Dutch, for example, have chosen a different approach. The expropriation authority has to make the draft decision available for inspection at the municipality in which the concerned parcels of land are located.120 Before it is made available for inspection, the mayor of that municipality publicizes the content of the draft decision in the state gazette and a suitable newspaper or another suitable medium.121 Information is thus made available to everyone and upon the authority’s own initiative. Moreover, the Dutch Government Information (Public Access) Act (Wet Openbaarheid van Bestuur, Wob) provides for access to information upon request to everyone.122 The access can only be denied under very narrow conditions.123 The German approach only enables those people to participate who request information and might therefore lead to a loss of valuable information and other input, which might render the decision of lower quality and therefore might reduce output legitimacy. On the other hand, however, having to provide information to the general public automatically requires time and resources that could also be dedicated to the participatory elements of procedure.124 This is notwithstanding the extensive participation mechanism that is applied before a German binding land-use plan is adopted. Section 9.8 deals with that mechanism.

121. Art. 3:12(1) and (2) Awb, 78(2) Ow.
122. Art. 3(1) Wob.
123. Art. 10 and 11, read in conjunction with Art. 3(5) Wob.
9.7.1.2 South African Law

The South African Promotion of Administrative Justice Act (PAJA) lays down a few obligations of the competent authority to provide information, which are meant to ensure a fair procedure. The obligations will only apply towards persons whose rights or legitimate expectations are materially and adversely affected by the administrative action.\textsuperscript{125} In principle, this excludes people without an adversely affected right to property or liberty or a legitimate expectation relating thereto and cases where the adverse effects on the people are of a mere trivial nature.\textsuperscript{126} The competent authority has to comply with the following obligations. Section 3 (2)(b)(a) stipulates that the competent authority must give adequate notice of the nature and the purpose of the proposed administrative action. Section 3 (2)(b)(c) obliges the competent authority to provide a clear statement of the administrative action. This obligation, however, refers to a decision that has already been adopted.\textsuperscript{127} Section 3 (2)(b)(d) and (e) provides that the competent authority has to inform about certain procedural rights.

If the rights of (any group or class of) the public are materially and adversely affected, the competent authority can choose between different procedures, namely a public inquiry, a comment and notice procedure, a combination of these two procedures or another fair procedure.\textsuperscript{128} It has yet to be clarified when the public is affected. The most likely definition is that the decision is equally and impersonally applied or has a significant impact on the public.\textsuperscript{129} In an expropriation case Section 4 will probably be applicable if a vast amount of land has to be expropriated from different owners or if the realization of the public purpose for which the land will be expropriated has a considerable impact on a significant part of the public.\textsuperscript{130}

If Section 4 is applicable, an explicit obligation to provide information is only laid down in PAJA with regard to the notice and comment procedure, namely, “to communicate the administrative action”.\textsuperscript{131} Although Section 4 (3)(a) PAJA only prescribes the provision of information to the members of the public that are likely to be materially and adversely affected, the Regulations on fair administrative procedures\textsuperscript{132} provide for a publication of notices in newspapers.\textsuperscript{133} Concerning public

\textsuperscript{125} Section 3(1) PAJA.
\textsuperscript{126} Hoexter 2012, p. 397 et seq.
\textsuperscript{127} Id., p. 376.
\textsuperscript{128} Section 4, read in conjunction with section 1 (xi) PAJA.
\textsuperscript{129} Hoexter 2012, p. 410.
\textsuperscript{130} Id.
\textsuperscript{131} Section 4 (3)(a) PAJA.
\textsuperscript{132} Published in Government Notice No. R. 1022 of 31 July 2002.
\textsuperscript{133} Sub-Regulation 18(1).
inquiries, the Regulations provide for an obligation to publish a public notice before the authority holds a public inquiry or a public hearing, which is a mandatory element of a public inquiry.\textsuperscript{134} This means that information is provided to the entire public in both types of procedures.

The Act does not define what ‘to communicate the administrative action’ means or what a ‘notice’ must include. The Regulations may provide the answer. Sub-Regulations 3 (4)(a) and 18 (3)(a) stipulate that a notice must contain so much information as to enable the members of the public to submit meaningful contributions. As to the characteristics of the notice and comment procedure and the public inquiry, the Regulations provide that some details of the procedure, such as the closing date, must be included in the notice.\textsuperscript{135} The cited Sub-Regulations, however, are not applicable to cases where the public is not materially and adversely affected.\textsuperscript{136} The substance of Sub-Regulations 3 (4)(a) and 18 (3) (a), however, can also be traced in the literature and case-law on administrative decisions not affecting the public.\textsuperscript{137} It is thus reasonable to assume that the notice in terms of Section 3 (2)(b)(a) must contain the same information.

The Promotion of Administrative Justice Act thus provides information about the proposed administrative decision and procedural rights. If only a few persons are likely to be affected by the expropriation decisions, however, this information is only provided to a restricted group of people.

The concerns expressed with regard to German law also largely apply to South African law. There are two important differences between PAJA and German law. First, PAJA foresees the active provision of information to the public in some instances. Secondly, PAJA does not pre-suppose that the persons entitled to receive information would act actively to get information, but rather requires the authority to provide information actively instead of merely granting access to it. This makes the access to information easier and facilitates participation. The drawback is that the active provision of information is time consuming and requires a lot of resources, which the authority might lack in the rest of the procedure.\textsuperscript{138}

9.7.1.3 English Law

According to Section 226 (1) of the Town and Country Planning Act 1990, a local authority can decide to adopt a compulsory purchase order. The public can, in

\textsuperscript{134} Section 4 (2)(b)(ii)(aa), and Sub-Regulations 3 (1) and 11 (2).

\textsuperscript{135} Sub-Regulations 3 (3)(b)-(e) and 18 (2).

\textsuperscript{136} Sub-Regulations 2 and 17.

\textsuperscript{137} Hoexter 2012, p. 369 et seq.

\textsuperscript{138} Coglianese, Kilmartin & Mendelson 2008, p. 4; and Barnard 2001, p. 143.
principle, attend the meeting of the local authority,\textsuperscript{139} inspect the minutes of the meeting and background papers relating to the compulsory purchase.\textsuperscript{140}

The authorization by the Secretary of State is subject to the Acquisition of Land Act 1981, which is declared applicable by Section 226 (7) of the Town and Country Planning Act 1990.\textsuperscript{141} In the framework of the procedure prescribed by the Acquisition of Land Act 1981, some information has to be provided actively, and access to other information has to be granted. The local authority first has to publish a notice in the local newspaper in two successive weeks.\textsuperscript{142} This notice has to include a notification of the compulsory purchase order and information about the land and the purpose for which it is compulsorily purchased. Furthermore, it must name the locality where the order and a map can be inspected.\textsuperscript{143} An additional notice is submitted to \textit{inter alia} all owners, lessees, tenants, and occupiers that are concerned by the compulsory purchase.\textsuperscript{144} This notice in particular has to state what the effect of an authorized compulsory purchase would be.\textsuperscript{145}

Unlike the German Federal Building Code and Section 3 of PAJA, the Acquisition of Land Act 1981 obliges the competent authority to provide information to the general public. The Act partially requires the authority to provide information actively, but also partially relies on the initiative of the people to inspect the available documents. It thus enables the people to participate, but does not facilitate it as much as the South African PAJA that obliges the competent authority to provide actively all relevant information.

9.7.2 \textit{Access to the Expropriation Procedure}

The answer to the question who has access to the participation mechanism has implications for the democratic legitimacy of the public purpose. Ideally, the more people can participate in a procedure, the more valuable input the participation mechanism generates and the higher the quality of the decision will be. This effect, however, is subject to a few conditions. First, if the general public can participate in the procedure, it is essential that all concerned groups are effectively represented and that the procedure is not dominated by groups with vested interests.\textsuperscript{146} Secondly, the

\begin{itemize}
\item \textsuperscript{139} Section 100A (1) of the Local Government Act 1972.
\item \textsuperscript{140} Sections 100C and 100D of the Local Government Act 1972.
\item \textsuperscript{141} See also, Burn & Cartwright 2006, p. 1040.
\item \textsuperscript{142} Section 11 (1) of the Acquisition of Land Act 1981.
\item \textsuperscript{143} Section 11 (2) of the Acquisition of Land Act 1981.
\item \textsuperscript{144} Section 12 (1) of the Acquisition of Land Act 1981 refers to all qualifying persons. Section 12 (2) and (2A) define the qualifying persons.
\item \textsuperscript{145} Section 12 (1) of the Acquisition of Land Act 1981.
\item \textsuperscript{146} O’Neill 2001, pp. 484 and 486; Bekkers & Edwards 2007, p. 51; and Dietz & Stern 2008, p. 60 \textit{et seq.}
\end{itemize}
participation of the general public must not require so many resources that the quality of the decision declines.\cite{147}

9.7.2.1 German Law
The legal systems examined in this contribution reflect different approaches to this question. § 106 (1) BauGB restricts the access to the participation mechanism to the persons listed in that paragraph, \textit{inter alia} the applicant, the owner, holders of other real rights on the land and certain holders of personal rights. The participation mechanism is thus not open to the general public. This is notwithstanding the extensive participation mechanism that is applied before a binding land-use plan is adopted. Section 9.8 deals with that mechanism.

9.7.2.2 South African Law
The South African PAJA also restricts the access to the procedure. According to Section 3 (1), access to the procedure is only granted to persons whose rights or legitimate expectations are materially and adversely affected by the administrative decision. Unlike § 106 (1) BauGB Section 3 (1) PAJA thus gives a general definition that needs to be applied to the specific case.\cite{148} In particular, the expropriatee falls under this definition because his right to the property would be (partially) taken away from him.\cite{149} A different conclusion would be reached if the rights of any group or class of the public are materially and adversely affected by the administrative decision.\cite{150} If a notice and comment procedure is followed, Section 4 (3)(a) suggests that Section 4 (3)(b) only gives affected persons the right to submit comments. Sub-Regulation 18 (2)(a), however, refers to an invitation to the public to submit comments and does not distinguish between persons who would be affected and those who would not. The conclusion would be that the entire public can submit comments that have to be considered by the competent authority.

If a public inquiry in terms of Section 4 (2) PAJA is ordered, the entire public can submit comments.\cite{151} Also, the entire public can, in principle, attend the mandatory public hearing.\cite{152} The competent authority, however, decides upon request or \textit{ex officio} whether or not to question persons or to give persons the right to make oral representations.\cite{153} If a person has requested to be heard, the competent authority will have to furnish reasons for declining the request.\cite{154}

\textsuperscript{147} Barnard 2001, p. 143.
\textsuperscript{148} See sub-section 9.7.1.2 for more details about Section 3 (1) PAJA.
\textsuperscript{149} Hoexter 2012, p. 398.
\textsuperscript{150} See for a definition sub-section 9.7.1.
\textsuperscript{151} Sub-Regulation 3 (3)(a).
\textsuperscript{152} Sub-Regulation 15 (1).
\textsuperscript{153} Sub-Regulations 13 (2)(a), (b), (d) and 3 (7).
\textsuperscript{154} Sub-Regulations 11 (5) and 3 (7).
The approaches laid down in Section 4 PAJA may have a positive impact on the expropriation procedure. The approach of Section 4 (3) PAJA not only allows for more input from the people, but may also save resources because the authority does not need to scrutinize who would be affected. Section 4 (2) combines these benefits with more flexibility for the competent authority to determine who may make representations at the public hearing, which may also lead to more valuable input from the people. The authority’s discretion, however, may have the drawback that certain groups are under- or overrepresented.

9.7.2.3 English Law

Section 11 (1) of the Acquisition of Land Act 1981 obliges the local authority to publish a notice in a newspaper. Every person can then make an objection against the compulsory purchase order considered by the Secretary of State.155 The Secretary of State, however, only needs to involve in the further procedure the owners, lessees, tenants, and occupiers of the land that is intended to be compulsorily purchased.156 The Secretary of State has the discretionary power to involve other persons.157 The authority that may confirm the compulsory purchase order can thus decide whether or not to extend the access to the procedure.

Whereas the German Federal Building Code and Section 3 of the South African PAJA clearly define the persons that may be admitted to the participation mechanism, the English Acquisition of Land Act 1981 provides for the discretionary power of the competent authority to admit other persons to the participation mechanism. The English approach may be a good compromise between the goal of extensive popular participation and the need to take into account the capabilities of the authority.

9.7.3 Form of Participation

There are different forms of participation, four of which are considered in this Section.158 They allow for different degrees of popular input and have a different impact on the quality of the outcome of the procedure. Accordingly, their impact on the democratic legitimacy of the public purpose varies considerably. As has already been pointed out above,159 there are also a few hindrances to the generation of democratic legitimacy. These problems include the effective participation by all affected persons and their ability to participate effectively,160 the capacity of the competent authority to...

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156. Section 13 (1), (2) of the Acquisition of Land Act 1981, read in conjunction with Section 13 (6).
159. See Section 9.7.
160. Dietz & Stern 2008, p. 60 et seq.
accommodate a participation process, and the quality of the participation. These problems are elaborated on where specific forms of participation are discussed. The questions whether or not the competent authority is legally obliged to solve these problems and whether or not they in practice succeed in solving these problems, however, go beyond the scope of this contribution.

9.7.3.1 Participation Mechanisms

In the first model of public participation, citizens provide the competent authority with information. The provision of information answers to the need of the competent authority for information that often does not have the knowledge necessary to predict the impact of different alternative decisions and to take a well-founded decision. This kind of participation thus improves the quality of the decision and therefore enhances the output legitimacy. One must concede, however, that this improvement depends upon an effective representation of all concerned groups. Otherwise, the authority might not be able to take due account of some information that is relevant to the subject-matter. As regards other sources of democratic legitimacy, the degree of popular input does not generate a significant amount of democratic legitimacy. The reason is that the citizens merely provide information, but cannot express their views on the proposed expropriation.

The second model of public participation is consultation. In this model, the citizens not only provide information, but the competent authority also gives the citizens the opportunity to give their opinion on the proposed expropriation. This is one-way communication as no deliberations follow and the decision is exclusively taken by the competent authority. The second model generates more democratic legitimacy than the first model. Not only does it improve the quality of the decision through the provision of information, but also through the views of citizens, which might enable the competent authority to view the subject-matter from the various perspectives of the citizens. Furthermore, the input from the people is larger than in the first model, which contributes to the democratic legitimacy of the public purpose. The impact of consultations, however, is limited because it does not guarantee

162. Participation is also often found to introduce poor-quality thinking into the decision-making process and to lead to results that are overly protective of the affected interests. See, Dietz & Stern 2008, pp. 54 and 64.
that the competent authority takes the views into account when taking the decision.\textsuperscript{166} An obligation to justify the decision to expropriate and to state how the authority took account of the participants’ views might be a solution, but does not guarantee that the authority actually reflected upon their opinion.\textsuperscript{167} Moreover, these considerations are all subject to the conditions that all concerned groups are effectively represented and that the opinions of citizens are based upon good quality reasoning.\textsuperscript{168}

The third model enriches consultations with deliberations. This model is based upon three elements. The first element is the provision of information by the people. The second element is the opportunity of the people to express their view on the subject-matter. The third element is deliberation. Deliberation refers to reasoned dialogues that may lead to a change of the opinions of the participants and the authority.\textsuperscript{169} There may be two-way communication between the authority and the participants and multi-way deliberations among the participants and between the participants and the authority.

Deliberation plays a particular role in deliberative theories of democracy. Scholars argue that we all have certain beliefs and preferences upon which we hardly ever reflect.\textsuperscript{170} These beliefs and preferences, of course, also play a role when citizens express their opinions in administrative procedures. The importance of deliberation is that citizens have to consider all facts, including the drawbacks of their opinion, and the arguments of others. On the basis of equality and the ability of citizens to reason, scholars assume that citizens will then revisit their beliefs and preferences and change them if they think this appropriate.\textsuperscript{171} The eventual input of citizens will thus better reflect their living conditions and the preferences that result from them. For this reason, this model enhances the democratic legitimacy derived from the people’s input more than a mere consultation procedure. Moreover, it also improves the quality of the decision because the authority receives information about the actual needs of the people and the deliberations make the authority more likely to reflect upon their own opinion.\textsuperscript{172} This results in more democratic legitimacy. This improvement will be

\textsuperscript{166} Arnstein 1969, pp. 216-224.
\textsuperscript{167} See on the functions of the obligation to give reasons: Stelkens, Stelkens/Bonk/Sachs-VwVfG, § 39, No. 1; on the obligation to balance interests: Damen et al. 2013, p. 388 et seq.
\textsuperscript{169} Nordic Council of Ministers 2002, p. 40 et seq., and Owens 2000, p. 1145 et seq.
\textsuperscript{170} Peter 2009, p. 43 et seq.
\textsuperscript{171} Peter 2009, p. 43 et seq.
\textsuperscript{172} See, note 167.
even greater if the authority hosts multi-way deliberations instead of only two-way deliberations.\textsuperscript{173}

There are, however, a few obstacles to this improvement. The same concerns that apply to consultation also apply here.\textsuperscript{174} Moreover, deliberations, if badly managed, are also prone to being dominated by charismatic figures.\textsuperscript{175} This may lead to preferences that would not have been shaped in deliberations without this influence. Furthermore, deliberations are particularly time-consuming and require a lot of resources, which may result in the quality of the decision decreasing.\textsuperscript{176} Furthermore, the improvement is limited by the fact that the competent authority proposes a draft decision, thereby defining problems and the main aspects of the decisions, which often remain unquestioned in the participation process.\textsuperscript{177}

In the fourth model, the people themselves vote on a proposed public purpose for which property is expropriated.\textsuperscript{178} Superficially, the implications for the democratic legitimacy of that public purpose seem obvious. Direct democracy not only means a direct translation of the popular will into a state decision,\textsuperscript{179} but also embodies utmost responsiveness to the needs of the people.\textsuperscript{180} The public purpose thus seems automatically democratically legitimate. Yet, there are a few hurdles to overcome. The first problem is that the people must have access to all relevant information before taking their decision.\textsuperscript{181} Secondly, the democratic legitimacy will be greater if the proposed public purpose is the result of deliberations among the people and is not determined by a competent state authority.\textsuperscript{182} And, if the proposed decision is the result of deliberations among the people, the quality of the deliberations must be examined.\textsuperscript{183} Thirdly, it is important that all concerned groups take part in the deliberations and vote.\textsuperscript{184}

The description of participation mechanisms in this contribution is not exhaustive. There are other mechanisms, such as corrective referendums or shared decision-
making,\textsuperscript{185} that differ significantly from the mechanisms presented here and mechanisms that share elements of different participation mechanisms.

\subsection*{9.7.3.2 German Law}

The variety of participation mechanisms is also reflected by the different approaches adopted in the examined legal systems. The German Federal Building Code provides for two participatory elements. § 107 (1), 3\textsuperscript{rd} sentence BauGB obliges the competent authority to give the participants in terms of § 106 BauGB the opportunity to make representations. This mechanism has two objectives. First, the competent authority can gather all relevant information about the subject-matter. Secondly, the participants can express their view on the matter and bring forward arguments for their position.\textsuperscript{186}

After the participants have had the opportunity to make representations, another participation mechanism is applied. The competent authority must base its decision to expropriate, including the decision on the public purpose, upon a hearing that it convenes in accordance with § 108 BauGB.\textsuperscript{187} The Federal Building Code, however, does not make provision for the exact procedure. Scholars agree that the subject-matter has to be thoroughly discussed and that the participants can make representations and present their arguments.\textsuperscript{188} A thorough discussion may suggest a deliberative character. It is, however, for the chairman to decide whether or not to allow for two-way or multi-way deliberations as envisaged in deliberative democratic theories.\textsuperscript{189}

The German model thus has one consultation mechanism and one mechanism that also allows for deliberative elements. The effectiveness is further enhanced by the obligation of the competent authority to give reasons for its decision,\textsuperscript{190} which includes the obligation to discuss the representations made by participants to the extent that the decision does not reflect them.\textsuperscript{191}

\subsection*{9.7.3.3 South African Law}

Section 3(2)(b) of the South African PAJA stipulates that persons whose rights or legitimate expectations are materially and adversely affected by the administrative decision must be given a reasonable opportunity to make representations.\textsuperscript{192} The

\begin{thebibliography}{9}
\bibitem{185} Nordic Council of Ministers 2002, p. 50 \textit{et seq.}, and Bekkers & Edwards 2007, p. 50.
\bibitem{186} H. Dyong, Ernst-Zinkahn-BauGB, § 107, No. 6.
\bibitem{187} § 112 (1) BauGB.
\bibitem{188} Dössing, Beck-OK-BauGB, § 108, No. 14.
\bibitem{189} Dyong, Ernst-Zinkahn-BauGB, § 108, No. 20.
\bibitem{190} § 39 (1) VwVfG.
\bibitem{191} Stelkens, Stelkens/Bonk/Sachs-VwVfG, § 39, No. 49.
\bibitem{192} Deviations from this mechanism may be based upon reasonableness or a statutory provision. See Section 3 (4) and (5).
\end{thebibliography}
authority will meet this requirement if those persons can make representations in writing; a hearing is not required. This is a mere consultation mechanism. The competent authority also has the discretionary power to give those persons the opportunity to appear in person and dispute arguments in order to give effect to the right to procedurally fair administrative action. That kind of participation would have a more deliberative character because it makes possible two-way communication.

If the rights of any group or class of the public are materially and adversely affected by the administrative decision, Section 4 of PAJA will be applicable. The competent authority can choose to order a public inquiry, to initiate a comment and notice procedure, to combine these two procedures or to follow another fair procedure. In the comment and notice procedure the competent authority calls for comments on the proposed administrative decision. The authority has to consider the comments made during that procedure. This is a consultation mechanism.

The public inquiry gives the people the opportunity to submit written comments, but also includes a public hearing. The procedure is determined by the competent authority. The person presiding at a public hearing may in particular allow persons present at the hearing to make oral representations, give evidence, and to produce documents if their request for permission has been granted. The chairman may also question other persons or allow them to make oral representations, give evidence, and to produce documents. The public inquiry is primarily envisaged to be a consultation mechanism. The presiding person, however, determines the procedure and may alter the inquiry into a two-way or multi-way deliberation mechanism. The effectiveness of these mechanisms is enhanced by the obligation of the competent authority to give adequate reasons for its decision. This includes the reasoning of the authority as well as the interpretation of the law and the findings upon which the reasoning is based.

194. Section 3 (3) PAJA.
196. Section 4 (1), read in conjunction with Section 1(xi) PAJA.
197. Section 4 (3)(a) and (b) PAJA.
198. Section 4 (2)(b)(i)(aa) PAJA and Sub-Regulation 3 (3)(a).
199. Sub-Regulation 12 (1).
200. Sub-Regulations 13 (2)(a), 11 (5) and 3 (7).
201. Sub-Regulations 13 (2)(b) and (d).
202. Section 5 (2) PAJA. Chapter 4 of the Regulations does not set out any requirements as to the content thereof.
9.7.3.4 English Law

Sections 13-13B of the Acquisition of Land Act 1981 provide for the participation mechanism for the compulsory purchase of land on the basis of Section 226 (1) Town and Country Planning Act 1990. Section 13 differentiates between objections made by owners, lessees, tenants and occupiers and objections made by other people. Only if an objection is raised by an owner, lessee, tenant, or occupier and it is neither withdrawn nor disregarded, will the Secretary of State have to apply a participation mechanism. The Secretary of State may require the owner, lessees, tenants, and occupiers to state the reasons for their objections. Furthermore, the Secretary of State can give those persons and the acquiring authority the opportunity to make written representations. If any of those persons does not consent in that procedure, the Secretary of State will either have to hear the owner, tenant, lessee, or occupier who made an objection or cause a local public inquiry in which the Secretary of State has to give them the opportunity to give evidence or produce documents. It is for the Secretary of State to decide whether to involve other persons.

If an owner, lessee, tenant, or occupier is to be heard, the Secretary of State will have to hear the acquiring local authority at the same time. The local public inquiry is subject to the Compulsory Purchase (Inquiries Procedure) Rules 2007. The owners, lessees, tenants, and occupiers who have made objections and the acquiring authority are entitled to appear at the inquiry, to give evidence, to call another participant to give evidence and to cross-examine a participant giving evidence. It is on that occasion that the competent authority explains to the persons appearing at the inquiry why the decision was adopted.

Depending upon how the law is put into practice, the hearing may be a consultation mechanism, but may also feature characteristics of a two-way deliberation mechanism. The fact that the acquiring authority has to be heard at the same time, however, also allows for multi-way deliberation. The local public inquiry seems to oblige the

204. This mechanism is declared applicable by Section 226 (7) Town and Country Planning Act 1990.
205. Section 13A of the Acquisition of Land Act 1981, read in conjunction with Sections 13 (6) and 12 (2).
206. Section 13 (3) of the Acquisition of Land Act 1981, read in conjunction with Sections 13 (6) and 12 (2).
207. Section 13A (2) and (6) of the Acquisition of Land Act 1981.
208. Section 13A (2) and (3) of the Acquisition of Land Act 1981 and Section 250 (2) of the Local Government Act 1972, read in conjunction with Section 5 (2) of the Acquisition of Land Act 1981.
212. Rules 14 (1) and (2), 15 (1), and 16 (3), read in conjunction with Rules 5 and 7 of the Compulsory Purchase (Inquiries Procedure) Rules 2007. This right is subject to the requirement that the owner, lessee, tenant or occupier has either submitted an outline statement or a statement of case.
213. Denyer-Green 2013, p. 27.
authority to introduce more deliberative elements, given the interaction between the
participants. To what extent the procedure will have deliberative elements, is subject
to the discretion of the inspector chairing the inquiry.\footnote{214}

The effectiveness of the participation is meant to be ensured by the obligation of the
authority to consider the objections and, if applicable, to consider the report on the
inquiry before confirming the compulsory purchase order.\footnote{215} Furthermore, the per-
sons listed in Section 12 must be served a confirmation notice.\footnote{216} The Acquisition
of Land Act 1981 does not explicitly provide for an obligation to give reasons. The
Compulsory Purchase (Inquiries Procedure) Rules 2007 that were adopted on the
basis of the Act, however, provide for such an obligation, but only after a local public
inquiry has been held.\footnote{217} In English common law, there is no general duty to give rea-
sons.\footnote{218} However, if a highly regarded interest is at stake or if the outcome of the pro-
cedure is aberrant, the competent authority will have a duty to give reasons.\footnote{219} As
fundamental rights such as property rights should be highly regarded interests, a
duty at common law to give reasons when a compulsory purchase order is confirmed.

9.7.3.5 Comparative Remarks
The standard participation mechanism in the examined legal order is the consultation
mechanism. Certain procedures, such as the English local public inquiry, can also feature
deliberative elements. Whether or not deliberations actually take place, however, always
seems to depend upon how the procedure is implemented in practice by the state author-
ity. Moreover, it is also essential that the participants are able and willing to deliberate
and that the authority seeks to overcome other obstacles to fruitful deliberations.

9.8 Democratic Legitimacy and the German Binding
Land-Use Plan

Subject to § 87 (1) and (2) BauGB, § 85 (1) lit. 1 BauGB stipulates that land can be expro-
priated in order to implement a binding land-use plan adopted by the municipal
council. Therefore, the democratic legitimacy of the public purpose significantly
depends upon the democratic legitimacy of the binding land-use plan. Again, the

\footnote{214} Rule 16 (1) of the Compulsory Purchase (Inquiries Procedure) Rules 2007.
\footnote{215} Section 13A (5) of the Acquisition of Land Act 1981.
\footnote{216} Section 15 (1) of the Acquisition of Land Act 1981.
\footnote{217} See Rule 19 (1) of the Compulsory Purchase (Inquiries Procedure) Rules 2007. Section 13B (7) of the
Acquisition of Land Act 1981 allows for the adoption of Regulations on the giving of reasons for
the decision of the Secretary of State in cases where written representations were made.
\footnote{218} M. Elliott, ‘Has the Common Law Duty to Give Reasons Come of Age Yet’, Public Law 2011,
pp. 56-74, p. 57.
\footnote{219} Elliott 2011, p. 57 \textit{et seq}.}
position of the municipal council in the state system and the participation mechanism that is employed have to be examined to determine the democratic legitimacy of the binding land-use plan. Besides, the contribution of the binding land-use plan to the democratic legitimacy of the public purpose, of course, depends upon how specific the binding land-use plan specifies the use of the land.220

“The binding land-use plan contains the legally binding designations for urban development”, reads § 8 (1), 1st sentence. In particular, it may prescribe the type and degree of building and land use.221 The planning authority lays down the designations on the basis of a balancing of all interests involved.222

The democratic legitimacy of the binding land-use plan first depends upon the authority competent to adopt it. The binding land-use plan is adopted at municipal level as a municipal statute.223 Only the municipal council has the power to adopt such statutes.224 The municipal council is directly elected by the people. The elections generate input from the people and therefore strongly legitimize the decision of the council to adopt the binding land-use plan.225 The binding-land use plan will also have to be approved by a higher administrative authority if no preparatory land-use plan in terms of § 5 BauGB has been adopted.226 In the expropriation procedure, the higher administrative authority will scrutinize whether the binding land-use plan complies with the Federal Building Code.227 However, it will not examine whether the choices of the municipal council are expedient.228 The contribution of the decision of the higher administrative authority on the democratic legitimacy of the public purpose is small, as has been discussed above.229

A thorough participation mechanism precedes the adoption of the binding land-use plan. The intention to draft and adopt a binding land-use plan has to be publicized.230 As early as possible, the public is informed about the goals of the planning, the alternative concepts and the likely effects.231 The public then has the opportunity to

220. See sub-section 9.5.2.1.
221. § 9 (1) lit. 1 BauGB.
222. § 1 (7) BauGB.
223. § 10 (1) BauGB.
224. See, for example, § 58 (1) lit. 5 of the Municipal Constitutional Law of Lower Saxony (Niedersächsisches Kommunalverfassungsgesetz).
225. See sub-section 9.3.3 and section 9.6.
226. § 10 (2), 1st sentence BauGB, read in conjunction with § 8 (2), 2nd sentence, (3), 2nd sentence and (4).
227. §§ 10 (2), 2nd sentence, 6 (2) and (4) BauGB; J. Stock, Ernst-Zinkahn-BauGB, § 10, Nos. 63 et seq.
228. Stock, Ernst-Zinkahn-BauGB, § 10, No. 63.
229. See sub-section 9.6.2.
230. § 2 (1), 2nd sentence BauGB.
231. § 3 (1), 1st sentence BauGB.
comment and discuss. The discussion is meant to be a dialogue among citizens and between the citizens and the municipality and thus entails multi-way deliberations.232

Subsequently, the municipality provides the public with a draft of the binding land-use plan and a justification thereof, as well as with details on the goals, the purposes, and the effects of the binding land-use plan.233 A notice and comment procedure follows. It has to be announced that the drafts are publicly accessible for one month.234 During this period, the public can comment on the drafts. The municipality will then have to consider the comments and suggestions, and will subsequently notify of the result of this examination the persons who have commented.235 Every time the draft is altered, the notice and comment procedure has to be repeated.236 This procedure is a repetitive consultation procedure because the public can submit to the planning authority their preferences and the reasons for them. It is, however, not aimed at a dialogue among the people and between the people and the authority.

The binding land-use plan thus derives its democratic legitimacy from the people’s input and the output. The input provides a solid democratic foundation that consists of the decision of a directly elected body and thorough consultative and deliberative participation mechanisms. This enormous and direct popular input also shapes the output in that the plan is adapted to the preferences of the people. This democratic legitimacy, however, is limited by the fact that the authority shapes the draft proposal.237

The democratic legitimacy of the binding land-use plan, in turn, has implications for the democratic legitimacy of the public purpose. If the land is expropriated in order to implement the binding land-use plan after the expropriation authority has applied § 87 (1) BauGB, the conclusion would be that the binding land-use plan gives its democratic legitimacy to the public purpose. Compared to an expropriation procedure in which an appointed authority determines the public purpose after a simple consultation procedure, the German binding land-use plan and the procedure leading to it thus significantly enhance the democratic legitimacy of the public purpose.

9.9 Conclusion

Democratic legitimacy is a term to which different scholars accord varying definitions. As diverse as the concepts of democratic legitimacy are also the paths that lead
to the democratic legitimacy of the public purpose for which land is expropriated. In order not to get lost on these paths, one should examine the applicable law, gather information about its application in practice and take the following steps to assess the democratic legitimacy of a specific public purpose:

1. The basis for expropriation: an Act of Parliament
   - To what extent does the Act define the public purpose?
   - Is the parliamentary procedure fair?
   - Were the parliamentary elections fair? Are all groups effectively represented in accordance with their share in the electorate?
   - Do fair public discussions precede the parliamentary procedure? Do experts participate in the discussions?

The Act of Parliament that forms the basis for expropriation may either specify narrowly the public purpose or leave it to the competent administrative authorities to determine the public purpose. Both approaches can be found in the examples examined in this contribution. These approaches have different implications for the democratic legitimacy of the public purpose. The more specific the public purpose is laid down, the more democratic legitimacy Parliament can give to the public purpose.

The other questions that cannot be answered in general give an indication as to the quality of the parliamentary procedure and preceding public discussions. The higher the quality is of the parliamentary procedure and the public discussions, the more democratic legitimacy the Act of Parliament will give to the public purpose.

2. The expropriation authority
   - Is the expropriation authority directly elected or appointed?
   - If it is appointed, does a directly elected or appointed body appoint the expropriation authority?
   - How is it accountable to the electorate?
   - At which level of the state system is it situated? In practice, does this have an impact on the moral integrity and responsiveness of the authority?

The position in the state system of the authority competent to expropriate and to determine the public purpose plays a role in the determination of the democratic legitimacy. The examples in this contribution show that in some systems appointed authorities that are only indirectly accountable to Parliament or the people are competent to expropriate, whereas in other systems Parliament vested the power to expropriate in a directly elected body. An authority that is directly elected and accountable to the people enhances the democratic legitimacy of the public purpose more than an authority appointed by a directly elected body, which, in turn, generates more democratic legitimacy than an authority that is appointed by an appointed body.
3. The participation mechanism
   - To whom does the expropriation authority provide information?
   - Does the expropriation authority provide so much information as to enable citizens to make a meaningful contribution?
   - Does the expropriation authority have to take the initiative to provide information?
   - Who has access to the expropriation procedure?
   - What is the form of participation?
   - If a popular vote is held, is the draft decision the result of fair public deliberations?
   - Are all groups effectively represented?
   - If deliberations take place, does the expropriation authority ensure the fairness of deliberations? In particular: does it prevent certain groups from dominating the deliberations?
   - Does the expropriation authority have to give reasons for its decision?

The participation mechanisms give the people the opportunity to influence the determination of the public purpose. The approaches to transparency and the access to the procedure in the examined jurisdictions differ significantly. In theory, the implications of these differences are clear. A pro-active provision of information to everyone lays a better foundation for democratic legitimacy than the provision of information upon request to a certain group of persons. Also, the more people have access to the expropriation procedure, the more democratic legitimacy the procedure will generate. In practice, however, the lack of resources of the competent authority or the failure to ensure the equal, fair, and effective involvement of all people concerned by the decision may pose considerable obstacles to an increase in democratic legitimacy.

The employed forms of participation are to a large extent similar in the examined jurisdictions. All of them entail more than the pure provision of information by the people, but do not let the people decide upon the public purpose themselves. Rather, the jurisdictions employ consultation procedures with a varying number of deliberative elements that are often subject to the discretion of the competent authority. The participations mechanisms are mostly supplemented by an obligation to give reasons, which helps to ensure that the expropriation authority takes due account of the interests of participants. These participation mechanisms enhance the democratic legitimacy of the public purpose. Again, in theory, other mechanisms would enhance the democratic legitimacy even more. In practice, these mechanisms, however, might pose the above-mentioned problems, which may even reduce the democratic legitimacy.

This contribution focuses on the normative side of democratic legitimacy. The question whether the criteria that have been established here also indicate whether or not
the people will actually accept the public purpose, falls outside the scope of this contribution. Moreover, descriptive democratic legitimacy is a lot more challenging than its normative counterpart because exploring this concept requires empirical fieldwork instead of a legal-philosophical discourse.

The example of Stuttgart’s central station shows that the participatory elements that the Legislature has found to be sufficiently democratic do not necessarily meet the expectations of the people. Although such unrest as we have seen in Stuttgart is unlikely to occur in normal expropriation cases, the conclusion would be that normative democratic standards can prove to be insufficient to create real acceptance. However, this inherent imperfection of normative standards does not mean that democratic legitimacy is a useless concept in practice. In the legal sphere it may serve as a remedy for the negative effects of the deference to legislative decision-making practiced by the courts with regard to the public purpose requirement. When it comes to the actual acceptance of the public purpose, normative democratic standards are also relevant. As the example of Stuttgart’s central station shows, the people regard democratic standards as vital to their decision whether or not to accept state action. But how can the authority determine what the people consider sufficiently democratic? They have to resort to trial-and-error. Yet, it may be advisable to deliberate with the people about the participation mechanism first and, only afterwards, about the public purpose for expropriation.
THE ‘LAND ASSEMBLY DISTRICTS’ SOLUTION TO THIRD-PARTY TRANSFERS

Michael Heller & Rick Hills*

10.1 Introduction

The time has come to stop debating whether expropriations for ‘third-party transfers’ meet a public purpose or public interest test. That’s asking the wrong question, and it has led debate into a conceptual and doctrinal dead end. Expropriations to assemble land for economic development are both attractive and appalling. From an efficiency standpoint, states need to use expropriation to eliminate overly fragmented land. But such land assembly often works a distributive injustice on the vulnerable communities that are bulldozed.

Here’s the right question: can we get the efficiencies of land assembly without unfairly enriching third-party transferees and burdening the condemned communities? Yes. But courts offer no help. And the academic literature is a muddle. In this essay, we show how it is possible to assemble land without harming the poor and powerless. To achieve these ends, we propose an experiment for legislatures to venture – the solution of Land Assembly Districts or ‘LADs’. The function of LADs is to unify property interests without expropriating property owners. LADs can solve the dilemma of expropriation and, more generally, show how careful redesign of property rights may enhance both welfare and fairness.

Until now, everyone has assumed that solutions to land assembly must be based either on private contracting or public intervention. With private voluntary contracting, holdouts lead to under-assembly.1 Developers may attempt to assemble land secretly, but negotiations frequently collapse when owners discover that each is a monopoly supplier as to the undivided land. On the other hand, expropriation, which

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is the public intervention route, leads to capricious redistributions. Because landowners are entitled only to the ‘fair market value’ of their land (or some arbitrary amount above that), but not to any of their subjective surplus, nor to any of the assembly value, landowners bitterly fight condemnation. They fight even where the value of land assembly to the public exceeds its costs to the condemnees. Failure to pay landowners the true value of land assembly can cause (1) the government to ignore those costs – leading to inefficient over-assembly, or (2) the private landowner to fight land assembly too vociferously – leading to wasteful under-assembly.

Across the globe today, urban land is often broken up into unusably small parcels. Land sits idle in a tragedy of the anticommons – the wasteful underuse caused by too abundant entitlement holders. The challenge is to solve this tragedy without creating another tragic outcome, expropriating the homes and businesses of the prior entitlement holders who are often poor and vulnerable. This type of dilemma, where there is no good mechanism to bridge the divergence between the individual scale of ownership and the social optimum, is just where property law innovation can prove most useful.

Enter the ‘LAD’. The economic and moral intuition underlying the LAD is simple: persons who hold a legal interest in a neighborhood’s land should collectively decide whether the land ought to be assembled into a larger parcel. Our legal theory solution is equally simple: property law can retrofit a community with a condominium-like structure tailored to solve the problem of land assembly. To allow people to overcome collective action barriers that might otherwise prevent them from selling their neighborhood, the LAD places them in a special district with the power, by a majority vote, to approve or disapprove the sale of the neighborhood to a developer or municipality seeking to consolidate the land into a single parcel. Unlike voluntary transactions between individual owners and a private land assembler, the LAD’s decision avoids holdout problems by requiring the landowners to make their decision through some sort of collective voting procedure. Unlike expropriation, the residents controlling the LAD would have a veto over whether or not to proceed with land assembly: if the municipality or developer does not offer a price satisfactory to the LAD’s constituents, then the assembly of land would not go forward.

LADs create a mechanism by which neighbors can bargain effectively for a share of the neighborhood’s ‘assembly value’ – its value after the fragmented interests are

united into a single parcel – and not merely the value of each lot before land assembly. By giving them a chance to get a share of the land’s assembly value, LADs help enlist the neighbors to be supporters of land assembly whenever such an assembly really will have a higher value than the neighborhood that it will replace. Moreover, it is not difficult to design LADs in such a way that individual owners within a LAD have the right to opt-out and receive the full, existing measure of legal protection (that is, condemnation based on fair market value) if they are dissatisfied with the bargain struck by the LAD. Thus, LADs can be designed so each individual is at least as well off as under current law, and most are substantially better off, a pareto-improvement that dominates over existing methods for ‘economic development’ land assembly.

Given these benefits of LADs, is there any reason to use traditional expropriation at all? We argue that LADs make expropriation unnecessary when the problem is simply the assembly of fragmented land. For instance, if the state has authorized the creation of LADs, then expropriation for the economic redevelopment by third-party transferees of ‘blighted’ neighborhoods ought to be forbidden, for the only function of such expropriation is assembly of over-fragmented land. By contrast, expropriation still has a role to play where the problem is acquiring unique sites for traditionally public infrastructure – say, the only feasible site for a highway or airport. In these cases, LADs provide no solution to the problems of bilateral monopoly that would arise if monopolistic landowners were to negotiate with monopsonistic government.

Our solution understands the assembly value of land as a common-pool resource. Any landowner can obstruct creation of the resource. We argue that, as a general matter, the best solution to a breakdown in collective action is not expertise but restoration of the affected parties’ capacity to govern their resource. Thus, we reject the traditional solution to such a tragedy of the anticommons, that is, a call for the Leviathan: disinterested experts employed by a larger scale government who figure out what the parties would have done were they capable of contracting or self-government. Indeed, the dominant proposals in the legal literature for reforming expropriation have followed this script, relying on the promise of legal or economic expertise. For instance, legal scholars occasionally call for measures of ‘just compensation’ that would approximate the landowners’ subjective valuation. Likewise, there is periodically a call in the United States to revive the Constitutional requirement that condemnations serve a ‘public use’. Both of these solutions overestimate the power of expertise and underestimate the potential of self-government.

The owner’s subjective valuation of their own land is by definition best known (and therefore best revealed or concealed) by the landowners themselves. Likewise, the ‘public use’ solution improbably assumes that judges are better at calculating the public benefits of land assembly than developers and politicians, groups whose peculiar expertise is discerning and catering to the desires of consumers and voters. The LAD is an institution through which the interested parties themselves, landowners and land assemblers, can determine whether the game of land assembly is worth the candle. LADs illustrate the principle that self-government, not expert government, is the best way to control a limited-access commons – in this instance, to manage the struggle for the assembly value of fragmented land.

Section 10.2 frames the problem; section 10.3 proposes our LAD solution; section 10.4 shows how LADs advance property values and democratic norms; and section 10.5 notes some global parallels. We show why it’s not so radical after all to think that people can solve problems of land assembly for themselves if we give them the right legal tools.

10.2 THE LANDSCAPE BEFORE LADs

This section explores the theoretical arguments for why existing methods of land assembly are both unfair and inefficient – and why existing laws offer no easy solutions, either by paying above fair market compensation or by having judges determine whether public uses or purposes are met by a proposed expropriation.

10.2.1 The Defects of Private Land Assembly

Absent strategic behavior by landowners, the ideal method of land assembly would be to require the assembler to secure the consent of the landowners whose land is sought for a larger parcel. When a land assembly goes forward on this basis, one can be reasonably confident that it is social welfare-enhancing because the landowner would not sell unless the assembly surplus exceeded the owners’ valuation of their properties – including peculiar values not reflected in market value, such as the landowner’s sentimental attachment to the land or special adaptations to the particular site that produce producer or consumer surplus for the landowner (for instance, location near long-time customers).

The familiar collective action problem arises, however, as soon as the landowners realize that a purchaser is attempting to assemble a larger parcel by combining several smaller lots. As soon as the land assembler has purchased a part of the planned larger parcel, the assembler becomes locked into purchasing the rest of it to avoid wasting the site-specific investment. Thus, existing owners become monopoly suppliers of
their parcels. Knowing that the assembler requires each of their parcels, each owner may seek to be the last to sell, and then to hold out for all of the extra value created by the assembly. With several such holdouts, negotiations collapse, because the assembler, of course, cannot pay the entire surplus to each owner.

Empirical confirmation of such holdout problems is plentiful and colorful. Tales are legion of speculators who swoop in to purchase options on lots of land from less-informed owners as soon as they get wind that the parcels lay in the boundaries of an impending assembly. Even where developers successfully assemble land by using dummy corporations and shill buyers, the transaction costs of the assembly are so high that only a small fraction of the most valuable projects go forward. Knowing ex ante that upfront costs will be high and impasse is likely, potential assemblers seek extraordinary returns or make alternate investments. On many city blocks, competing developers and holdouts may play a waiting game that lasts for decades. Under this regime, predictably, too little land is assembled. In short, uncoordinated individual action results in holdouts that obstruct cost-justified sales or panic sales that hinder retention of community.

10.2.2 The Defects of Expropriation

10.2.2.1 Under-Compensation
As an alternative, assemblers pressure local governments to condemn land on their behalf. Expropriation avoids the holdout problem, but only at the expense of introducing other fairness and efficiency concerns. The difficulty with expropriation is that it must substitute a court’s objective valuation for a value determined by the parties’ bargaining. But the administrative costs of judicial valuation require courts to choose crude measures of valuation – for instance, ‘fair market value’ (meaning the courts estimate of the value that a willing buyer would pay a willing seller for the particular parcel at its highest and best use on the open market). Such measures of value necessarily fail to give landowners the same compensation that they would have demanded in a fully voluntary transaction. In this purely descriptive sense,

7. See e.g. Andrew Alpern & Seymour Durst, New York’s Architectural Holdouts, McGraw-Hill, New York, 1984 (cataloging of lengthy negotiations and costly modifications of buildings to accommodate landowners holding out for a piece of assembly surplus).
8. Id.
we can say that expropriation ‘under compensates’ landowners. (We explore in the next sections whether this under-compensation should be regarded as a normative problem.)

Consider two sources of under-compensation that are built into the concept of fair market value. First, landowners frequently derive some sort of consumer or producer surplus in their lots that is higher than the price the average seller would pay for the parcel. Homeowners might build up sentimental attachments to property simply by living in it. They develop ties to neighbors through connections at local churches, favorite coffee shops, bars, clubs, or other familiar local watering holes – what some have called ‘social capital’. Fair market value does not include any compensation for such lost social capital, goodwill, or lost subjective value. One way to understand what it means when a landowner says property is ‘not for sale’, is that the owner’s subjective value in the land is higher than the fair market value.

Second, fair market value does not include any of the enhancement of value resulting from the land assembly itself. This assembly surplus can be considerable: a quarter-acre parcel in a rundown residential neighborhood might be worth a small fraction of a quarter-acre parking lot next to a glittering new festival mall.

10.2.2.2 Unfairness
Is such ‘under-compensation’ unfair? We believe that no general answer is possible to this question of distributive justice: as we explain below, the answer will depend on the contingent facts of each condemnation. But the very contingency of the question indicates something deeply wrong with our current system of expropriation. Expropriation invariably relies on ‘one-size-fits-all’ formulae – for instance, ‘fair market value’ – to reduce administrative costs. This emphasis on simple formulae is the

11. See Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) (“[L]oss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power is properly treated as part of the burden of common citizenship”).
13. See Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (“Many owners are ‘intra-marginal,’ meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular … needs, they value their property at more than its market value (i.e. it is ‘not for sale’)). State statutes, however, sometimes go beyond what the Fifth Amendment requires, providing compensation for lost business goodwill.
14. See United States v. Miller, 317 U.S. 369, 375 (1943) (“[Compensation] cannot be enhanced by any gain to the taker…. [S]pecial value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value”).
15. See United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (5th Cir. 1979) (listing various ‘working rules’ and ‘practical standards’ courts apply in expropriation cases, regardless of idiosyncrasies of underlying facts).
inevitable result of expropriation’s procedures, which include no method for encouraging neighbors and land assemblers to bargain honestly, thereby revealing their true preferences concerning land assembly.\textsuperscript{16} The result is an administratively cheap but ethically crude system that ignores most of the context-specific concerns relevant to the question of distributive justice.

Consider, first, whether landowners ought to receive any share of the increased value resulting from the land assembly itself. Conventional wisdom suggests that landowners do not deserve any share of such gains, because they do not create the assembly itself. But it is an error to suppose that landowners make no contribution to the success of land assembly beyond their land that is condemned. The speed with which land is condemned depends critically on the attitude of condemnees. By denying cooperative landowners any share of the assembly gains, the system of expropriation provides no reward to landowners who actually help create those gains through cooperative behavior.

Quite apart from the possibility that landowners might deserve some share of the assembly surplus, expropriation typically denies condemnees any compensation for lost consumer or producer surplus above fair market value.\textsuperscript{17} A normal attribute of ownership is the right to hold out for a sale price that will leave one in as good a position as one was before the sale. Expropriation obviously strips the condemnee of this perquisite. It is a notorious fact that landowners tend to value their own land above the market value.\textsuperscript{18} To the extent that expropriation is supposed to achieve this sort of corrective justice by placing condemnees in the position that they would have occupied but for the condemnation, ‘fair market value’ is an unjust system of compensation.

One might defend the use of ‘fair market value’ on the ground that it is simply too costly to determine a landowners’ long-term, ‘genuine’ subjective valuation of their land. But this argument assumes that the only procedures for determining subjective valuation are the traditional expropriation methods. These procedures make heavy use of expert testimony, but they have no mechanism (beyond the penalties of perjury) for encouraging neighbors to state honestly their valuation of their land. Expropriation procedures reject all efforts at neighborhood democratic deliberation in favor of judge-managed expertise. The result, predictably, is that consideration of the

\textsuperscript{16} Statutes authorizing expropriation typically require the assembler to make a good-faith offer for the voluntary purchase of the property sought to be condemned. See 6 Julius L. Sackman, \textit{Nichols on Expropriation} § 24.13[1][a]. But the requirement is almost never judicially enforced to limit expropriation. \textit{Id.} This lack of judicial enforcement is hardly surprising given the evidentiary difficulty of proving lack of good faith in an initial offer.

\textsuperscript{17} \textit{Miller}, 317 U.S., at 375.

neighbors’ subjective valuation of their neighborhood might be prohibitively costly. However, if different procedures could gauge subjective valuation more cheaply and effectively, then there can be little doubt that such procedures would be more just, measured by the goals of corrective justice already implicit in the system of just compensation.

10.2.2.3 Efficiency
Quite apart from the question of fairness, there is the additional difficulty of whether expropriation sends an accurate signal to government and private condemnees concerning the relative value of preserving the status quo or assembling fragmented ownership patterns. Just compensation does not really indemnify landowners for the true cost of expropriation. The result is that incentives to use or forego expropriation are skewed. Government and private land assemblers have an incentive to over-use expropriation when landowners are politically ineffective.

Politically effective landowners have reason to object excessively to expropriation, possibly deterring its use even when it is necessary. The measure of just compensation offered by expropriation provides them with no incentive to collaborate with government in the project of land assembly. At the very best, they will receive fair market value, which likely under-compensates many of them. It is frequently argued that condemnees deserve no share of the assembly value because they are merely ‘passive participants’ who do nothing to assist in the process of land assembly but involuntarily supply the factor of land.19 This argument, however, forgets that landowners need not be passive: they can do a lot to hasten or delay the pace of a land assembly through litigation, demonstrations, and sheer political muscle. By giving them no incentive to promote a project, the ‘market value’ measure of just compensation makes it likely that they will actively oppose it.

10.2.3 No Easy Fixes within Existing Law

Of course, there might be easy ways to solve the problems of expropriation that would not require the creation of new institutions. It’s possible that changing compensation practice or increasing judicial supervision of condemnations would solve the core dilemmas of expropriation. But we doubt it.

10.2.3.1 Payments above FMV
Government might try to use voluntary payments of money above fair market value to buy off bitter landowner opposition to expropriation. But this expedient assumes what the case for expropriation denies – namely, that holdout problems and strategic

19. Id., at 86.
behavior by landowners will not bog down negotiations for a voluntary solution. Having only expropriation and voluntary transactions with which to gauge landowners’ valuation of their neighborhood, government has no institution by which to get an accurate appraisal of what an unassembled neighborhood – the status quo – is really worth.

One might also try to solve the problems of distributive and corrective justice by uniformly increasing the measure of compensation from ‘fair market value’ to some higher amount, which would presumably reflect the margin by which landowners value their own land above market value.\(^{20}\) We will assume (unrealistically) that landowners would reliably reveal their subjective valuation of their homes and shops through their responses on expertly designed surveys. Nevertheless, a problem with such a uniform ‘kicker’ would remain: it would be uniform. It would ignore the distinction between vibrant neighborhoods from which neighbors derive high subjective value and neighborhoods composed of transients with little interest in preserving their mutual social ties. These proposals replace arbitrary under-compensation in some cases with arbitrary over-compensation in others.

The point of criticizing ‘fair-market-value-plus-some-percentage’ as measure of compensation is not to improve the details of expropriation but rather to raise the possibility of eliminating it altogether. If there were some other procedure for overcoming holdout problems that was administratively cheap but also gave landowners their subjective valuation of land – that is, their actual valuation of land – and gave them some share of assembly value equal to that of their neighbors, then such a procedure would be superior to expropriation. It would be fairer and more efficient. The central question for those seeking sensible land assembly, therefore, is whether such a device could exist.

### 10.2.3.2 Judicial Review

Much of the literature surrounding expropriation revolves around whether courts should more aggressively control condemnations by barring such condemnations that do not (in the judge’s opinion) serve a ‘public use’. In theory, it is well-settled law in the United States that the Constitution’s Fifth and Fourteenth Amendments do not permit the federal and state governments to condemn land unless the condemnation serves some ‘public use’.\(^{21}\) State constitutions (either as written or construed by state courts) often contain similar requirements. In practice, the great majority of

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courts defer to the political decision makers’ assessment about whether some proposed land assembly serves a ‘public use’.

Part of the reason for such deference is doctrinal incoherence: courts are not at all clear about what exactly a ‘public use’ is. The idea seems to be that a ‘public use’ is a use that predominantly benefits the public at large rather than the private party seeking the land assembly. Such a requirement might imply that the proposed land assembly be necessary to produce a public good in the economic sense of the term. Some state courts have gone further to suggest that the proposed land use actually be owned by the government. The broad principle underlying the ‘public use’ requirement, however, could be construed as a rule that the courts need to prevent private land assemblers from using expropriation for what Merrill calls ‘secondary rent-seeking’—that is, cheap acquisition of land through low-balling the condemnee. The implicit premise behind calls for stricter enforcement of the public use requirement is that private land assemblers have too much power relative to private landowners.

There are several legal difficulties with such calls for stronger judicial enforcement of ‘public use’ requirements. However, as a matter of sensible policy, the deeper objection to the debate over the ‘public use’ requirement is that it is simply beside the point. Judicial deference to the political process may indeed be the right answer—but it is an answer to the wrong question.

At best, a tough ‘public use’ requirement simply insures that government does not condemn more land than necessary. But, as noted above, it could be the case that we have too little land assembly. As several commentators have noted, government rarely uses expropriation because potential condemnees often have lots of clout to stop such efforts or make them extraordinarily costly. Expropriation gives none of the participants—government officials, private land assemblers, or landowner-condemnees—the right incentives to oppose or support expropriation with the correct level of intensity. As a result, expropriation might give private condemnees too much incentive to oppose expropriation, with the result that we have too little land assembly. Judicial policing of expropriation does nothing to solve this problem.

Aside from being irrelevant to the problem posed by expropriation, the arguments in favor of a tougher ‘public use’ standard founder on excessive optimism about courts. The implicit premise behind all such arguments is that ordinary politicians are

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22. See County of Wayne, 684 N.W.2d, at 783 (describing cases in which ‘public use’ requirement is satisfied).
23. See e.g., Abraham Bell & Gideon Parchomovsky, ‘A Theory of Property’, 90 Cornell L. Rev., 2005, pp. 531, 605; Merrill, supra note 2, at 80 (“[C]asual observation suggests that when governments acquire interests in land they prefer, if possible, to do so by market transactions. Government officials frequently complain about the costs and delays of expropriation”).
corrupted by private advocates of land assembly into condemning too much or at least the wrong sort of land. But the advocates of heightened ‘public use’ requirements have yet to explain why judges and the litigation process are not also affected by these pressures from allegedly omnipotent ‘special interests’. The litigation process, after all, is biased in favor of the well-heeled and well-organized interests who can contribute to state judges’ electoral campaigns and hire a good lawyer and a stable of well-paid experts to ‘spin’ judicial opinions that use mushy ‘public use’ tests to limit or allow expropriation. Why will such judicial oversight control eminent process when political oversight has failed?

The answer to the problems of expropriation, in short, cannot be simply better valuation methods or smarter judges: all such solutions assume the existence of what we palpably lack, namely, some expert methodology for sorting out when some proposed land assembly is better (for the ‘public’, for the various parties to the transaction, for the world) than the status quo of fragmented land. The premise behind proposals for ‘heightened’ judicial scrutiny of expropriation is that somehow judges can answer this question with impartial expertise. However, this premise is just as unfounded as the analogous premise of advocates for better valuation methods.

The contrary premise of this Article is that expertise is no substitute for self-governance. We need institutions that will encourage the parties themselves – condemnees and condemnors – to reveal how much they value the rival uses of fragmented neighborhoods or assembled land. LADs may be just such an institution.

10.3 **AN OUTLINE OF LADs**

LADs are essentially a form of special district with the power of expropriation over all of the land located within the district’s jurisdiction. The essential purpose of this district is to allow the LAD’s residents to overcome collective action problems arising from fragmentation of ownership. The LAD accomplishes this task by giving these stakeholders the collective power to force each member of the LAD to accept a land assembler’s proposal to buy the neighborhood.

This general proposal opens up many tough questions about the details of LAD design. There are critical decisions to make regarding how to balance the goals implicit in the concept of private property and land assembly of individual dominion

24. See *Kelo*, 545 U.S., at 504-505 (O’Connor, J., dissenting) (arguing that without stronger ‘public use’ standard, no home or personal property, “however productive or valuable to its owner,” is secure from “private interests … with disproportionate influence and power in the political process”) (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d, 455, 464 (1984) (Fitzgerald, J., dissenting)).
and democratic self-government. We address these details in the *Harvard Law Review* article from which this Essay is adapted. For now, it is important to avoid getting lost in a tangle of rules. Here’s a brief overview of the key points:

**10.3.1 Formation Rules**

The rules for LAD formation can be divided into four categories: there would be rules about (1) who would be permitted to propose a LAD; (2) which government agency would initially approve the LAD; (3) how LAD proposals would be publicized and negotiated with the neighbors affected; and (4) how LADs would be approved through some sort of vote of the neighbors. This section provides only a skeletal overview of these issues.

**10.3.1.1 Who Initiates the LAD?**

A LAD promoter, whether resident or outside assembler, would propose a LAD to city planners, including its boundaries and proposed uses. The LAD promoter could be anyone, whether a full-time developer or neighborhood activist, who spies an opportunity in developing under-utilized but over-fragmented urban real estate. The opportunity need not be motivated by profit: the promoter could be a non-profit organization trying to revitalize an economically stagnant block. Sometimes a developer will have assembled part of a block and have a project planned, either to build directly or to sell to another builder. An enterprising developer may, however, only have an option on some of the land to be assembled. Other times, an entrepreneurial resident or neighborhood organization may choose to organize a particularly suitable neighborhood district in the path of development. By marketing itself to developers as assembly-ready, such neighborhoods would be well placed to capture assembly gains. Placing the LAD within the planning process gives the municipality a substantial voice in the process and serves to promote transparency in the process.

**10.3.1.2 Who Oversees LAD Formation?**

Because so much of the value from assembly comes from the rezoning that developers of larger parcels are often able to negotiate, and from the additional scale possible with the development, the planning commission or its equivalent local body will be a necessary first stop in the process. The steps for approving the LAD election are substantially parallel to those involved in existing redevelopment and condemnation procedures. Enabling legislation would require municipal planners to designate areas where LADs could be attempted, to specify minimum and maximum areas for LADS, and acceptable purposes. In particular, the planning commission would have to certify that a LAD is necessary to overcome some problem of excess fragmentation of land. Such certification would generally be easy to determine from a title search showing divided title. Indeed, the inquiry would be self-policing, because few
developers would gratuitously assume the administrative costs of creating a LAD when voluntary transactions would do the trick of assembling the parcel.

One might ask why a government would have any incentive to prefer LADs over expropriation. The self-interested local government, after all, might be keen to retain for itself as much of the assembly surplus as possible. However, one should not exaggerate the likely hostility of local governments to LADs, because the latter provide politicians with some significant benefits. In particular, they redirect hostility about expropriation away from the politicians themselves, allowing land assembly without political fallout. This is no small benefit in a political climate in which expropriation is increasingly embattled.

10.3.1.3 Negotiations to Final Vote
To educate the neighbors about the potential benefits and costs of a LAD, the government would hold a series of hearings where the private land assembler could make the case for land assembly to the neighbors. (Again, the planning commission would be the natural venue.) At these hearings, one would expect the developer to pitch the LAD by suggesting how much the proposed land assembly would increase the values of the neighbors’ property and how much the typical resident could be expected to reap from the sale. At this early stage, however, the numbers would have to be non-binding, for neither the city nor the developer would have accurate information concerning valuation of individual lots or even certainty that the local zoning code would be amended to allow the project. Opposed to the developer would presumably be neighborhood activists – including persons not residing within the LAD areas who would likely object to the increased congestion costs resulting from the proposed project.

10.3.1.4 The Vote
The catalyzing expression of intra-neighborhood democracy would be the vote by the residents of the proposed LADs. Assuming the local government allowed the vote to go forward, the creation of the LAD would then have to be approved by the LADs’ residents. Because the LAD process would replace expropriation entirely in those cases where only fragmented ownership prevented land assembly, this means that the neighbours residing in the LAD would have an absolute collective veto on all economic redevelopment requiring coercive land assembly. If the neighbors refused to approve a LAD, then all possibility of assembly by any means other than voluntary private assembly would be at an end.

10.3.2 Jurisdictional Rules
Once a LAD has been formed, three questions arise concerning the LAD’s jurisdiction. First, there is the question of whether and to what extent LADs can preclude all expropriation. Second, there is the question of how LADs negotiate for the sale of their
neighborhood to a developer, a sale requiring a second vote by the LAD’s constituents or their representatives. Third, what happens to dissenting owners.

10.3.2.1 Blight v. Uniqueness
We urge that LADs should be the exclusive procedure for land assembly only where assembly is blocked by excessive fragmentation. As a practical matter, this mean that LADs will replace expropriation when the purpose of land assembly is redevelopment of ‘blighted’ neighborhoods, consolidation of prematurely subdivided land in the suburbs, or the reconstruction of obsolete infrastructure in aging neighborhoods. In these and like cases, there is no argument that the land in question is somehow uniquely suited for some public function beneficial to the community beyond the neighborhood. Instead, the problem is that some usually drab, nondescript parcel of land suffers from problems of internal governance: even if the residents wanted to sell their neighborhood, they could not do so easily because of the holdout problems created by fragmentation. LADs solve the problem of neighborhood fragmentation, eliminating the rationale for using expropriation to overcome the collective action problem of getting unanimous consent from all of the neighbors.

In a wide range of cases, therefore, LADs can solve the ‘public use’ problem. Expropriation can be reserved for projects that meet the traditional ‘public use’ understandings, such as roads and railways. LADs would be available instead for the sorts of projects most likely to be denounced as ‘not public’. LADs make expropriation unnecessary when the only purpose of expropriation is consolidation of fragmented land.

10.3.2.2 Auctioning Off the Neighborhood
Once a LAD is approved by its constituents, what can it do? The answer, in short, is that it can sell the neighborhood. The LAD would have the power to accept or reject proposals by developers to assemble the land for some new land-use – a festival mall, auto factory, casino, or simply a nicer version of what it already is, a mixed residential-commercial district. At this stage of the LAD process, one would expect the land assembler to pony up specific figures on the total purchase price for the neighborhood and each LAD constituents’ share of that price. The shares would be rooted in the constituents’ share of voting power: in effect, the land assembler would propose some lump sum, which would then be divided among the neighbors based on their proportional real estate holdings within the LAD’s area.

Not all LADs will succeed. Some will stall at early stages. Others will not receive the required voting majority. What happens then? LADs must incorporate procedures for their dissolution if deadlines for the various steps are not met or if the vote fails.

25. See Heller, Tragedy, supra note 3, at pp. 639, 673-674 (describing this problem).
Otherwise, the neighborhood could be frozen in a non-development limbo, like neighborhoods are today that have been designated as blighted but have not yet been condemned. We would leave the timelines and details on dissolution to be decided by each jurisdiction in its LAD enabling statute. After a LAD dissolves, new LAD proposals would have to start from scratch, with new boundary drawing and new authorizations.

10.3.2.3 Dissenting Owners
The final aspect of LADs is the right of any individual landowner to opt out of the proposal even if that proposal is approved by a majority of LAD votes. In such a case, the dissenting landowner would have the right to insist that his or her parcel be purchased through ordinary expropriation procedures. Such a landowner would receive ‘fair market value’ rather than the sum proposed by the land assembler. Opting out, however, does not give landowners a new route to delay or derail the LAD’s decision to sell. Condemnation statutes in many states already allow redevelopment projects to begin even before the validity of the condemnation has been adjudicated or compensation awarded.

10.4 How LADs Protect Property and Democracy Values

Many landowners around the world would approach LADs with a deep skepticism grounded in an aversion to coerced sale of their homes. Expropriation, even for uncontroversially ‘public’ uses, such as highways, still raises objections because of the coerced nature of the transfer, and the often-unseemly political infighting over just whose neighborhood gets bulldozed. At the same time, the existence of expropriation attests to a rival intuition – that democratically approved plans to change land-use patterns within a community should not be held hostage to the stubbornness or greed of private property owners. In short, we have rival intuitions about the role of property and democracy in our republic. The test for our LAD proposal is whether it does a better job of reconciling these values than the existing institutions of expropriation and voluntary purchase. In this section, we argue that the proposal outlined above is likely to pass this test.

Implicit in the concept of private property is the belief that landowners have the right to refuse any offer, even if the price exceeds their actual valuation of their land. Expropriation obviously qualifies this absolute dominion over land. As suggested in section 10.1, this limit on landowners’ powers can burden condemnees in ways that are both

inefficient and unfair. How do LADs restore some of the landowners’ traditional prerogatives?

Most obviously, the LAD gives landowners a collective veto over whether or not to assemble their land into a larger parcel. LADs, therefore, insure that the people most affected by an assembly have the power to determine whether the assembly goes forward. Especially if the rationale for the assembly is improvement of the land being assembled – say, replacement of aging infrastructure or removal of ‘blighted’ structures – then the case is strong that the alleged beneficiaries of the assembly ought to decide for themselves whether they want the proffered gift.

10.4.1 Neighborhood Control

In response to this claim, one might object that neighborhood control is hardly the same as individual control. The neighborhood might endorse a proposed land assembly that an individual landowner within the neighborhood might reject. The landowner whose subjective valuation of his or her parcel exceeded both the fair market value and the LAD’s best offer would, therefore, be forced to sacrifice the difference between his or her actual valuation of his or her parcel and the money provided by the LAD. In effect, LADs substitute neighborhood control for municipal control. Is there any reason to believe that neighborhood control protects landowners better? Yes. We do not minimize the danger that neighborhood control could become a curse of majoritarian tyranny to the very landowners that LADs are supposed to benefit. But LADs contain safeguards that contain these dangers within reasonable limits.

LADs exist for a single narrow purpose – to consider whether to sell a neighborhood. Given this narrow mission, many of the economic cleavages that might divide a neighborhood into antagonistic factions in the context of zoning or service provision can find no outlet within a LAD. LADs simplify the interests of their constituents by addressing only one issue – the net price that those constituents receive from the sale of their neighborhood. All differences of interest based on the constituents’ different activities or investments, therefore, merge into a single question: Is the price offered by the assembler sufficient to induce the constituents to sell?

10.4.2 Voting Rules

The critical factor for determining the relative power of landowners within a LAD would be the LAD’s voting rules. LADs require neighbors to vote on two different issues: the initial establishment of the LAD and the ratification of the LAD’s proposal to sell the neighborhood to an assembler. How should voting rights be allocated concerning these two decisions? Given that a LAD’s narrow agenda is focused exclusively on maximizing the sale price of a neighborhood, it would seem odd to give residents
power over LADs that was unrelated to their stake in that sale price. Therefore, one might allocate voting power according to the property owner’s share of property within the district. This compromise on voting rights best reconciles the values of democratic equality and private property implicit in a LAD. In order to succeed, LADs must not become vehicles for the redistribution of wealth. Any such redistributive mission will plague LADs with paralyzing clashes between heterogeneous interests.

To be sure, it is conceivable that owners with only transient interests in a neighborhood will gang up on owners with deep connections to their parcel. But balanced against this risk is the rival danger that city officials, elected by residents with no interests whatsoever in a neighborhood’s real estate, will authorize expropriation in utter indifference to whether the residents’ valuation of their current use exceeds the value of the proposed assembly. The track record of expropriation suggests that landowners have more to fear from city hall than their own neighbors.

10.5 **Land Adjustment and LADs**

The foregoing sketch is, well, sketchy. Because no jurisdiction has ever authorized the creation of LADs, we have no data on how they are likely to perform. Our speculation is that they could not do much worse than expropriation. But this intuition rests on confidence in bargaining over centralized and expert planning. Of course, *a priori* reasoning is no substitute for actual experience. However, we think that the initial indicators are good enough for some political entrepreneur to give LADs a try.

Absent an actual LAD track record, the best way to assess how LADs are likely to perform is to assess the performance of closely analogous institutions. Here, we discuss land adjustment, an analogue with global reach. (Our *Harvard Law Review* article explores a wider range of related solutions, including joint-stock corporations, business improvement districts, oil unitization districts, and class actions). There is no *a priori* reason to believe that LADs would systematically under-perform these veteran mechanisms of collective decision-making.

The closest analogy to LADs, one which gives us substantial confidence in their potential, comes from the land pooling and readjustment procedures developed in Germany in the late 19th century, and used today most often in Japan, Korea, Taiwan, and Australia. About 30% of Japan’s urban land has been developed using this technique and over 70% of the city of Nagoya’s.

The essence of land readjustment is that the owners of the area to be ‘readjusted’ consolidate their land into a common pool, which is then re-divided into smaller lots to
provide infrastructure – roads, sewers, parks, etc. – that will raise the value of the property. The owners receive in return some share of the consolidated land, usually but not necessarily in the form of a smaller but better serviced and thereby more valuable parcel. Alternatively, the owners could receive stock in development created from the readjusted land. For instance, the reconstruction of war-torn Beirut during the 1990s, after the Lebanese civil war, was financed in part by downtown property owners’ contributions of 1,650 parcels of real property. In return, these landowners received shares in Solidere, the development company re-building Beirut’s central district. In Taiwan and Japan, the process of readjustment can be initiated by private landowners, but only if large majorities of the landowners consent. In Germany, land readjustment is initiated by the government without the consent of the affected landowners.

Readjustment resembles LADs in one key respect: both give the existing landowners some share of the gains from assembling land. This stake in assembly insures that the landowners will have an incentive to promote rather than obstruct the assembly – a key benefit, given the power of landowners to throw a wrench into the assembly process.27

But readjustment differs from LADs in at least three important respects. First, readjustment is not primarily a mechanism for giving landowners the power to bargain over whether or not to sell their neighborhood. Instead, readjustment assumes that the neighborhood ought to be readjusted and simply gives the landowners some share of the assembly gains. In some jurisdictions such as Germany, for instance, landowners simply have no say in whether readjustment goes forward. In Japan, landowners can veto a readjustment, but there is no mechanism by which landowners can bargain with an assembler over the purchase price. Thus, readjustment is not really an allocative mechanism for determining whether land ought to be assembled. Instead, readjustment is simply a distributive mechanism for giving landowners a share of the assembly gains.

Second, readjustment does not permit the wholesale transformation of the neighborhood. Instead, readjustment simply ‘readjusts’ the boundaries of the lots, requiring each landowner to contribute a certain percentage of land in exchange for better infrastructure. The landowner’s share of the total cost of the project may depend on the nature of the ‘readjusted’ lot that he receives in return: owners who receive lots on especially wide streets or favorable corners might be called upon to contribute a larger

share to the cost of infrastructure. Thus, readjustment is not a useful mechanism for transforming a residential neighborhood into a completely different use such as an auto factory or festival mall.

Third, readjustment forces the neighbors to bear some of the risk of the assembly, by giving those neighbors shares of the project rather than cash. The residents do not sell their neighborhood; instead, they trade their individual lots for shares in a new, improved neighborhood of uncertain value. Assuming that the neighbors are not experienced real estate developers, they might be averse to bearing this sort of risk. In any case, they might be incapable of determining whether their share in the final project will be worth their contributions of land. Unlike a simple percentage of a total purchase price, a share in a consolidated project is a lumpy asset, difficult for an amateur to evaluate.

These three differences between LADs and readjustment are rooted in one critical fact about the latter: Readjustment forces the neighbors to be long-term partners in land assembly. Far from being a one-shot deal, readjustment creates a long-term commons in which the existing landowners contribute the capital, bear the risk, and retain a possessory interest in land assembly. Absent a neighborhood composed entirely of real estate experts, this cumbersome arrangement will frequently be impractical as a method of financing urban redevelopment.

10.6 Conclusion

The law governing land assembly for economic development is a mess. People have failed to come up with good solutions either through private contracting, which leads to hold-outs and under-assembly, or through public regulation, which leads to transparently politicized, coercive, and confiscatory condemnation. Courts have not fared better: current jurisprudence regarding ‘public use’ and ‘just compensation’ provides too crude a tool to constrain legislatures and to generate either fair or efficient solutions. In sum, current approaches to land assembly provoke widespread hostility, discredit both courts and legislatures, and cost society a staggering amount in forgone social value.

LADs are the solution, so long as one accepts our premise that those burdened by condemnation should be able to share more directly in some of its benefits. Closely-analogous property forms, such as land readjustment, provide templates

for much of the LAD’s needed governance mechanisms, though they must be tailored to account for the specific values people bring to land assembly. By forcing owners to reveal their reserve price, LADs promote efficient assemblies and deter inefficient ones. And by letting neighbors bargain for assembly gains, LADs can mitigate the unfairness surrounding condemnation. More generally, LADs illustrate how property rights innovation can and should operate – by offering solutions to seemingly intractable, collective action dilemmas.
The purpose of this paper is to examine the fundamental premises of expropriating immovables in Poland. The admissibility of land expropriation in a democratic country is justified by the fact that land is a scarce resource and private ownership does not always allow public needs to be protected or realized. Consequently, a legal instrument which allows to acquire land from individuals against their will in order to attain a public goal is a necessary element of the legal system. Although it is relatively easy to explain the need to expropriate land when public purposes are to be achieved, it is much more difficult to devise a system which will adequately balance the interests of the public and those of an individual.

Despite many differences, most legal systems allow expropriation only if a public interest, public purpose, or public benefit is to be achieved and full, just, fair, equitable, or adequate compensation is awarded.1 Expropriation (also called compulsory purchase/acquisition or eminent domain) is also seen as an instrument of last resort in the sense that it may be applied only if no other legal institutions may be utilized to achieve the public purpose. These basic and general assumptions behind expropriation are understood intuitively; however, their translation into more detailed legal provisions and their practical application unveils a plethora of issues that cause disputes and raise doubts when expropriation occurs in practice.

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In this light, it is necessary to examine art. 21 s. 2 of the Polish Constitution\(^2\) of 2 April 1997,\(^3\) where it is stipulated that expropriation is allowed only for public purposes and with just compensation. There are, however, further constitutional provisions, which need to be considered, as well as statutory instruments which shape the institution of land expropriation. Their interpretation will require an analysis of views presented in academic writings and judicial decisions, which give insight into theoretical and practical problems that expropriation poses. Only when all the actors involved in expropriation have a clear and common understanding of the notions of the public purpose and just compensation is it possible to balance the public and the private interest.

11.2 THE CONSTITUTIONAL NOTION OF EXPROPRIATION

11.2.1 Historical Overview

Before considering the current constitutional regulations on expropriation one should consider a brief overview of the development of regulations on expropriation in Poland. When Poland regained its independence in 1919, after over 100 years of partitioning,\(^4\) the need to develop the country required, among other things, the improvement of the road and the railroad system. This led to the enactment of a decree of 7 February 1919 on temporary provisions concerning the compulsory acquisition for the purpose of creating railroads and other roads of land transports, as well as waterways and all types of public utility equipment.\(^5\) At that time Poland did not yet have a constitution and the later enacted ‘Small Constitution’ of 20 February 1919\(^6\) only regulated the structure of the executive. Apart from expropriation, the mentioned decree also provided for compulsory, temporary occupation (not exceeding 3 years) or the compulsory creation of easements. All of these measures required a prior decision of the Head of State and could only be effected for just and fair compensation. It is interesting to note, that expropriation included not only immovables, but also all materials necessary to erect the mentioned roads or public utility equipment (art. 1 of the decree). The decree contained provisions on the valuation of real estate, initial negotiations with the owner to effect a contractual sale, and finally the expropriation procedure.

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2. English, German, French, and Russian translations of the Polish Constitution are available on the following website: [www.sejm.gov.pl/prawo/konst/konst.htm](http://www.sejm.gov.pl/prawo/konst/konst.htm).
4. In 1772, Russia, Prussia, and Austria executed the First Partition of Poland, which lost 1/3 of its territory. In 1793, Russia and Prussia effected the Second Partition of Poland leaving it with so little territory and population, that the further existence of Poland as a state was at best uncertain. The third and final partition of Poland was concluded in 1795 by Russia, Prussia, and Austria. Poland ceased to exist as a political entity for over 100 years, but regained its independence after World War I.
The first contemporary Polish Constitution – the Constitution of the Second Polish Republic from 17 March 1921, declared in art. 99 that Poland acknowledged all types of ownership (personal, collective, state) and guaranteed their protection. Limiting or extinguishing ownership could only take place on the basis of an act of Parliament for ‘needs of higher utility’ and for compensation. Additionally, in art. 1 of the ordinance on expropriation procedure of 24 September 1934, it was stated that expropriation is admissible only for higher utility purposes and with compensation, when a legal provision admits such a possibility. The provisions contained a detailed regulation of administrative proceedings leading to expropriation, including the possibility to conclude a contract of sale with the owner to be expropriated. Compensation was to cover the real loss (damnum emergens), however changes in real estate value caused by the change of land use or works carried out as a result of expropriation were not taken into account (art. 27 § 1 and 2 of the ordinance). The ordinance had the force of an act of Parliament on the basis of special legislation which provided the President of Poland with the capacity to issue such ordinances.

After World War II a new constitution of the People’s Republic of Poland was enacted on 22 July 1952; however, it did not contain any express provisions concerning expropriation. It should also be noted that the constitution distinguished three types of property, namely: social property (vesting in the state, co-operatives and other social institutions such as political parties and workers’ unions), individual property (utilized by natural or juristic persons as a means of production, like businesses, land, plant, and machinery) and personal property (private ownership of consumable goods, for example, cars and home appliances). Since social property was favored, legislation was aimed at limiting the scope of private property, especially by nationalization of numerous private enterprises and some land during the 1940s. Social and personal property enjoyed special and full constitutional protection, whereas private property was only protected by several Parliamentary statutes.

In the communist era (1945-1989), there were several acts regulating expropriations, most notably the 1958 Act on the rules and procedures of real estate expropriation,

later replaced by the 1985 Act on land management and real estate expropriation.\textsuperscript{13} Both acts required expropriation to be carried out in order to realize a public purpose; however, the former act, like the pre-war decree and ordinance mentioned above, referred to the more or less general public purpose/utility requirement, whereas the 1985 act introduced a list of purposes considered to be public. Both acts expressly required just compensation to be paid for the expropriated immovables. Compensation was based on value; however, it was mostly calculated on the basis of the cost approach to valuation, as opposed to the market approach which developed after the shift to a market economy in 1989/1990.\textsuperscript{14} The 1985 Act was replaced by the Management of Real Estate Act in 1997 (MRE),\textsuperscript{15} the latter regulation still in force today.

11.2.2 Expropriation in the Current Polish Constitution

The highest authority for the existence and protection of ownership is provided by art. 21 of the Constitution (PC), located in its first chapter, which concerns the principles of Poland’s socio-economic system. According to that provision, the Republic of Poland protects ownership and the right to inherit (s. 1); expropriation is allowed only for public purposes and with just compensation (s. 2).

One should add that according to art. 20 PC a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue, and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland. Although art. 20 PC does not directly refer to expropriation, it does require the Polish economy to be based on private means of production and not on public ones, like it was in the communist era. This does not eliminate the existence of public ownership, it does, however, exclude the possibility of building an economy based predominantly on public ownership of means of production.\textsuperscript{16} This consideration should be taken into account when interpreting the admissibility of expropriations, which cannot achieve an economic result contrary to art. 20 PC.\textsuperscript{17} In other words, the Constitution prohibits introducing or applying legal instruments such as nationalization, expropriation, and other types of takings if they could endanger the social market economy.\textsuperscript{18}

\textsuperscript{13} Journal of Statutes 1985, no. 22, item 99.  
\textsuperscript{14} Cf. R. Żróbek, ‘Real estate expropriation in Poland during 1919-1990 with focus on compensation for limitation of the right to real estate’, in S. Żróbek (Ed.), Some Aspects of Compulsory Purchase of Land for Public Purposes, Olsztyn, Towarzystwo Naukowe Nieruchomości, 2010, pp. 11-17.  
\textsuperscript{15} Journal of Statutes 2004, no. 261, item 2603, as amended.  
\textsuperscript{16} See, the Polish Constitutional Tribunal judgment of 7 May 2001 (k 19/00), OTK 2001/4/82.  
11.2.2.1 The Object of Expropriation

It should be pointed out that in art. 21 s. 1 PC the legislator refers to ownership without specifying its type (public, private) or its object. Consequently, the protection of ownership concerns all types of ownership and all kinds of goods,\(^\text{19}\) whether movable or immovable, historical or not, tangible or intangible. Although in the mentioned provision, the legislator employs the term ‘ownership’, the location of art. 21 within the PC implies that for constitutional purposes, the term is understood not only in its narrow, technical, law of real rights sense,\(^\text{20}\) but also as a wider notion that is closer to the term ‘property’,\(^\text{21}\) particularly as defined in art. 1 of Protocol no. 1 to the European Convention on Human Rights.\(^\text{22}\)

It seems logical that the interpretation of art. 21 s. 1 PC must influence the understanding of art. 21 s. 2 PC, since both sections form one provision. Consequently, expropriation refers not only to the right of ownership, but also to other proprietary rights.\(^\text{23}\) This interpretation was not initially accepted by the Constitutional Tribunal (CT). In a judgment of 12 January 1999 (P 2/98),\(^\text{24}\) the CT stated that the constitutional notion of ownership is not equivalent to and as wide as the notion of proprietary rights and art. 21 PC does not protect proprietary rights other than ownership. In later judgments, the CT did not maintain this line of interpretation and clearly stated that art. 21 s. 2 PC pertains not only to the expropriation of ownership but also of other proprietary rights (judgment of 28 January 2003, K 2/02, OTK ZU 2003/1A/4; judgment of 9 December 2008, K 61/07, OTK ZU 2008/10A/174).\(^\text{25}\)

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\(^{23}\) Garlicki 2008, p. 108.

\(^{24}\) OTK 1999/1/2.

not been consistent in this matter and various, fairly recent judgments in which the CT rejects the wide meaning of the term ownership may be found.26

It should, however, be noted that interpreting art. 21 PC as referring to proprietary rights and not ownership exclusively is coherent with art. 1 Protocol 1 of the European Convention on Human Rights and the line of judgment observed by the European Court of Human Rights.27 Since Poland is a member of the Council of Europe and has ratified both the ECHR and its first Protocol, the obligation to protect proprietary rights and not merely the right of ownership must be observed within the Polish legal system also through interpreting the provisions in force in accordance with the ECHR.28 Expropriation must therefore be associated not only with the deprivation of ownership, but also with the deprivation of all kinds of proprietary rights.29

One of the reasons behind the confusion in the interpretation of art. 21 PC is art. 64 PC, which concerns ownership and regulates its possible limitations. According to that provision everyone shall have the right to ownership, other property rights, and the right of succession (s. 1); everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession (s. 2). The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the essence of such right (s. 3). Additionally, in art. 31 s. 3 PC it is stated that restrictions on the enjoyment of constitutional freedoms and rights may only be imposed through an Act of Parliament (statute), if they are necessary in a democratic state to ensure public safety or order, the protection of the environment, health and public morals, or freedoms and rights of other persons. Such restrictions may not constitute an infringement of the essence of a given right or freedom. Both provisions are located in Chapter II of the PC, entitled: The Freedoms, Rights, and Obligations of Persons and Citizens; however, art. 31 PC is located in the General Principles heading of that chapter and art. 64 PC is located in the Economic, Social and Cultural Freedoms, and Rights heading of that chapter. Initially, in the already-mentioned judgment P 2/98, the CT concluded that since in art. 64 PC other property rights are mentioned explicitly and in art. 21 PC they are not, the latter concerns ownership exclusively and not other proprietary rights.

26. For an exemplary list of CT judgments accepting and rejecting the wide meaning of the term ‘ownership’ see, K. Zaradkiewicz, Instytucjonalizacja wolności majątkowej. Koncepcja prawa podstawowego własności i jej urzeczywistnienie w prawie prywatnym, Trybunał Konstytucyjny, Warszawa, 2013, p. 469, fn. 177.


This interpretation must be seen as flawed not only for reasons already mentioned above, but also because the location of both provisions within the PC suggests their different roles and meanings. While art. 21 PC must be given a very general and wide meaning because it concerns the fundamental principles of the Polish socio-economic system, art. 64 PC has a more narrow scope, as it concerns particular rights and freedoms of persons and citizens. The function of art. 21 PC is to emphasize the obligations of the State, whereas the function of art. 64 PC (but also 31 PC) is to stress the ability of persons and citizens to hold rights and to protect them from unconstitutional limitations, e.g. through the constitutional complaint provided for in art. 79 PC. Consequently it is justified to treat art. 21 PC as *lex generalis* in relation to both art. 31 PC and art. 64 PC, which in turn should be treated as *lex specialis* in relation to art. 21 PC. For this reason, in its judgments, the CT often concludes that both art. 21 s.1 PC and art. 64 PC have been violated which seems to be a logical consequence of the fact that violating a more detailed provision will automatically violate a more general one.

11.2.2.2 The Scope of Expropriation

The above considerations should solve the issue of whether expropriation as mentioned in art. 21 s. 2 PC concerns ownership exclusively or the entirety of proprietary rights and allow one to conclude that expropriation concerns all types of proprietary rights. It would therefore seem unnecessary to further deliberate on the relation of art. 21 PC to art. 31 s. 3 PC and 64 PC, since expropriation is mentioned only in art. 21 s. 2 PC. Unfortunately, the extremely concise nature of art. 21 s. 2 PC makes it impossible to define the notion of expropriation only on the basis of that provision and without reference to art. 31 s. 3 PC and 64 PC.

At this point, it is imperative to emphasize, that the PC does not in fact contain a definition of what expropriation is and the understanding of this institution is often influenced by statutes which contain regulations relating to particular types of expropriation. Although it has been ascertained above that expropriation may concern all proprietary rights, it has not been determined in what way expropriation influences those proprietary rights. The question that needs to be answered is whether the constitutional notion of expropriation includes only the complete deprivation of a right or

31. Art. 79 s. 1: “In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act, upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.”
whether it also includes its limitation. This is where the need to examine the relation of art. 21 s. 2 to art. 31 s. 3 and 64 s. 3 resurfaces, as only the latter provisions mention the limitation of rights, but not their complete deprivation. It is unnecessary to question the premise that expropriation most definitely includes the complete deprivation of a proprietary right, since this has been the essence of expropriation in its historical evolution.35 It is less clear if instances of limiting proprietary rights should also qualify as expropriation in the light of PC provisions.

It is plausible to hold that the legislator has clearly differentiated the deprivation of a right from its limitation, by providing in art. 31 s. 3 PC and 64 s. 3 PC that limitations of proprietary rights are admissible if they do not violate the essence of those rights.36 Violating the essence of a right implies its deprivation, since a right that has no essence or core is an empty right (nudum ius) and has not been merely limited but completely destroyed, factually extinguished.37 Consequently, once limitations of rights are severe enough to violate the essence of a right they may no longer be treated as mere limitations but must be viewed as a deprivation of right.38 On the other hand, a complete deprivation of a right always violates its essence and is therefore equivalent to expropriation.39

The CT confirmed that expropriation is aimed at violating the essence of a right and must be distinguished from limitations of rights which leave the essence of right intact. In cases of complete deprivation of rights as well as limitations of rights which violate their essence, art. 21 s.1 PC and art. 64 s. 3 PC do not apply, because such events amount to expropriation and must be analyzed according to art. 21 s. 2 PC.40 Consequently, the scope of art. 21 s. 2 PC differs from art. 31 s. 3 PC and 64 s.3 PC, since the latter are only applied in situations where a right has been limited, but its holder has not been completely deprived of a right. The deprivation of a right includes limiting a right to a point where its essence has been violated.

According to the CT, the essence of a right is its core or nucleus, without which a given right could not exist, whereas additional elements of a right may be modified or

shaped in different fashions without changing the identity of the right in question. The violation of the essence of a right may also take the shape of burdening its holder with obligations that are so onerous that they cannot be performed.\textsuperscript{41} With respect to ownership, this nucleus denotes two spheres: a positive one (\textit{ius possidendi, ius utendi, ius fruendi, ius abutendi, ius disponendi}) and a negative one (the owner may enjoy his right to the exclusion of all others), but it is also necessary to consider whether the ownership of a given thing in a given context (factual situation) has lost the ability to fulfill its function. Expropriation must always be viewed as a violation of the essence of ownership, since it effectively deprives the owner of his right. Consequently expropriation needs an explicit constitutional base,\textsuperscript{42} which is to be found in art. 21 s. 2 of the Constitution.\textsuperscript{43}

Although it follows from the above that art. 31 s. 3 PC and 64 s. 3 PC do not regulate instances of expropriation and their detailed analysis is therefore beyond the scope of this paper, it should be briefly mentioned that the CT has addressed the relation between these two provisions. The CT pointed out that art. 64 PC should be interpreted jointly with art. 31 s. 3 PC, the former stipulating that restrictions of ownership are permissible, and the latter presenting the reasons which justify restrictions of constitutional freedoms and rights as well as forming the basis of the principle of proportionality.\textsuperscript{44} This principle denotes that the legislator may only utilize restrictions which are adequate to the goal that is to be achieved and that limit the right to the smallest possible extent.\textsuperscript{45}

The CT in the judgment SK 9/98 reflected on Polish construction law, which requires issuing building permits for construction works. Carrying out construction without a permit may lead to a mandatory demolition of the erected structures. The CT emphasized that the above are indeed restrictions of ownership, but they cannot be viewed as violating the essence of ownership and are provided for in a statute. The necessity to apply for a building permit is justified by protecting public health, the environment, and freedoms and rights of other people. It does not violate the essence of ownership, since the owner is not deprived of the right to construct on his land, as long as he does not violate the protected values set out in art. 31 s.3 PC. The building permit is a measure employed by the legislator, which in no way is excessive to the goals it is to achieve, namely public and environmental safety. Consequently, the Constitutional

\begin{itemize}
  \item 41. CT judgment of 12 January 2000 r., P 11/98, OTK ZU 2000/1/3.
  \item 42. Jarosz-Zukowska 2002, p. 258.
  \item 43. CT judgment of 25 May 1999, SK 9/98, OTK 1999/4/78.
\end{itemize}
Tribunal found no grounds to consider the respective provisions of construction law as unconstitutional.

In a similar judgment concerning the limitations of land owners to carry out construction works in areas adjoining flood banks, the CT found that restrictions are imposed in a statute in order to protect interests mentioned in art. 31 s. 3 PC, the principle of proportionality has been observed, and the essence of ownership has not been violated (art. 64 s. 3 PC). Consequently, expropriation did not occur and the obligation to pay just compensation did not arise. Simultaneously it is imperative to note that the CT does sometimes require compensation to be paid in order to observe the proportionality test; however, the need to compensate for the limitation of a proprietary right may not always arise.

11.2.2.3 The Form of Expropriation

Having ascertained that according to art. 21 s. 2 PC, expropriation denotes the complete deprivation of proprietary rights, it is necessary to determine if the deprivation must take a particular legal form in order to be classified as expropriation. The CT has stipulated that the constitutional notion of expropriation denotes all instances of depriving persons of the rights they hold, regardless of whether this deprivation is accomplished through an individual, administrative decision or in another form, as long as it is carried out in order to accomplish a public purpose. A. Jamróz indicates that this interpretation has been confirmed in CT judgments of 14 March 2000 (P 5/99, OTK ZU 2000/2/60) as well as of 12 April 2000 (K 9/98, 1999/4/78) and should be considered as the prevailing view. This opinion has also been shared by other academics who emphasize that the form in which the deprivation of proprietary rights takes place may vary; however, it does not influence the assessment of whether expropriation occurred.

Unfortunately the CT has not been consistent in maintaining the above viewpoint and academic writers have also questioned whether the constitutional notion of expropriation is wide enough to include takings in the form of nationalization. A. Frankiewicz

and S. Jarosz-Żukowska observe that the CT has distanced itself from the previously advocated definition of expropriation which encompassed all forms of deprivation of proprietary rights.\(^5\) K. Świderski argues that since expropriation has not been defined in the Constitution there is no reason to assume that the legislator wished to deviate from the traditional, developed in administrative law, understanding of expropriation. This understanding identifies expropriation as an individual (not general) administrative act that leads to a complete deprivation of a right through an administrative decision. In his opinion, this narrow interpretation of expropriation provides a better protection of proprietary rights because it allows expropriation to take place only when an administrative procedure has been completed, including the possibility of judicial review.\(^5\) A narrow understanding of expropriation renders all forms of depriving persons of property through a general public law act inadmissible due to the fact that they are not encompassed by the notion of expropriation.\(^5\)

In an already cited CT judgment P 25/02 expropriation was defined as the deprivation of a proprietary right which is performed by a public authority; however, the CT refused to accept that the notion of expropriation encompasses all forms in which persons may be deprived of the proprietary rights they hold. According to the CT this would result in treating nationalization as expropriation which is inadmissible, since expropriation is legal if conditions in art. 21 s. 2 PC are observed (public purpose and just compensation), whereas nationalization is illegal, due to art. 20 PC and the protected social market economy. The CT noted that expropriation should only be associated with deprivations of proprietary rights through individual, administrative decisions.\(^5\) Yet in a judgment of 3 April 2008, K 6/05,\(^5\) the CT confirmed once again that the notion of expropriation in the Constitution is much wider than the one contained in the Management of Real Estate Act 1997 (MRE 1997).

The MRE in art. 112 s. 2 defines the expropriation of immovables as any deprivation or limitation of ownership, perpetual usufruct or other real right over an immovable which takes the form of an administrative decision. In art. 112 s. 3, it is added that

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53. A similar opinion is presented by S. Jarosz-Żukowska, Konstytucyjna zasada ochrony własności, Zakamyczce, Krakw, 2003, p. 247, who holds that the possibility to bring a constitutional complaint (Art. 79 PC) against an act introducing an \textit{ex lege} expropriation does not afford the level of protection that individualized, administrative proceedings do.


56. ZU 2008/3A/41.
Expropriation is only allowed if public purposes cannot be accomplished by means other than the deprivation or limitation of rights over immovables and the latter could not be acquired through contract. Furthermore, expropriation may only concern immovables which are located in zones that have been designated for public purposes in local development plans or which are located in areas for which a decision of locating a public investment purpose has been issued (art. 112 s. 1 MRE). This regulation confirms the constitutional premise of proportionality and the fact that expropriation is a measure of last resort that may only be utilized to attain a public purpose. It deviates from the constitutional notion of expropriation in that it classifies both deprivations and limitations of real rights over immovables as expropriation.

The CT was also careful to point out in the already-mentioned judgment P 5/99 that associating expropriation with various forms of proprietary right deprivation does not indicate that the legislator has complete freedom to choose or introduce any form of right deprivation even if it is done for a public purpose and with just compensation. The application of expropriation is limited by constitutional principles of a democratic state of law in which rights and freedoms of citizens and persons are protected. The CT noted that the act of 13 October 1998 – Provisions introducing acts reforming public administration57 provided for an *ex lege* expropriation for the benefit of the state or self-governments of all land which was in their control and effectively utilized as public roads but was owned by private entities. This solution included the payment of just compensation and was implemented in order to achieve a public purpose of regulating the legal status of land factually developed and used as public roads. This land often comprised scattered bits and pieces of plots owned by private entities. The CT held that the act is an example of an *ex lege* expropriation which did not involve issuing individual, administrative decisions but was justified by the magnitude of the goal that needed to be achieved in the public interest. The CT also stated that *ex lege* expropriations may only be employed to regulate factual states which are a result of historic circumstances, are already in existence, and are irreversible by other means. It cannot be applied to public roads that may need to be created in the future.

The CT has, however, been consistent in maintaining that expropriation does not include situations in which owners are forced to transfer their rights to another person on the basis of private law regulations introduced in statutes. Such regulations usually involve various enfranchisement mechanisms, which allow holders of lesser rights to demand that ownership be transferred to them. In a judgment of 29 May 2001, K. 5/01,58 it was held that expropriation is an institution of public law which focuses on depriving owners of their rights for the benefit of the State or another public authority. Private law regulations introduced in statutes which force owners to

transfer their ownership to indicated persons are not examples of expropriation. The CT continued to note that in such situations the content of art. 21 s. 2 PC, as well as art. 31 s. 3 PC and 64 PC is relevant in the sense that it indicates the conditions which have to be met (compensation, proportionality, interests which justify deprivation of right) when ownership must be transferred between subjects of private law due to a statutory provision. The CT emphasized that the deprivation of ownership for the benefit of private parties cannot be subjected to lesser constitutional requirements than when such deprivation is done for the benefit of public authorities, since the premises for any type of right deprivation should be uniform. This view was cited in the CT judgment P 25/02, as well as in a CT judgment of 17 December 2008, P 16/08\textsuperscript{59} and an earlier judgment of 12 April 2000 r., K. 8/98.\textsuperscript{60}

In the light of the above it is justified to conclude that the constitutional notion of expropriation should be understood as the deprivation of a proprietary right through an act of public law, introduced for the benefit of the State or another public authority, with the exclusion of all acts which are illegal due to constitutional principles of a democratic state, social justice (art. 2 PC), a social market economy (art. 20 PC), and other inviolable principles expressed in the PC. The most obvious and unquestioned, by judicature and academia alike, instance of expropriations involves the deprivation of ownership through an individual administrative act issued on the basis of statutory provisions, like the MRE.\textsuperscript{61} The definition presented above would also include general (as opposed to individual) acts of public administration, like development plans enacted by self-governments,\textsuperscript{62} and possibly \textit{ex lege} expropriations necessary to regulate the legal status of land that has been and continues to be used for public purposes (roads, waterways, etc.). All such acts must amount to the deprivation of a proprietary right and not merely its limitation, the latter falling under art. 31 s. 3 PC and/or 64 s. 3 PC. It must, however, be reiterated that according to the MRE limitations of rights over immovables also qualify as expropriation and are subject to protective mechanisms provided in that act.

\subsection*{11.2.2.4 The Object of the Expropriated Right}
As has already been concluded in the preceding sections of this paper, the object of expropriation includes all proprietary rights; however, expropriation is often associated only with the deprivation of those proprietary rights which concern immovables. According to A. Jamróz, art. 21 s. 2 PC does not encompass the deprivation of movables due to art. 46 PC where it is stipulated that things may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court.\textsuperscript{63} While it is true

\footnotesize
\begin{itemize}
\item \textsuperscript{59} OTK ZU 2008/10A/181.
\item \textsuperscript{60} OTK ZU 2000/3/87.
\item Suchar 2012, p. 25.
\item Jamróz 2012, p. 471.
\end{itemize}
that the narrow, traditional notion of expropriation does relate to immovables only, particularly when one considers the most important statutory basis for expropriation, namely the MRE and its predecessors, the wording of the constitutional provisions does not support such a narrow understanding. Forfeiture that art. 46 PC refers to is an additional penalty mechanism within penal law and therefore the mentioned provision concerns qualitatively different situations than art. 21 s. 2 PC. It has also been demonstrated in this paper that the constitutional notion of expropriation is relatively wide and therefore it is logical to assume that at least in theory it also concerns the deprivation of proprietary rights to movables which could take the form of confiscation or requisition. If the legislator were to introduce such institutions they should be qualified as a form of expropriation and all the required conditions for it to take place would have to be met.

The above comments concerning the constitutional notion of expropriation must be supplemented by an important observation. The provision concerning expropriation contains only two conditions for its admissibility, namely, the public purpose and just compensation (these will be considered in the following sections of this paper). Surprisingly, the legislator did not explicitly provide that expropriation must have a statutory basis which would prevent attempts to introduce expropriation in lower level acts that are not enacted by the Parliament. This solution has been negatively assessed by academics who also point out that one of the proposed amendments before the final enactment of the PC was to expressly provide for expropriation to be allowed only if it had a statutory (as opposed to subordinate legislation) basis, an important public interest was to be achieved, and just compensation was paid.

The fact that in art. 21 s. 2 PC the adjective ‘important’ does not precede the public purpose requirement and that no explicit reference is made to an obligatory, statutory basis for expropriation makes the constitutional notion of expropriation more difficult to construe, as references to other constitutional provisions have to be made. It seems that the argument of a minori ad maius has to be employed and reference to art. 31 s. 3 PC and 64 s. 3 PC has to made. According to these provisions, limitations of proprietary rights may only be introduced in statutes and the proportionality principle has to be observed. Therefore, it must follow that since it is forbidden to limit proprietary

64. Cf. Zimmerman 1933, p. 70 et. seq.; see also, Woś 2011, pp. 24-26, who differentiates between the wide notion of expropriation (encompassing all things) and the classical notion of expropriation, which concerns only immovables.
rights through subordinate legislation then it is also forbidden to *deprive* persons of proprietary rights through such legislation. Similarly, since limiting proprietary rights is subject to the proportionality principle then the deprivation of those rights must also be subjected to that principle.69

11.3 The Public Purpose Requirement

The notion of the public purpose is fundamental to expropriation yet it is one of the most elusive legal concepts. The division of purposes to be achieved into public and private is to some extent understood intuitively, since a public purpose satisfies the interest of the public, whereas a private purpose indicates that only an individual or selected individuals will benefit from the realized objective. A further exploration of the differences between the public and the private as well as attempts to define the exact meaning of these adjectives have been the object of many academic disputes, even when they concern the very general delimitation of law into public and private.70 This is unsurprising when one realizes that public and private are in fact assessments and not empirical statements. It is therefore impossible to ascertain whether such assessments are true or false.71 Moreover, assessments may change over time, particularly when socio-economic developments occur bringing about a change in the needs of the public. The public purpose thus needs to be continuously redefined.72

Despite these difficulties the legislator, academics and the judicature employ the terms: public interest and public purpose making it imperative to indicate the main elements or criteria of ascertaining the existence of ‘publicity’ within the interest or purpose in question. Due to the complexity of the public and private division, employing a single criterion (e.g. based only on the type of the benefiting entity, or only on the type of the entity that performs the purpose/task) will generate misleading results and must be seen as unacceptable.73 In order to ascertain whether a given purpose is in fact public it is necessary to take into account what use the expropriated object will be put to, what type of entity acquires the expropriated object, what type of entity is responsible for carrying out the set objective, and what the connection of this

objective to the obligations of public authorities is. Only a careful consideration of all these factors, based on current assessments of the needs of the public and community will allow one to conclude if an interest/purpose/task is indeed public.

It is plausible to hold that the public interest is a more general term than the public purpose (goal). The former is an interest of the society that is protected by the state or self-governments, the latter being emanations of the state. The mentioned entities create conditions for the public interest to be satisfied. A public purpose (goal) is a particular, defined fragment of the public interest, which should be performed on the behalf of and for the benefit of the State, the latter performing obligations towards the society. The public purpose (goal) is always performed in the public interest, however not all activities performed in the public interest are a realization of a public goal.

The above remarks reflect a theoretical understanding of the public purpose; however, their practical application in real life scenarios would doubtlessly create many uncertainties. Consequently, with respect to the expropriation of immovables, the legislator has decided to provide a list of the basic public purposes currently in existence. The relevant provisions are contained in the MRE which in art. 6 contains a list of public purposes. This allows one to conclude that the understanding of public purposes with respect to the expropriation of immovables is a formal one, i.e. a purpose is only public if it has been listed in art. 6 MRE. Consequently, for the purpose of expropriating immovables, an analysis of whether a public purpose exists consists of comparing it to the list in art. 6 MRE. Simultaneously it is imperative to emphasize that the legislator cannot include a private purpose in the list. The mere inclusion of a purpose in art. 6 MRE cannot change the nature of a given purpose, although it may bring about the supposition that since a purpose is listed as public, then it probably is a public purpose. If, however, a purpose contained in art. 6 MRE were to be recognized as private, this would be the basis for the CT to remove that part of the provision from

75. Cf. Art. 16 PC: 1. The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law (s. 1). Local government shall participate in the exercise of public power. The substantial part of public duties which local government is empowered to discharge by statute shall be done in its own name and under its own responsibility (s. 2).
77. Matusik 2012, p. 57.
78. First instance administrative court in Szczecin judgment of 5 November 2009, II SA/Sz 798/09, LEX no. 589226.
the legal system by holding that it is unconstitutional. The PC clearly requires a public purpose to be the reason for expropriation; therefore, the legislator cannot arbitrarily choose purposes and classify them all as public.\(^{80}\)

The public purposes listed in art. 6 MRE are as follows:

1. the allocation of land for public roads and waterways, the construction, maintenance, and performing construction works of such roads/ways, buildings and facilities of public transport, as well as of public communications and signaling systems;
   1a. allocation of land for railroads and their construction and maintenance;
   1b. allocation of land for airports, facilities, and buildings servicing air traffic, including areas for approaching landing, as well as the construction and maintenance of these airports and facilities;
2. the construction and maintenance of drainage tracts, ducts, and equipment for carrying and distributing liquid, steam, gas, and electric energy, as well as other buildings and facilities indispensable to use these ducts and equipment;
3. the construction and maintenance of public facilities providing water for the population, collecting, transmitting, treating, and transporting sewage as well as reclaiming and neutralizing waste, including its storage/disposal;
4. the construction and maintenance of buildings and facilities for the protection of the environment, reservoirs and other water facilities used for the supply of water, the regulation of tides, and protection from floods, as well as the regulation and maintenance of waters and water melioration facilities, that are owned by the State or self-governments;
5. protection of immovables which are historical in the understanding of provisions on the protection and care of monuments;
   5a. the protection of Mass Murder Monuments in the understanding of provisions on the protection of areas which were formerly Hitler’s extermination camps and of places and monuments commemorating the victims of communist terror;
6. the construction and maintenance of facilities for offices of public authorities, administration, courts and prosecutors, state higher education entities, public schools, as well as public: health care buildings, kindergartens, social care institutions, care and upbringing institutions, and sports facilities;
   6a. the construction and maintenance of buildings and spaces indispensable to carry out tasks by a public operator in the area of publicly accessible postal services, as well as other buildings and spaces connected with the provision of such services;

7. the construction and maintenance of facilities and equipment indispensable for state defense and border protection, as well as for ensuring public safety, including the construction and maintenance of jails, prisons and juvenile penal institutions; 
8. searching, identifying and excavating minerals owned by the State; 
9. establishing and maintaining cemeteries; 
9a. establishing and maintaining places of national remembrance; 
9b. the protection of endangered plants and animals or natural habitats; and 
10. other public purposes specified in separate statutes.

The above list may be classified as exhaustive in the sense that at any given point in time it is possible to enumerate the public purposes which may form the basis for the expropriation of immovables.\(^{81}\) It is interesting to note that in point 10 of art. 6 MRE the legislator did not maintain the pre-1998 open clause, according to which public purposes also included ‘other, obviously public goals’. The current solution allows decisions as to what is an obviously public goal to be made not on the level of public authorities but on the level of the legislator, i.e. the Polish Parliament. This should be seen as a positive development that limits the flexibility of the regulation but does not completely remove it.\(^{82}\) Simultaneously it has been noted in literature, that a constantly expanding catalog of public purposes (e.g. letters added to the points in art. 6 indicate that amendments of the act have introduced new public purposes) is a worrying phenomenon as it indicates the growing scope for expropriations.\(^{83}\)

It is also important to bear in mind that public purposes may be specified in other statutes and these are by no means negligible. It will suffice here to mention acts on: repairing or removing buildings damaged as a result of the elements (2001), the preparation of the soccer UEFA finals (2012), the preparation of flood protection investments (2010), and the support and development of telecommunications networks (2010).\(^{84}\) Additionally, the enactment of more detailed provisions in separate acts is utilized when the legislator wishes to introduce faster procedures and mechanisms (as compared to ones provided in MRE) that speed up the process of expropriation and facilitate carrying out public purpose investments. A good example of such an act is the act of 10 April 2003 on special principles of preparing and carrying out public road investments,\(^{85}\) which introduces special procedures of land expropriation. Such procedures cannot, however, violate the principles expressed in the

\(^{83}\) Czarnik, ‘Cel’, 74. 
\(^{84}\) Cf. Matusik 2012, p. 79. 
\(^{85}\) Journal of Statutes 2008; no. 193, item 1194, as amended.
The list of public purposes in art. 6 MRE introduces an aspect of certainty to expropriation and additionally protects the owners of immovables. The latter may employ legal instruments to protect their interests already at the stage of preparing local development plans. When a planned use matches one of the art. 6 MRE public purposes, landowners may choose to be active during the drafting of the local development plan and utilize legal instruments available to them in the planning procedure to influence the shape of the final plan. As has already been mentioned, expropriation may only concern land which is located in zones that have been designated for public purposes in local development plans or which are located in areas for which a decision of locating a public investment purpose has been issued (art. 112 s. 1 MRE). Despite this advantage, the list of public purposes does cause problems in interpretation even though it would seem that naming public purposes would eliminate most uncertainties. It is beyond the scope of this paper to analyze all the wording used to express public purposes in the MRE as well as in various special acts and point out the exact difficulties their interpretation has caused in practice. It will suffice to mention that the legislator uses the conjunctions: ‘and’, ‘as well as’ when designating activities forming a public purpose (e.g. establishing and maintaining; the construction and maintenance), while in some instances the alternative conjunction ‘or’ would be a more reasonable option. Due to the fact that the interpretation of expropriation provisions cannot as a rule extend beyond their literal meaning, the use of conjunctions will require all elements of the conjunction to be present.

Another inconsistency is that in some of the listed public purposes the legislator uses the adjective ‘public’, while in others that adjective is missing. In art. 6 point 1b) airports are mentioned; however, according to Aviation Law, there are two categories of airports, namely: public use airports and private use airports. Since the legislator has not indicated that art. 6 point (1b) MRE refers only to public use airports, this could lead to the conclusion that allocation of land for private use airports has also been classified as a public purpose. This interpretation must be rejected as it is difficult to maintain that airports that are not open to the public actually serve a public

89. Cf. Matusik 2012, p. 64.
A further discrepancy concerns art. 6 points (2) and (3) MRE, because water facilities mentioned in point (3) are already covered by point (2) which mentions liquids in general. The facilities mentioned in point (3) must be public, however even if they are not, most of them will still be covered by point (2) anyway, unless one concludes that just like with airports, point (2) only concerns public facilities. Views expressed in academic writings differ with some authors advocating the former and some the latter interpretation.

A public purpose which caused numerous controversies concerned the construction, maintenance and performing construction works of public communications and signalling systems (art. 6 point 1) MRE. The question that arose was whether this provision could be applied to the construction of cellular network base stations, since their proprietors are not public entities and operate not in order to fulfill a public purpose but to generate profit through their business. Nevertheless, cellular networks are accessible to the general public and even though the service is not free, the same principles apply to anyone wishing to make use of wireless communication. Building cellular network base stations is a part of building a telecommunications system which provides telecommunication services to the general public. Private telecommunication operators also have a number of public obligations they are required to perform in accordance with legal provisions regulating telecommunication services. In numerous judgments of first instance administrative courts as well as the Supreme Administrative Court, for the reasons stated above, it was held that erecting base stations for cellular networks is a public purpose and this line of judgment currently prevails.

This example shows that a public purpose does not necessarily denote an activity/investment that is performed and financed exclusively by a public authority. In fact

93. Czarnik 2009, p. 79.
95. Supreme Administrative Court judgment of 13 November 2007, II OSK 1506/06, LEX no. 438619; Supreme Administrative Court judgment of 10 May 2006, II OSK 811/05, LEX no. 236467; first instance administrative court in Gliwice judgment of 18 May 2007, II SA/G1852/06, LEX no. 507200; first instance administrative court in Gdańsk judgment of 22 June 2006, II SA/Gd 536/05, LEX no. 203307; an opposing view was presented in first instance administrative court in Gdańsk judgment of 22 November 2006, II SA/Gd 408/05, LEX no. 235253, in which the court held that building a cellular network base station by a commercial company is not a public purpose because not all investments connected with the provision of public services in the field of communication qualify as a realization of a public purpose.
the whole project may be financed from private funds. Administrative courts have pointed out that the adjective ‘public’ used in the list of art. 6 MRE is not a specification of the type of entity that will carry out the indicated public purpose, but of the type of activity/investment that is to take place. The investment must, however, be one which satisfies public needs and is accessible and open for public use even if not all members of the public are interested in utilizing it. Therefore a private airport which is not open for public use and is not aimed at satisfying the transportation needs of the general public cannot be classified as a public purpose, whereas a private cellular network is aimed at providing communication systems to all interested members of the public and does qualify as a public purpose. Public purposes cannot currently be perceived without acknowledging the so-called ‘privatization of public purposes’, which allows for public services to be provided by private entities or by public-private partnerships.

The above comments lead to the conclusion that the list of public purposes should be carefully reviewed in order to remove evident inconsistencies and phrases that cause difficulties in interpretation. Although it is not possible to completely remove all ambiguities, opinions that have been expressed by academic writers as well as by courts form a useful database which should be utilized to review art. 6 MRE as well as provisions of other statutes in which public purposes are introduced. It should also be noted that the adopted solution in which it is the legislator, and not public authorities, who specify public purposes has been assessed as beneficial to the protection of private ownership.
11.4 JUST COMPENSATION FOR EXPROPRIATION

11.4.1 The Constitutional Notion of Just Compensation

In art. 21 s. 2 PC it is stipulated that expropriation is only allowed when the requirement of just compensation is met. This requirement was explained in a widely cited judgment of the CT of 8 May 1990, K 1/90\textsuperscript{102} in which it was held that just compensation denotes fair compensation. Fair compensation must simultaneously be ‘equivalent’, because only equivalent compensation may compensate the loss of ownership. Deductions from the amount of compensation may only be made for rights encumbering ownership, but other types of offsets are inadmissible. The CT also noted that paying compensation in installments may amount to compensation which does not equalize the loss of ownership, particularly if the economy is suffering from severe inflation.\textsuperscript{103} An equivalent compensation should allow the affected person to recreate his proprietary situation from before expropriation occurred.\textsuperscript{104}

Two other important CT judgments, indicated by M. Wolanin,\textsuperscript{105} are ones of 25 November 2003 (K 37/02)\textsuperscript{106} and of 14 March 2000 (P 5/99).\textsuperscript{107} In the former judgment, the CT stipulated that violating the principle of just compensation is treated by the ECHR as the violation of the proportionality principle in the sense that the applied measures are not commensurate with the goals to be achieved through expropriation. A just compensation ensures that a balance is struck between the public interest and the need to protect the fundamental rights of persons. In the latter judgment, the CT agreed that the payment of just compensation is a required by law element that allows to achieve a balance between the deprivation of ownership and the need to fulfill a public purpose. The CT also emphasized that the PC does not provide further guidance as to how just compensation should be defined or calculated.

In a judgment of 23 September 2003, K 20/02,\textsuperscript{108} the CT considered the phrase ‘just compensation’ and concluded that the term is not equivalent to full compensation. It was explained that the PC does not require a full compensation of loss even if a person is completely deprived of his/her right. The compensation must only be just, however, not necessarily full. The fact that compensation does not cover all the losses experienced due to expropriation does not mean it is unconstitutional

\textsuperscript{102} OTK 1990/1/2.
\textsuperscript{103} CT judgment of 19 June 1990, K 2/90, OTK 1990/1/3.
\textsuperscript{104} CT judgment of 14 March 2000, P 5/99, OTK 2000/2/60.
\textsuperscript{105} Wolanin 2010, pp. 279-281.
\textsuperscript{106} OTK-A 2003/9/96.
\textsuperscript{107} OTK 2000/2/60.
\textsuperscript{108} OTK 2003/7A/76.
as long as the awarded compensation remains just. The CT also pointed out that
the full compensation principle accepted in civil law (private law) liability and
expressed in art. 361 § 2 k.c. of the Polish Civil Code (PCC), 109 which encompasses
real loss (damnum emergens) and lost profits (lucrum cessans), cannot be applied to
the interpretation of constitutional provisions. The latter are to be interpreted in
the light of constitutional principles, notions, and institutions and not in the
understanding of statutes.

This view has been confirmed in a more recent judgment of 16 October 2012, K 4/10110
in which the CT also referred to similar views expressed in a CT judgment of 20 July
2004, SK 11/02. 111 In both judgments, it was explained that just compensation for
expropriated immovables should be reasonably connected with their value, but it
does not always equal to that value. In the latter judgment, the CT explained that
the phrase ‘just compensation’ is more flexible than the term ‘full compensation’,
which was not actually employed in the constitutional provision. Consequently just
compensation may not be completely equivalent, however, arbitrary limitations of
compensation are always inadmissible. The notion of just compensation involves a
balancing of the public and the private interest and implies that the legislator is ratio-
nal. This also denotes that achieving a public purpose must be rational and cannot
cause financial obligations that the State is unable to fulfill. In the former judgment,
the CT also stressed that according to art. 134 s. 1 MRE, just compensation for an
immovable is, as a rule, equal to its market value and this should be viewed as a suit-
able basis for calculating compensation. According to the CT, the market value entails
the assumption, that the expropriated party will be able to recreate the state from
before expropriation and therefore there is no reason to base compensation on the
replacement value.

The above CT judgments clearly indicate that the CT is reluctant to accept that ‘just
compensation’ for expropriation denotes full compensation, particularly since even in
art. 361§2 PCC, it is stipulated that compensation covers real loss as well as lost
profits, unless statutory provisions stipulate otherwise (K 4/10). Most opinions
expressed in legal academic writings either automatically equate the market value
of an expropriated immovable with just compensation or do not question this basis
of calculating compensation. 112 It is true, that receiving the market value of the

110. OTK – A 2012/9/106.
111. OTK ZU 2003/7A/76.
112. Tarkowski, 2011, p. 174; A. Woźniak, ‘Scalenie, podział i wywłaszczenie nieruchomości’, in H. Kisie-
lewksa (Ed.), Nieruchomości. Zagadnienia prawne, Warszawa, Lexis Nexis, 2009, p. 205; R. Strzelczyk,
Prawo nieruchomości, C.H. Beck, Warszawa, 2011, pp. 315-316; A. Stemachowski, ‘Nabycie i utrata war-
immovable one has lost as a result of expropriation does balance the loss of that asset; however, this does not denote that the loss experienced as a result of expropriation has been compensated. The question that needs to be addressed is not whether compensation must be full or just, but whether one is considering compensation for losses caused by expropriation or compensation for the lost asset only. The wording of art. 21 s. 2 PC according to which expropriation is allowed when just compensation is paid does not indicate that only the value of the lost asset should be considered. In order to determine what just compensation for being expropriated is, one needs to consider the kinds of losses that the expropriated person experiences. These extend far beyond the market value of the lost immovable and usually include: lost profits, costs of finding and purchasing a new immovable, costs of moving and recreating the former household or business, increased costs of commuting. Therefore, it is justified to doubt whether accepting that just compensation for expropriation is equal to the market value of the expropriated asset is in fact a fulfillment of the constitutional requirement. It is reasonable to agree with the CT that just compensation does not have to be a full compensation, because some losses caused by expropriation would be very difficult or virtually impossible to compensate for and if taken ad absurdum would make expropriation an institution that cannot be applied in practice. Simultaneously, this does not justify a very simplified interpretation that since just compensation is not a full compensation it is enough to compensate only the value of the lost asset as opposed to compensating for the losses resulting from expropriation.

11.4.2 Just Compensation in the MRE

The constitutional provision on expropriation forms the basis for enacting more specific provisions in which the whole expropriation process is regulated. The general provisions on the expropriation of immovables are contained in the MRE in which it has been confirmed, that just compensation for expropriating a proprietary right to an immovable is equal to the value of that right (art. 128 s. 1 MRE). In other words, the legislator’s

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113. Cf. J. Kowalczyk, T. Ramian, ‘The value of corporate real estate for the purposes of expropriation’, in S. Żróbek (Ed.), Some aspects of compulsory purchase of land acquisition, Olsztyn, TNN, 2010, p. 95 et seq. where the authors consider the valuation of immovables that are a part of an operating business and which, when expropriated, cannot be easily or at all replaced by immovables in other locations. The question of just compensation for expropriating corporate real estate in relation to losses experienced by the operating business is carefully analyzed.

interpretation of the constitutional requirement of just compensation is limited to the value of the proprietary right that is taken. It is further stipulated that the value to be assessed is market value (art. 134 s. 1 MRE). If the expropriated immovable is one for which no market data exists (immovables with a particular use, features, etc. are not traded on the market), its replacement value is calculated (art. 135 s. 1 MRE).

Additionally, when determining the market value of the expropriated immovable, the valuer is given specific directions as to the assumptions on the use of the immovable that are to be made. If the use of the immovable which is consistent with the purpose of expropriation brings about an increase in its value, the immovable in question is to be valued according to the assumption that it is being put to that alternative use (art. 134 s. 4 MRE). This means that if the current use of the immovable at the date of expropriation generates a higher market value, that use should be considered in the valuation. However, if the current use of the immovable at the date of expropriation generates a lower market value than the use for which expropriation is taking place, the latter use (i.e. the alternative use) is to be accepted as a valuation assumption. This solution is aimed to work in favor of the expropriated party; however, it does not seem logical, fair, or necessary. In essence, the public pays a premium for an increase in value which is the result of a future public investment. The expropriated party is thus being compensated for future increases in value that are in no way related to his/her activities or losses resulting from expropriation. In other words, the expropriated party will be in a better situation due to expropriation than he/she would have been if a voluntary sale occurred. This does not correspond to the basic premise that compensation should be equivalent and allow the affected person to recreate his proprietary situation from before expropriation occurred (e.g. CT judgment K 1/99; P 5/99). Just compensation should allow the expropriated party to recreate the lost asset, but it has no connection with the changes of land value that will only occur once the property is expropriated and therefore qualifies to be put to an alternative use.

The MRE regulations indicate that the compensation for expropriation does not follow the assumption that the expropriated party’s material status should remain unchanged. The idea that compensation should reflect the objective value, i.e. the market value of the expropriated immovable (or another proprietary right to an immovable), but also the diminished value of the remaining property (broken ties, division) and other losses and costs that adversely affect the expropriated person’s financial status, has been rejected by the Polish legislator in the MRE. This poses questions as to the constitutionality of such a solution in the light of the requirement for compensation to be just, i.e. one which covers the damage experienced by the expropriated party.

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Even if one accepts that compensation should only reflect the value of the lost immovable, it is still debatable whether market value is the appropriate basis for calculating compensation for expropriation. Market value is dependent on market phenomena and market risks which influence the behavior and transactions that occur on the market, between market participants. It is questionable, however, if these market considerations should be applied to forced acquisitions of immovables when it is clear that the expropriated party is not taking part in a market transaction. Therefore, it should not come as a surprise that just compensation (i.e. an equivalent and economically commensurate one) is not as strongly connected with market value as may seem at first glance.

Moreover, calculating the market value of an immovable is an imperfect procedure because of deficiencies of the real estate market that may be exacerbated in markets that are still developing. In Poland, where the real estate market may still be qualified as an emerging or a developing market, difficulties in market valuations result from inefficiencies of the legal system (e.g. registration of titles in the land register suffers from unnecessary delays, local development plans are enacted only for selected areas), the limited availability of reliable and extensive market information (low market transparency), considerable volatility of the market (speculative capital, inflow of capital from EU countries), deficiencies in the skills of real estate valuers. The above challenges inherent in Polish market valuations suggest that the market value of an immovable is always a somewhat imperfect calculation which should probably be employed to set the bottom limit of just compensation but not to be its definitive indication. It has also been suggested that replacement value for an immovable may be a better alternative to market value since it is based on calculating the costs of buying a comparable plot of land and recreating fixtures of land, the cost of latter being decreased by depreciation. Thus, replacement value is closer to just compensation which should allow a person to recreate his lost proprietary right. Currently, according to art. 135 s. 1 MRE calculating the replacement value applies to immovables that are not traded on the market and is an exception to the rule that market value should be calculated. Nevertheless, even replacement value will not compensate losses other than the loss of the expropriated immovable. Furthermore, replacement value takes into account the depreciation of an asset while offers on the market may not include ones of older, more depreciated immovables. The expropriated party will therefore have difficulties in recreating his previous state on the basis of the replacement value alone.

It becomes increasingly difficult to support the assumption that the market value for
the lost immovable exclusively amounts to just compensation for expropriation
when one takes into account the elements that the current compensation system
of the MRE ignores, namely: the costs of finding (real estate broker) and purchasing
(notarial and other legal costs) a new immovable, the costs of moving to a new loca-
tion and establishing the household/business/agricultural activity there, the costs
of adapting the immovable to special needs (handicapped persons), severed per-
sonal and business connections, the diminished value of the retained part of the
immovable.121

Simultaneously, in a special piece of legislation, namely, the act of 10 April 2003 on the
special principles of preparing and completing public road investments,122 the legis-
lator does award an additional 10,000 PLN (approximately 2400 Euro) if the expro-
priated immovable (for the purpose of a public road investment) was put to a
residential use and the expropriated party actually lived there (art. 18 s. 1f). The
act also provides that all expropriated owners are entitled to an additional 5% of
the calculated value of the immovable if they vacate and hand over the immovable
subject to expropriation immediately but in any case no later than in 30 days (art.
18 s. 1e) after receiving a relevant administrative decision (as defined in art. 18 s.
1e points 1-3). The reasons for introducing these two incentives are easily understand-
able. The additional payment for expropriating a residential immovable in which the
owner actually resides is a reflection of the fact that costs of moving will have to be
borne by the expropriated party. This premium does not apply to residential immov-
ables in which the owner does not live or to other types of immovables. The premium
paid for swiftly vacating and handing over immovables to be expropriated is an addi-
tional motivation for the owners to cooperate during the expropriation process.123

The above provisions clearly illustrate that compensation for expropriating immov-
ables is not the same for everyone and that the legislator is willing to compensate
additional costs and losses, but only in selected situations. At the same time, it is dif-
ficult to understand why the legislator pays a premium for moving residential pre-
mises but does not do so when businesses have to be relocated. Moreover, the
above only applies to those expropriated for public road investments. It is also sur-
prising that only those expropriated for public road investments receive an additional
premium for their co-operation, but those expropriated for other public purposes do
not. Does this warrant the conclusion that some public purposes are more important
than others? Even if this could be justified, why should it influence the amount of
compensation to be paid? Compensation should reimburse the losses caused by

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122. consolidated version: Journal of Statutes 2008, no. 80, item 721, as amended.
expropriation and not generate other profits, paid from public money, to the expropriated person. Maybe the legislator is aware of the fact that the market value of the expropriated immovable is not enough to ensure the proper co-operation of expropriated persons who realize that this value does not cover the losses resulting from expropriation. Finally, this solution is questionable in the light of art. 32 s. 1 PC according to which everyone is equal in the light of the law and may expect to be treated equally by public authorities. This provision seems to be violated by the fact that just compensation for expropriation will only consist of the market value for some, while for others it will include additional payments not directly connected with the losses they incurred.124

At this point, it should also be mentioned, that expropriation must be preceded by negotiations to purchase the immovable through a private law contract, usually of sale or exchange (art. 112 s. 3 and 114 s. 1 MRE). In practice, since compensation for expropriation will not cover many substantial losses caused by expropriations, owners seek to negotiate a sale price that highly exceeds the market value of the immovable. The state or local authorities are sometimes more and sometimes less willing to pay such a price depending on the negotiating skills of the expropriated party, the type of the investment, the time pressure of completing the acquisition of necessary land, the number of owners that still must be expropriated, etc. This often results in a situation when some, more clever or determined owners are overcompensated while others are grossly under-compensated. This may occur particularly when the expropriating party loses its interest in negotiations and offers to pay a price that will cover little more than market value or only the market value. Although negotiations by their very nature produce different effects for different parties, this is not acceptable when public money is being spent on realizing a public purpose and the owner is forced to enter negotiations under the threat of being expropriated. It seems imperative to introduce additional rules concerning the prices that may be paid by public authorities as a result of negotiations which are conducted in forced conditions.

As an example, one may indicate that according to German law, the offer in negotiations must be reasonable and allow the owner to purchase a comparable property and re-establish the previous land use at a new location without suffering loss. The market value of the immovable to be expropriated as well as consequential damages and lost profits are all taken into account. If the owner refuses to accept an offer which is reasonable, it serves as the top limit of compensation that may be paid when expropriation proceedings are instigated and subsequent increases of value will not be taken into account. This should prevent any delaying tactics that owners may want

to employ in negotiations. Unfortunately, no such mechanisms are present in Polish regulations which denotes that the system of expropriation does not attempt to eliminate possible and observable in practice speculative behaviors and vast differences between prices paid for immovables as a result of pre-expropriation negotiations and the compensation paid if proper expropriation proceedings are instigated.

The need to compensate losses caused by expropriation and not just the loss of the immovable is evident when one considers some practical examples of expropriation. One of them concerns a blind person whose house was expropriated. The house was unattractive in terms of its design, functionality, and repair; however, it was designed and adapted to the needs of a blind person. Its market valuation was not very high and consequently made it impossible for the blind person not only to buy another house on the market, but also to buy one which was adapted to his needs. In a similar scenario, a person who used a wheelchair was expropriated from a house renovated and adapted to his needs and located in a neighborhood where long-lasting ties and cooperation among the neighbors developed. The market value may not fully reflect adjustments to the house connected with wheelchair access and similar requirements. Additionally, the ties of the expropriated owner with the supportive community will be severed and negatively impact the quality of his life.

Another example concerns the expropriation of a part of an immovable on which a residential house is located. The compensation paid amounted to the market value of the expropriated part, but it did not compensate for the decrease in the value of the remaining plot of land where the house is located. The decrease in value was a result of the vicinity of a new, busy public road, the increased noise and vibrations, as well as the undesirability of living near a busy, public road. Finally, when the expropriated immovable is a part of a business operation, the payment of market value does not compensate for lost profits during relocation, the cost of relocation, possible loss of clients, costs of relocating other business operations which have to be located in the vicinity of the main operation, or increased costs of commuting between business immovables. In many expropriation cases additional losses suffered by the expropriated owners are connected with lengthened distances they have to cover in order to reach their farms, warehouses, businesses, places of

127. Walacik, Żróbek 2010, pp. 4-5.
128. This is a particularly important issue when expropriating the homes of persons running an agricultural business who may not have the physical ability to relocate their homes to a location near their farms/fields (or vice versa), cf. M. Trojanek, The process of acquiring rights to properties with regard to
work, or homes.\textsuperscript{129} In an extreme case, an expropriated owner of agricultural and forested land was forced to use a detour in order to reach a bar that he operated on a piece of land that was left to him and excluded from expropriation. As a result of this expropriation, the distance to his bar for him and his clients became approximately 20 times longer and made operating the bar unprofitable. None of these arguments were taken into consideration and the supposedly ‘just compensation’ amounted to the bare market value of the expropriated land.\textsuperscript{130}

The above illustrate the extreme shortcomings of accepting that the payment of bare market value for the taken immovable fulfils the constitutional requirement of just compensation for expropriation and compel one to question the constitutionality of the relevant MRE provisions. None of the CT or other court judgments deny that just compensation should first and foremost allow the expropriated party to recreate his/her previous situation even if not all losses are compensated. There is, however, a notable difference between accepting that just compensation is not full compensation and accepting that just compensation is simply the market value of the expropriated asset. The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. Financial compensation on the basis of equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition; the money paid cannot fully replace what is lost.

11.5 Conclusions

The PC contains only a very concise provision on expropriation according to which it is allowed for a public purpose and with just compensation. A fuller understanding of the constitutional premises of expropriation requires additional interpretation of other constitutional provisions which allow one to conclude that expropriation should also meet the requirement of proportionality and that it may only be introduced in a statute as opposed to lower level legislation. It seems that the constitutional expropriation clause is unnecessarily brief and that an explicit statement as to the additional requirements mentioned above should be included in art. 21 s. 2 PC.

Luckily, the MRE which supplements the constitutional provision makes it clear that the expropriation of immovables is an instrument of last resort which may only be

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129. Walacik, Zróbek 2010, pp. 4-5.
employed if public purposes cannot be realized by means other than the deprivation of ownership and the necessary immovable could not be acquired through a contract (art. 112 s. 2 MRE). Moreover, expropriation is only allowed in areas which in local development plans have been designated for public purposes or when a decision about the location of a public purpose investment has been issued (art. 112 s. 1 MRE). These principles along with detailed administrative procedure (art. 113 et seq. MRE) ensure that expropriation is utilized only when absolutely necessary and when less drastic measures could not be employed. The constitutional proportionality and public purpose requirements are therefore fully implemented in the MRE.

Unfortunately the same cannot be said about just compensation that is to be paid for expropriation. Although it is reasonable to accept that just compensation does not have to amount to full compensation for all (even the most remote) losses that may occur as a result of expropriation, it should achieve a balance between the economic impact expropriation has on the landowner and the importance of implementing a public purpose investment. This balance cannot be achieved if just compensation includes only the market value (exceptionally the replacement value) of the immovable but no consequential damages or lost profits are taken into account. In effect, the compensation for expropriation does not allow the affected party to be put in an equivalent position to the one in which he/she was prior to expropriation. Therefore it is questionable whether compensation provided for in the MRE is in fact just/fair.

The lack of balance is further exacerbated by the fact that in negotiations which obligatorily precede expropriation it is possible to achieve a price that overcompensates the landowner at the expense of public money. The principle that landowners should neither be enriched nor impoverished by expropriation\(^\text{131}\) and that the compensation shall ensure that the affected party’s financial position is not weakened\(^\text{132}\) has not been properly reflected in the Polish legal system. This is surprising particularly in the light of comparative studies which show that many European and non-European systems (e.g. Austria, Canada, Cyprus, Finland, the Netherlands, Germany, Norway, New Zealand) include, in addition to the value of the lost immovable, lost profits, and other costs (consequential damages).\(^\text{133}\)


\(^{132}\) Cf. International Federation of Surveyors (FIG), *Compulsory Purchase and Compensation Recommendations for Good Practice*, Copenhagen, Denmark, FIG, 2010, p. 27.

\(^{133}\) Cf. S. Zróbek (Ed.), *Some Aspects of Compulsory Purchase of Land Acquisition*, Olsztyn, TNN, 2010, which contains a collection of papers concerning expropriation and compensation issues in various countries; also see, Walacik, Zróbek 2010, pp. 8-10 and the study they conducted: Comparative Study on International Compulsory Purchase Compensation Solutions in Accordance to FAO Principles of Equity and Equivalence, [www.fig.net/pub/fig2011/papers/ts08g/ts08g_walacik_zrobek_4799.pdf].
The following FAO observation is indicative of the practical consequences of being expropriated:

The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. Financial compensation on the basis of equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition; the money paid cannot fully replace what is lost.\textsuperscript{134}

It is therefore imperative to open a legal discussion on compensation paid according to MRE provisions in the context of experiences of other countries and economic analyses published outside the strictly legal realm. The full market value of expropriated land is not the perfect answer to compensating losses experienced as a result of expropriation, particularly since neither the obligatory negotiations nor the expropriation procedure are market phenomena.

\textsuperscript{134} FAO 2008, p. 23.
**LESS INVASIVE MEANS**

*The Relationship between Sections 25 and 36 of the Constitution of the Republic of South Africa, 1996*

*B.V. Slade*

## 12.1 Introduction

Section 25(2) of the 1996 Constitution of the Republic of South Africa states that property may only be expropriated in terms of a law of general application, for a public purpose or in the public interest and is subject to the payment of compensation. It was recently confirmed that the justification for an expropriation in terms of Section 25(2) of the Constitution lies in the public purpose or public interest that is served by the expropriation. The payment of compensation can therefore never justify the expropriation, since the payment of compensation is only a required result of a valid expropriation. The question that was raised in recent court decisions was whether the availability of less invasive means to achieve the purpose of the expropriation is a valid defense against an expropriation. In other words, the issue was whether the presence of an alternative less intrusive measure would be able to invalidate an expropriation that is otherwise lawful in terms of the constitutional requirements.

The less invasive means argument is a novel argument in South African expropriation law and takes either one of two forms. Firstly, the less invasive means argument can be aimed at the adoption of a different and less invasive measure such as a regulatory scheme that does not involve expropriation of the property. Secondly, the less invasive measure can relate to the expropriation of only a portion of land instead of the entire parcel. Therefore, the adoption of such a different measure would in theory still ensure that the public purpose is met, but without expropriating the property or the whole of the property.

Recent case law creates the impression that courts will not easily question the expropriator’s decision to expropriate if it finds that the expropriation is for a public purpose or in the public interest. This can be attributed to the deference traditionally shown towards the choices made by the administrator and the rationality test that

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2. Harvey v. Umhlatuze Municipality 2011 1 SA 601 (KZP), Para. 82.
the courts customarily apply in expropriation cases. Therefore, once a court has found that a particular expropriation is for a valid public purpose or in the public interest it will not entertain the argument that the expropriation should be declared invalid because the purpose for which the property is expropriated can also be realized by alternative and less invasive measures.

In a previous article, I considered whether the application of a proportionality-type inquiry in determining whether the expropriation is justified in terms of the public purpose or public interest requirement might involve taking less invasive means into account. It was found that it is unlikely that the courts will ever apply a proportionality-type inquiry in that particular instance, given the deference usually showed towards the decisions of administrators to expropriate property. The decision to expropriate property also constitutes an administrative action and therefore it must comply with Section 33 of the Constitution. As a result, I also considered whether, in terms of the reasonableness analysis, the application of a proportionality test in reviewing the decision of the administrator to expropriate property can involve the question whether less invasive means was taken into account when the administrator decided to expropriate the property. The status of proportionality as a ground for review is, however, controversial in South African law, making it unlikely that less invasive means will play a meaningful role in reviewing the decision to expropriate.

In this contribution, the relationship between Section 25 and the general limitation clause in Section 36 of the 1996 Constitution, which refers to less restrictive means as a factor to consider in determining whether a limitation placed on a right in the bill of rights is justified, is considered. If Section 36 finds application to Section 25, the less invasive means argument should find application in the evaluation as to the whether the expropriation (the limitation on a right) is justified.

12.2 Case Law

12.2.1 Introduction

The less invasive means argument can take either one of two forms. Firstly, the applicant may argue that the expropriation of his entire parcel of land for the fulfillment of

5. Section 33(1) of the 1996 Constitution provides that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”.
7. See Slade 2013, pp. 208-209.
the public purpose is unnecessary, since only a portion of the property is in fact required to realize the public purpose. This argument was raised in the decision of *Bartsch Consult (Pty) Ltd. v. Mayoral Committee of the Maluti-A-Phofung Municipality* (Bartsch). Secondly, the applicant may argue that the expropriation in its entirety is unlawful, since a different measure that does not involve expropriation would be equally effective to realize the purpose of the expropriation. This argument was raised in *Erf 16 Bryntirion (Pty) Ltd. v. Minister of Public Works* (Erf 16 Bryntirion).

12.2.2 *Bartsch Consult v. Mayoral Committee of the Maluti-A-Phofung Municipality*

In the *Bartsch* decision, the respondent expropriated the applicant’s property to construct a road. The expropriation notice authorized the expropriation of property for purposes of building a road (regarded as the primary purpose of the expropriation) and doing all things necessary in connection with building the road (regarded as the secondary purpose of the expropriation). The applicant argued that the expropriation of its property is unlawful, since it was expropriated for the benefit of a third party. The section of the property not needed for the construction of the road was to be transferred to a third party for the erection of a shopping complex. In the alternative the applicant argued that the expropriation of its entire parcel of land was unlawful since it only required a portion of the land to construct the road.

The court regarded the building of a shopping mall by a third party as falling within the secondary purpose of the expropriation, namely doing all things necessary in connection with building a road. As a result, the court held that the expropriation of the land in its entirety is for a public purpose and therefore lawful. The court also dismissed the applicant’s argument that the expropriation of the additional land was unlawful, because the court was of the opinion that the applicant confused motive with purpose. Since the expropriation was for a valid purpose and was done in good faith, the motive behind the decision to expropriate was apparently irrelevant “to the question whether the power of expropriation had been validly exercised”.10 The applicant could not prove bad faith on the part of the expropriator when its property was expropriated and the court therefore could not find any fault in the decision of the expropriator to expropriate the entire parcel of land.11

The court did not consider the argument of the applicant concerning the expropriation of the parcel of land not needed to construct the road since the court was satisfied

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11. The court did not consider whether the expropriation of the additional property to allow the third party to use it for economic development purposes was also for a valid public purpose. See Slade 2013, p. 201.
that the building of a shopping mall was allowed for in the expropriation notice. In that regard, the court did not consider less invasive means as an alternative measure to realize the primary purpose of the expropriation.

12.2.3 Erf 16 Bryntirion (Pty) Ltd. v. Minister of Public Works

In this case, the applicant’s property was expropriated in order to upgrade the security of the Bryntirion estate. The official residence of the president of South Africa as well as the official state guest house is situated within the estate. The minister of public works was of the opinion that the state had to own all the properties in order to create one geographical unit to effectively ensure that the estate was properly secured. The applicant’s property, being the only property in the estate that was not owned by the state, was consequently expropriated in order to incorporate the property into the enclosed estate.

The applicant, as well as the high court and the Supreme Court of Appeal, accepted that the expropriation of his property for purposes of improving the security of the presidential estate is for a valid public purpose. The applicant nevertheless argued that the expropriation of his property is unnecessary because there were alternative means available to the state that would still ensure that the security of the estate was improved. The alternative less invasive measures included the exclusion of his property from the estate and the building of high walls between the applicant’s property and the estate.

The high court held that since the expropriation was for a valid public purpose, the presence of alternative, less intrusive means to achieve the result was irrelevant. Similarly, the Supreme Court of Appeal also accepted that the expropriation was for a public purpose before addressing the argument of the applicant that the expropriation was unnecessary because there was a lesser intrusive means available to achieve the required result. In this regard, the Supreme Court of Appeal held as follows:

It is for the expropriating authority to decide how best to achieve its purpose. The evaluation of whether an expropriation is expedient or necessary lies with the expropriating authority. The fact that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a ‘public purpose’.

12.2.4 Evaluation

From the decisions discussed above, it seems unlikely that the South African courts will consider alternative means to realize a public purpose as a means to invalidate an expropriation. It may seem as if the courts shy away from strictly scrutinizing the need for the state to exercise its power of expropriation. This can be attributed to the rationality test that the courts customarily apply in expropriation cases.\(^\text{15}\) In terms of the rationality test the availability of alternative less invasive means is not considered, since the courts are deferent towards the decision of the expropriator once it is satisfied that there is a rational connection between the decision and the purpose of the decision.

12.3 The Relationship between Sections 25 and 36 of the 1996 Constitution

12.3.1 Introduction

It is apparent from the decisions discussed above that South African courts do not regard a lesser invasive means to realize a public purpose to be a valid defense against an expropriation or even as a relevant consideration in deciding whether the expropriation is justified in terms of the public purpose requirement.\(^\text{16}\) However, Section 36(1) Constitution, the general limitation clause, states that a right in the bill of rights may only be limited to the extent that the limitation is reasonable and justifiable, taking into account all relevant factors.\(^\text{17}\) In Section 36(1)(e), the factor that may be considered is “less restrictive means to achieve the purpose”. Section 36(1) usually comes into play during the second stage in the two-stage approach to bill of rights litigation.\(^\text{18}\) The two-stage approach involves, during the substantive phase, firstly the question whether there has been an infringement of a right in the bill of rights, and secondly (when an infringement was proved), whether that limitation is justifiable in terms of Section 36.\(^\text{19}\) If the two-stage approach is

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\(^{15}\) See Badenhorst, Pienaar, & Mostert 2006, p. 567.

\(^{16}\) See especially Erf 16 Bryntirion (Pty) Ltd v. Minister of Public Works [2011] ZASCA 246, Para. 16.

\(^{17}\) Section 36(1): “The rights in the Bill of Right may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”


followed, Section 36(1) and specifically “less restrictive means to achieve the purpose” may be taken into account in deciding whether the limitation of a particular right is justified.

Although it was initially assumed that the two-stage approach to bill of rights litigation would also apply when it concerns the protection of property in terms of Section 25,20 the Constitutional Court in First National Bank of SA Ltd. t/a Wesbank v. Commissioner, South African Revenue Service; First National Bank of SA Ltd. t/a Wesbank v. Minister of Finance21 (FNB) set out a particular methodology in which all constitutional property disputes in Section 25 should be evaluated. The steps laid down in the FNB decision allows for justification in terms of Section 36(1) when a particular action results in an arbitrary deprivation of property or an expropriation that conflicts with Section 25(2).

12.3.2 Applying the FNB Methodology to All Constitutional Property Disputes

The Constitutional Court in FNB set out a particular framework in which all constitutional property disputes in Section 25 should be evaluated.22 In terms of the FNB decision, expropriation is a subset of deprivation; therefore, all expropriations (Section 25(2)) must also satisfy the test for a valid deprivation in terms of Section 25(1).23 In FNB, the Court also recognized that a deprivation that does not pass scrutiny under Section 25(1) should be justified in terms of the general limitation clause, Section 36.24

22. The first question is whether that which is taken away constitutes property for purposes of Section 25. If answered in the affirmative it is asked whether there has been a deprivation of such property. If there has been a deprivation of such property it is asked whether the deprivation is consistent with Section 25 (1). If is not consistent with Section 25(1) it is asked whether the deprivation is justified in terms of Section 36 of the Constitution. If it is justified in terms of Section 36, it is asked whether the deprivation amounts to an expropriation for purposes of Section 25(2). If the deprivation amounts to an expropriation, it is asked whether it complies with Section 25(2). If it does not comply with Section 25(2), it is asked whether it can nevertheless be justified in terms of Section 36(1). It should be noted that when any of the questions has been answered in the negative, that is the end of the enquiry. For instance, if that which is taken away does not constitute property for purposes of Section 25, the inquiry does not proceed past the first stage. First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 4 SA 768 (CC), Para. 46.
24. First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 4 SA 768 (CC), Paras. 46, 58. In National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 74, the Constitutional Court stated that it previously assumed,
Much has been written about the FNB methodology, all of which will not be repeated here.25 The effect of the methodology proposed by the Court in FNB is that the determination of whether a deprivation (or an expropriation) would pass constitutional muster will depend on the evaluation of whether a particular deprivation is arbitrary.26 According to the Court in FNB, a deprivation is substantively arbitrary if there is insufficient reason for the deprivation. To determine whether there is insufficient reason for the deprivation, a ‘complexity of relations’27 must be considered. This particular test is contextual and the level of scrutiny also depends on the particular context.28 Sufficient reason may in some cases be established through the application of a mere rationality test, while in other cases a proportionality test might be necessary.29 The proportionality test that might be applied in some instances resembles, or is closer to, the test in terms of Section 36(1).30 It is also said that the factors for determining whether there is sufficient reason for the deprivation as explained in the FNB decision is the same as the factors in Section 36(1).31

Therefore, a deprivation that fails the Section 25(1) test will also fail the Section 36(1) test given the similarity between the arbitrariness test as laid down in the FNB decision and the factors contained in Section 36.32 If an expropriation passes the arbitrariness test (and it can then be assumed that it will also pass the Section 36(1) test), it is difficult to imagine that it will be declared invalid because it does not comply with the specific requirements in Section 25(2).33 For instance, if an

without deciding, that a deprivation can also be justified in terms of Section 36(1). In that regard the Court stated that “the text of section 36 does not suggest that any right is excluded from limitation under its provisions”.


26. In this regard Roux 2003, chap. 46-2-46-3, 46-23 argues that the property clause inquiry will be dominated by the arbitrariness test.


28. See Van der Walt 2011, pp. 245-246.

29. First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 4 SA 768 (CC), Para. 100(g). See also Van der Walt 2011, p. 246.

30. See National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 75, and the discussion of this decision below.

31. Van der Walt 2011, p. 77; Badenhorst, Pienaar & Mostert 2006, pp. 530-531. See National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 75, and the discussion of this decision below.


33. See Van der Walt 2011, pp. 451-452.
expropriation is not undertaken for a public purpose or in the public interest, it would have already been declared invalid during the determination of whether the deprivation is arbitrary.\textsuperscript{34} Therefore, an inquiry into the validity of an expropriation would either be constitutional or not based on the finding of whether the expropriation is arbitrary as formulated by the Court in FNB.\textsuperscript{35}

Given that expropriation is a subset of deprivation, and that all property disputes should, in terms of the FNB decision, first have to be answered in terms of Section 25(1) and that the outcome will depend on whether the deprivation is arbitrary, it has been argued that it is highly unlikely that Section 36(1) limitation analysis would apply to constitutional property disputes,\textsuperscript{36} except in “the most singular and abnormal cases”.\textsuperscript{37} This would in principle mean that when a claimant protests against the legitimacy of the expropriation of his property in terms of the Expropriation Act 63 of 1975, it should firstly be considered whether the state interference constitutes an arbitrary deprivation of property.\textsuperscript{38} Given the arbitrariness-vortex argument of Roux,\textsuperscript{39} it is difficult to see how a Section 36(1) analysis would add anything to the inquiry, because the arbitrariness test will determine whether the objection raised against the expropriation will succeed or fail.

However, it should still be possible to take less invasive means into account, but in a very unique way. As already indicated above, the determination as to whether the deprivation is arbitrary, as described in the FNB decision, will involve the same set of questions that would have been asked in Section 36(1).\textsuperscript{40} If the deprivation is therefore arbitrary, it cannot be saved in terms of Section 36(1) given the similarity. If the deprivation is not arbitrary, it will also pass the Section 36(1) inquiry. However, the arbitrariness test can involve the consideration of whether a less invasive means is available. Or alternatively, if the courts were to follow the FNB methodology, the

\textsuperscript{34} With reference to First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 4 SA 768 (CC), Para. 100, Van der Walt 2011, pp. 228 states that the “[r]ecognition of an implicit public purpose requirement fits in with section 25(1) of the South African Constitution, especially in view of the fact that the Constitutional Court has confirmed that the prescription of arbitrary deprivation is intended to ensure that deprivation of property is imposed with due regard for proportionality between the public interest served by regulation and the private interests affected by it.”

\textsuperscript{35} See Roux 2003, Chap. 46-2-46-3, 46-23.


\textsuperscript{37} Van der Walt 2011, pp. 77.

\textsuperscript{38} Since all expropriations are undertaken in terms of legislation, it is assumed that the ‘law of general application’ requirement in Section 25(1) and Section 25(2) will seldom lead to difficulties.

\textsuperscript{39} Roux 2003, chap. 46-2-46-3, 46-23.

\textsuperscript{40} National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 75. See also I.M. Rautenbach, ‘Overview of Constitutional Court Judgments on the Bill of Rights – 2012’, 2013 TSAR, p. 319; Van der Walt 2011, p. 77.
courts can apply the arbitrariness test (with specific reference to the factors in Section 36) to an expropriation, in a contextual approach.

For instance, in National Credit Regulator v. Opperman\textsuperscript{41} the Constitutional Court had to decide whether to uphold the high court’s declaration of unconstitutionality of Section 89(5)(c) of the National Credit Act 34 of 2005 (NCA) because it constitutes an arbitrary deprivation of property in contravention of Section 25(1) of the Constitution. In that decision the Court held that the deprivation of the respondent’s enrichment claim is property and therefore enjoys protection in terms of Section 25.\textsuperscript{42} The Court also held that there was a deprivation of such enrichment claim; that the deprivation is arbitrary because there was insufficient reason for such a deprivation; and that the means chosen to deter unregistered credit providers from extending credit outside of a regulatory framework was disproportionate.

What is of interest for present purposes is the Constitutional Court’s approach to the test for arbitrariness as previously laid down in \textit{FNB} and the factors in Section 36(1). The Court stated that:

\begin{quote}
[m]any of the factors employed under the arbitrariness test to determine sufficiency of reason yield the same conclusion when considering whether a limitation is reasonable and justifiable under Section 36.\textsuperscript{43}
\end{quote}

For instance, there must be an appropriate relationship between the limitation and the purpose as envisaged by Section 36(1)(d), which is also a consideration when determining whether a deprivation is arbitrary.\textsuperscript{44} The Court also specifically considered the factor in Section 36(1)(e), namely, the availability of less restrictive means to deter unregistered credit providers from extending credit outside of the ambit of the regulatory regime, in coming to the conclusion that the deprivation is arbitrary. According to the Court a less restrictive mean can include the forgoing of interest by the unregistered credit provider. This less restrictive means would not lead to the deprivation of the unregistered credit provider’s enrichment claim in all situations.\textsuperscript{45} The Court ultimately held that Section 89(5)(c) cannot be saved “as a reasonable and justifiable limitation of the right not to be deprived of property arbitrarily”.\textsuperscript{46} The Court also summarized its finding as follows:

\textsuperscript{41} 2013 2 SA 1(CC).
\textsuperscript{43} National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para 75. In this regard Rautenbach 2013, p. 319 states that “[t]he court now frankly states that the concept ‘arbitrary’ is applied by taking into account all the considerations referred to in Section 36(1)(a)-(e).”
\textsuperscript{44} First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance 2002 4 SA 768 (CC), Para. 100.
\textsuperscript{45} National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 78.
\textsuperscript{46} National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 80.
The nature of the right, the importance of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose have all, in effect, been considered in determining whether the deprivation is arbitrary.47

In terms of this construction, it seems possible that less restrictive means to achieve the purpose when property is expropriated can be taken into account in the evaluation of whether the expropriation is arbitrary in terms of Section 25(1) of the Constitution. The less restrictive means can, therefore, be taken into account in a contextual approach that incorporates the factors in Section 36(1) by applying the FNB methodology to all constitutional property disputes.

12.3.3 The Courts’ Evasion of the FNB Methodology in Formal Expropriation Cases

The Constitutional Court in FNB laid down a specific methodology that should be applied when a Section 25(1)-(3) infringement has been shown. However, recent case law suggests that when a formal expropriation48 has taken place, courts will not stick to the FNB methodology of starting with the requirements for a valid deprivation in terms of Section 25(1), but will proceed directly to Section 25(2), asking whether the expropriation was undertaken for a valid public purpose or in the public interest or whether the compensation is just and equitable as required by Section 25(2) and (3).49

For instance, in Du Toit v. Minister of Transport50 where the applicant’s property was expropriated for purposes of building a road the Constitutional Court had to consider whether the compensation offered to the applicant in terms of the Expropriation Act 63 of 1975 was just and equitable as required by Section 25(3) of the Constitution. In this decision, there was a clear expropriation in terms of the National Roads Act 54 of 1971, and it was merely assumed that the purpose of the expropriation (upgrading a national road) is for a public purpose. The Court immediately proceeded to ask whether the compensation is just and equitable as required by Section 25(3) of the Constitution, without following the steps in FNB. Similarly, in the cases discussed above, Bartsch51 and Erf 16 Bryntirion,52 the relevant courts accepted that the limitation rose to the level of expropriation that had to comply with Section 25(2). In these

47. National Credit Regulator v. Opperman 2013 2 SA 1 (CC), Para. 79 (emphasis added).
48. In this sense ‘formal expropriation’ refers to the situation where a property owner has been served with an expropriation notice in terms of relevant legislation that confers expropriatory powers on a particular authority (for instance the National Roads Act 54 of 1971), indicating the purpose for which the property is expropriated, the date of expropriation and the compensation offered in terms of the Expropriation Act 63 of 1975.
50. 2006 1 SA 297 (CC).
decisions, the relevant courts did not first consider whether there was an arbitrary deprivation as prescribed by FNB.

If the courts proceed directly to Section 25(2), without following FNB, the arbitrariness test (which overlaps with the factors in Section 36(1)) is not considered but attention is only paid to the specific requirements in Section 25(2) and (3). Furthermore, in the absence of following the FNB methodology the courts do not follow the two-stage approach to bill of rights litigation. In that regard, the factors contained in Section 36(1) is not considered. This creates the impression that if the state expropriates property it must only comply with the specific requirements in Section 25(2), namely, that is must take place in terms of a law of general application, must be for a public purpose or in the public interest and the compensation offered must be just and equitable. If the expropriation does not take place in terms of a law of general application or the purpose of the expropriation is not a valid public purpose or in the public interest, the expropriation will be invalid.53 This creates the impression that Section 25(2) might protect nothing more than the right not to be expropriated of property but for the provisions in the relevant section.

12.3.4 Applying the Two-Stage Approach to Bill of Rights Litigation to Section 25(2) Disputes

It was already shown that the courts do not apply the FNB methodology when a formal expropriation has taken place. In principle, it should be possible that Section 36(1) can still find application if the two-stage approach to bill of rights litigation is applied to Section 25(2) disputes. Section 36(1) is relevant during the second stage of substantive bill of rights litigation, in other words when it is considered whether the limitation of a right in the bill of rights is justified. However, certain provisions in the bill of rights, such as Section 25(1) and 25(2), contain specific limitation provisions and this seemingly complicates the application of Section 36(1) to these sections.54 Section 25(1) states that “[n]o one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property”.55 Section 25(2) states that property may only be expropriated in terms of a law of general application, for a public purpose or in the public interest and is subject to the payment of

53. If the compensation is not just and equitable the expropriation will in itself not be invalid, since the payment of compensation is not a legitimacy requirement, but a required consequence of a valid expropriation. In this regard see Harvey v. Umhlatuze Municipality 2011 1 SA 601 (KZP), Para 82; Van der Walt 2011, p. 496.

54. Sections 9, the right to equality, and 12, the right not to be deprived of freedom arbitrarily and without just cause, are further examples. In this regard see I.M. Rautenbach, ‘The Limitation of Rights in terms of provisions of the Bill of Rights other than the general limitations clause: A few examples’, 2001 TSAR, pp. 617-641. See also Woolman & Botha 2006, chap. 34-4-34-5.

55. (emphasis added).
What is of special importance is the relationship between the specific limitation provisions contained in Section 25(2) and the general limitation clause. This relationship can only be considered effectively if it is accepted that Section 25(1)-(3) protects a right to property and not just a right not to be deprived or expropriated of property but for the specific requirements of Section 25(1) and (2).

Rautenbach argues that if a clause in the bill of rights contains a specific limitation provision applicable only to that right, the specific limitation provision should be applied cumulatively to the factors contained in the general limitation clause. The presence of a specific limitation provision does not therefore exclude the general limitation provision, since it applies to all rights. In that regard a special limitation provision may set more stringent requirements for limitation of that particular right, may “render the limitation of a specific right easier”, clarify an uncertainty with regard to an element in the general limitation clause, or just simply re-iterate what is stated in the general limitation clause.

With regard to the relationship between the specific limitation provisions in Section 25(2), namely, that an expropriation may take place only for a public purpose or in the public interest and that compensation must be paid, and the general limitation clause, Rautenbach argues as follows: When an infringement of property rises to the level of expropriation, it is only justified in terms of the specific limitation provision if it is undertaken for a public purpose or in the public interest, which according to Rautenbach qualifies the general limitation clause with respect to “the importance of the purpose of the limitation”. An expropriation may therefore not be undertaken for any other purpose, such as a private purpose, but only for a public purpose or in the public interest. Section 25(2), read with Section 25(3), also stipulates that compensation must be paid when an infringement rises to the level of expropriation. According to Rautenbach this specific limitation provision:

56. (emphasis added)
57. See Van Walt 2011, pp. 34-42 for arguments raised for and against viewing Section 25(1)-(3) as a property guarantee.
60. Rautenbach 2012, p. 315.
qualifies the general limitation clause, [Section 36(1)(d)] because it prescribes that the appropriate relation between the limitation of the right and its purpose must be achieved through the payment of compensation and in no other way, for example, through the rewarding of expropriates with civil-service appointments.64

Given that Section 25(2), read with 25(3), qualifies two of the provisions in the general limitation clause, what is the position of the remaining provisions in Section 36(1) that Section 25(2) does not qualify or clarify?65 Is it possible to take less restrictive means into account in evaluating whether the expropriation is justified? In this regard Rautenbach states the following:

The provisions of section 25(2) and (3), therefore, contain special limitation requirements that qualify the general limitation in respect of the purpose for which the limitation may be imposed and the way in which an acceptable relation between purpose and limitation must be achieved. This is not a complete overlap. In principle, section 36 as embodied in the non-arbitrary requirement of section 25(1) must, therefore, apply to expropriation to the extent that section 36 has not been qualified by section 25(2) and (3).66

Following Rautenbach’s argument, it is possible to conceive that the factors mentioned in Section 36(1) not specifically qualified by Section 25(2) can find application when it is considered whether the expropriation (the limitation on the right to property) is justified. Therefore, when there is an alternative means to realize the purpose of expropriation, such as expropriating only a part of the property or instituting a regulatory measure, the expropriation may in principle not be justifiable in terms of Section 36(1). If the expropriation does not, on the facts of the case, constitute a justifiable limitation then the expropriation should be invalid.

Although this approach looks appealing and quite straightforward, the courts do not follow the two-stage approach to bill of rights litigation when it concerns a Section 25 (2) dispute.67 The FNB methodology as prescribed by the Constitutional Court is also not followed. The courts, in evaluating whether an expropriation is justifiable, only inquire whether the specific requirements of Section 25(2) have been complied with. In the Erf 16 Bryntirion v. Minister of Public Works68 decisions, the courts only considered whether the expropriation is justified in terms of the public purpose requirement.

65. Section 36(1)(a), (c) and (e) of the 1996 Constitution.
66. Rautenbach 2011, Para. 1A73.3; Rautenbach 2012, p. 410.
In Du Toit v. Minister of Transport,\textsuperscript{69} the Constitutional Court only considered whether the compensation offered complied with the relevant Constitutional provisions. This creates the impression that Section 25(2) is a guarantee of nothing more than the right not to be expropriated of property but for the specific requirements in Section 25(2).\textsuperscript{70} If property is expropriated for a public purpose or in the public interest in terms of a law of general application and the compensation is just and equitable, the expropriation is valid and that is the end of the matter. If however, the expropriation does not take place for a public purpose or in the public interest, then the expropriation is invalid and no further justification can be offered. In that regard the chances are slim that Section 36(1), and particularly the less restrictive means factor in Section 36(1)(e), can find application to a Section 25(2) dispute.

12.3.5 Evaluation

The courts do not follow the \textit{FNB} methodology as prescribed by the Constitutional Court when a formal expropriation has taken place. It also seems unlikely that the two-stage approach to bill of rights litigation will apply to a Section 25(2) dispute. If Section 25(2) is regarded as nothing more than the right not to be expropriated of property but for the requirements in Section 25(2), it seems improbable that less invasive means will be considered given that the South African courts customarily apply a rationality test when considering whether an expropriation is justified in terms of Section 25(2).\textsuperscript{71} South African courts are deferent towards the decision of the expropriator and once they are satisfied that there is a rational connection between the decision and the purpose of the decision, the expropriation is deemed to be justified. While this position may be unproblematic in cases where the property is expropriated for a public purpose, such as building roads, it may be unsatisfactory when property is expropriated in the public interest, such as expropriating property for purposes of economic development, where a third party transfer is also involved.\textsuperscript{72}

12.4 Conclusion

The justification of an expropriation lies in the public purpose or public interest that is served by the expropriation.\textsuperscript{73} In recent court decisions, South African courts have
indicated that once it is found that an expropriation is for a valid public purpose or in the public interest, the fact that there may be less invasive means available to realize the purpose of the expropriation is irrelevant. In this article, two ways in which less invasive means could be taken into account when determining whether an expropriation is justified was considered. The first concerns the application of the FNB methodology to all constitutional property law disputes, while the second relates to the application of the two-stage approach to constitutional litigation. Above it was pointed out that neither of the possibilities seems to be viable. Courts do not follow the FNB methodology of starting with Section 25(1) when the case concerns a formal expropriation, and in the absence of following the FNB methodology, courts do not follow the two-stage approach. In all cases dealing with a formal expropriation, the courts only consider whether or not the expropriation complies with the specific requirements in Section 25(2). If the expropriation, therefore, takes place in terms of a law of general application, is undertaken for a public purpose or public interest and the compensation is just and equitable, then the expropriation is justified and no further objections can be raised. Since the two possibilities outlined in the paper seem not to be feasible, the argument for the application of a proportionality type inquiry in terms of Section 25(2) becomes stronger, especially where property is expropriated for broader purposes that are vaguely in the public interest.

Recent case law confirms that as long as there is a rational connection between the purpose of the expropriation and the expropriation as a means to realize that purpose, and provided the purpose vaguely satisfies the public purpose or public interest requirement on that low level of scrutiny, the courts will not query or invalidate the decision of the expropriator to expropriate property purely because there may be an alternative means to realize the same purpose. The generally deferent attitude adopted by the courts implies that the availability of an alternative, less invasive means to realize the purpose is not currently a valid ground for an attack on the decision to expropriate.

In situations where the purpose of the expropriation is uncontroversial, this approach is unproblematic. For instance, ensuring the safety of the state president is a valid public purpose as understood narrowly and if the responsible authority decides that expropriation of private property is the best way to ensure the safety of the president, the expropriation should arguably not be set aside by the courts easily merely because alternative measures to reach the goal are available. In the Irish decision of Lord Ballyemond v. The Commission for Energy Regulation the court held that even if there are alternative means available to realize a valid public purpose, the decision

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76. 2006 IEHC 206.
to expropriate property along a specific route or in a specific manner can only be set aside if there is a substantial reason as to why the expropriating authority should have elected to expropriate along a different route. Mere unhappiness on the side of the expropriated owner is, therefore, not a ground for setting aside the expropriation.77

To this extent, current reluctance to accept the less invasive means argument is justifiable. However, in cases where the purpose of the expropriation is in itself controversial, such as vaguely defined economic development purposes or transferring expropriated property to third parties for economic development purposes, the availability of less invasive means to realize the purpose cannot be irrelevant.78

In German law, legislation must be specific about the purpose for which property is expropriated. It therefore has to indicate that expropriation of property is absolutely necessary for the achievement of a particular, specific public purpose. As a result of the public purpose requirement in Article 14.3 of 1949 German Basic Law,79 coupled with the proportionality principle applied by the German courts when adjudicating expropriation cases, an expropriation is only valid if it is the only manner (ultima ratio) in which the public purpose can be realized.80 If an alternative, less invasive means is available to realize that specific public purpose, the expropriation can be set aside by the courts.81 This ensures that the appropriate balance between the protection of individual property rights and the interest of the society is maintained, without unduly interfering with the decision-making powers of the administration.82 Therefore, it is suggested that a stricter proportionality enquiry, as is applied in German expropriation law, should also be applied in South African law in cases where the purpose of

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78. This is especially true in the absence of a dedicated legislative scheme that defines the proposed development and that includes some kind of control over or accountability of the purpose.
79. Grundgesetz für die Bundesrepublik Deutschland 1949.
81. In this regard Mostert 2002, p. 303 states that there should be ‘no other more lenient or less serious method’ available to the state to realise the purpose of the expropriation. See further Wendt 2007, p. 629, Para. 164; D. Kleyn, ‘The Constitutional Protection of Property: A Comparison between the German and South African Approach’, (1996) 11 SAPL, p. 436.
the expropriation is controversial or in cases where it is not immediately apparent that the purpose complies with the constitutional requirements.

Recent South African case law suggests that courts will not apply a proportionality-type enquiry to expropriation decisions.\textsuperscript{83} Again, this level of judicial deference is acceptable where the purpose of the expropriation is unproblematic. However, it is submitted that courts should apply a stricter proportionality-type test, possibly on the basis of administrative law, in expropriation cases where it is not immediately clear that the expropriation is for a valid public purpose or in the public interest, such as expropriation for vague economic development purposes not controlled in terms of a development scheme set out in dedicated authorizing legislation. In such cases, a stricter enquiry into the proportionality of the decision to expropriate arguably affords stronger protection of property rights by ensuring that expropriation must be strictly necessary to achieve the desired aim. In the event that alternative less intrusive measures are available, it should at least cast doubt on whether the expropriation is strictly necessary and justified. However, this will arguably only be the case when the purpose of the expropriation is not a narrow public purpose, but more broadly in the public interest.

EXPROPRIATORY COMPENSATION, DISTRIBUTIVE JUSTICE, AND THE RULE OF LAW

Hanoch Dagan*

INTRODUCTION

Many constitutional property regimes make full (fair market value) compensation a precondition for accepting the valid use of public power to expropriate private property.1 Others recognize some exceptions to this rule and authorize using state power to take, even if only partial (and at times even no) compensation is provided.2 This essay studies the latter category, examining possible justifications for partial compensation.

One justification applies in cases of public measures, where the burden is deliberately distributed progressively, namely, where redistribution is the desired goal of the public action or at least one of its primary objectives. A prime example of such easy cases is the South African Constitution of 1996, which sanctions public measures intended to ameliorate historical injustices from the apartheid era, making access to land more equitable.3 Other, albeit less obvious, examples relying on this justification are measures primarily meant to “achieve greater social justice”.4 The progressive distribution of the burden in such measures is deliberate, and their aim would be thwarted if full (rather than partial or possibly no) compensation was required.5 More often, however, the primary goal of the public action that prompts the expropriation is

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3. Id., at 504, 512.


In these cases, justifying partial compensation faces a far harder challenge: if redistribution is a by-product of a public project, activity, or regulation, can it ever be justified?

In addressing this challenge—my focus in these pages—courts and commentators invoke two rationales. As I argue in section 13.2, however, neither one is convincing. Partial compensation is at times justified by claiming public interest. But whereas the importance of a public project can justify taking the land that it requires, it can hardly justify except for deliberately distributive expropriations—imposing its costs on the owner of the land. The second rationale adduced to justify partial compensation, claiming it is a means for adjusting its amount to the specific circumstances of the case, is no more successful. Ad hoc discretion, namely, an open-ended authorization to do justice, threatens both aspects of the rule of law: the requirement that law be capable of guidance, and the prescription that law not grant officials unconstrained power. If partial compensation is to be justified, it must be formulated either as clear rules or as informative standards.

The failure of these conventional rationales for partial compensation could tempt us to conclude that the better rule (at least outside the category of deliberately redistributive measures) is one of uniform fair market value compensation, on the lines of the prevailing American law of eminent domain. But as I show in section 13.3, this rule too confronts serious problems. In indiscriminately compensating landowners for the fair market value of their land, such a rule entails regressive effects. Given that differences in wealth correlate with, or are translated into, differences in political power, applying this rule makes it systemically more difficult to expropriate the land of the haves than the land of the have nots, even when the former is just as, or possibly more, suitable for the project at hand. In addition to its disappointing distributive consequences, a uniform rule of full compensation fails to properly vindicate other important property values, notably those dealing with the role that some property institutions play in the constitution of our personhood, and the function of others as community-building fora.

If partial compensation could assume only the form of discretionary authority for an ad hoc adjustment, we might have justifiably concluded that these consequences are the unavoidable result of our commitment to the rule of law. But partial compensation can also assume another form, compatible with both the guidance and the constraint aspects of the rule of law. As I show in section 13.4, legislatures— and maybe even courts—can adopt a rather simple set of bright line rules (or informative standards) that address the challenge of systemic regressivity and can fortunately be framed so as to be responsive to other important property values as well: liberty, personhood, utility, and social responsibility.

13.2 CRITICIZING PREVAILING RATIONALES FOR PARTIAL COMPENSATION

Both German and South African constitutional property clauses mention that compensation should reflect “an equitable balance between the public interest and the interest of those affected”. The latter further mentions “the purpose of the expropriation” as one of the (five) important factors to be considered in striking such a balance. This reference has led courts in both countries to hold that, where the public interest at hand is particularly important, partial compensation should be sanctioned.

The significance of the pertinent public purpose may certainly be relevant when examining the legitimacy of the expropriation as such. The question of compensation, however, is different. The role of this constitutional guarantee is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”. The core of the compensation requirement is thus distributive. Hence, the challenge posed by expropriations that are not deliberately distributive and wherein redistribution is by definition a by-product is to justify why the landowner rather than the community that benefits from this public use (i.e., the taxpayers of that jurisdiction), should incur any portion of the burden of the public project, activity, or regulation at hand. The sheer significance of the public interest, then, can hardly be viewed as a persuasive answer to this challenge.

As André van der Walt indeed argues, whereas “expropriation related to land reform should or could be treated with greater understanding and accommodation”, the sheer lawfulness of the expropriation because of public interest cannot “justify a reduction of the compensation amount” in cases that have “no bearing on land reform or the transformation of land rights or greater access to land rights”. Such cases, which represent the vast majority of expropriation cases under ‘normal’ circumstances, do not on their face justify deviation from the normal rule requiring spreading the pertinent burden “among citizens through taxation and other measures from which compensation can be paid for unequally distributed burden”. The conclusion that public interest in the use of the property at hand is particularly

10. This critique is also relevant to claims that make the significance of the public interest a relevant factor in answering the question of when a regulation of land is no longer a mere regulation but a regulatory taking, which requires compensation. See, e.g. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 136-38 (1978).
large does not seem to make a difference. Furthermore, even where “the purpose of expropriation is land reform”, a result of no compensation or partial compensation should not automatically follow, absent an underlying distributive foundation that can serve as its justification.

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The second prevalent attempt to justify partial compensation in expropriations that are not deliberately distributive claims it is a means for adjusting compensation to the specific circumstances of the case. Thus, Van der Walt argues that “all the relevant circumstances (including the [factors] mentioned in [the Constitution] but not restricted to them) should be considered together in deciding whether it should be just and equitable to pay no compensation (or [partial] compensation …) in a specific case.”

In a similar spirit, Gregory Alexander commends the way German courts use partial compensation to determine “the amount of compensation […] under the facts of the specific case”, that is, by judging the weight of “the property’s market value and the owner’s financial loss […] according to the immediate circumstances”. In this view, the “flexible and contextualized” measure of partial compensation is justified by and requires reference “to all relevant circumstances”, a doctrinal hook for “a contextualized judgment with due regard for individual property interests”.

These observations imply that partial compensation needs to take the form of a license for ad-hoc judicial discretion. This presupposition seems intuitive: given the lack of a “precise method for calculating values that are based on considerations of equity and justice or of weighing [them] against each other”, the outcome of each case must be determined in its particular circumstances. If this intuition was conclusive, and if case-by-case adjudication was indeed the only way of incorporating considerations of distributive justice into expropriatory compensation doctrine in non-deliberately distributive expropriation cases, this possibility would be normatively dubious. Two

13. Id., p. 506. The language of the South African Constitution grants this position some support by requiring ‘regard to all relevant factors’.
15. Van der Walt 2011, pp. 509-510. See also Alexander 2006, pp. 147, 217.
main aspects of the rule of law are compromised in it: the requirement that law be capable of guiding its subjects’ behavior, and the prescription that law not confer on officials the right to exercise unconstrained power.18

Ad hocism contravenes the conception of the rule of law associated mostly with Joseph Raz, stating that the rule of law must provide people effective guidance.19 Though seemingly thin, the guidance conception of the rule of law is intimately connected with people’s autonomy, understood as self-authorship. By requiring that “government in all its actions [be] bound by rules fixed and announced beforehand”, the rule of law enables people “to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan [their] affairs on the basis of this knowledge”.20 Only a relatively stable and predictable law can serve as a “safe basis for individual planning”, which is a prerequisite of people’s ability to “form definite expectations” and plan for the future. Law’s participation in securing stable “frameworks for one’s life and action” increases “[p]redictability in one’s environment”, and therefore “one’s power of action”, thus facilitating people’s “ability to choose styles and forms of life, to fix long-term goals and effectively direct one’s life towards them”.21

Case-by-case adjudication similarly threatens another well-known conception of the rule of law, which views it as a constraint. The rule of law stands here for “the absence of arbitrary power on part of the government”,22 through the imposition of “effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims”.23 Unrestrained power is objectionable, both because of its potential devastating burdens and because it renders us mere objects, dominated by the power-wielder.24 The rule of law addresses these grave concerns by prescribing “a particular mode of the exercise of political power: governance through law”. More specifically, the rule of law requires that “people in positions of authority should exercise their power within a constraining framework of public norms,

rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong."25

Both aspects of the rule of law resist open-ended standards allowing judges to consult the law’s underlying commitments in each case they must settle, preferring instead clear rules that translate “the implications of normative values into concrete prescriptions”, “sufficiently determinate” to be followed by their appliers.26 To be sure, the rule of law does not always prescribe the use of bright-line rules.27 At times, commitment to the rule of law implies allowing, or even preferring, that the social practice of a legal topic be formed around a vague but informative standard. This may be the case either because the alternative would be a complex set of technical and non-intuitive rules,28 or because the standard at hand is guidance-friendly and constraining-friendly, so that its addressees (or their lawyers) are able to figure out its intended content and thus predict its future unfolding and realm of application, monitoring, or modifying their behavior accordingly.29 Hence, standards that refine the regulative principle actually governing a specific area of law along these lines – informative standards, as I call them – are generally unobjectionable.30 By contrast, open-ended references to justice, fairness, good faith, or reasonableness as interpreted by the presiding law applier given the specific circumstances of the case at hand, fail to ensure proper predictability or properly constrain law appliers. They should therefore be criticized as an invitation to *ad hoc* discretion, which affronts the rule of law.31

Open-ended discretion poses another problem, which returns us to the context of expropriation. Legal regimes that endorse clear and simple rules (or informative standards) promote equality by reducing the – at times unconscious – possibility of bias in...
the application of official discretion. Contexts such as land use and planning laws, in which undue influence by the rich and powerful is a real concern, underscore the importance of this virtue. Since vague standards do not self-authenticate, they require injured landowners to spend significant resources on legal advice, thus tending to generate regressive outcomes. The reason for this unfortunate result is that heavy dependence on legal advice creates a built-in advantage for repeat players and other strong parties. Ordinary citizens and certainly members of weaker sections of society cannot afford long and expensive legal battles.

13.3 The Problems with Full Compensation

My argument, viewing open-ended discretion in setting partial expropriatory compensation as deeply troublesome, could be read as vindicating the position insisting that partial compensation should have no room outside the realm of deliberately redistributive measures. But this position, which echoes the prevailing American law of eminent domain (and its counterpart in many commonwealth jurisdictions), is also problematic. While a compensatory regime of uniform fair market value compensation may seem liberty friendly, efficient, and distributionally neutral, it entails regressive effects that also undermine its apparent commitment to liberty and efficiency, and it fails properly to vindicate other important property values.

Friends of an across-the-board rule that compensates for the fair market value of the expropriated property argue that the full compensation rule, and the Blackstonian conception of ownership as ‘sole and despotic dominion’ on which it is premised, are essential in order to shield individuals from claims by other persons and from the power of the public authority to redefine our property, thus facilitating personal freedom, security, and autonomy. Only such a rule, they further claim, makes landowners indifferent to the possibility of their land being taken, so that no one has any reason to exert any pressure on the public authority. Neutralizing the objections of

33. This claim is obviously limited to form: the substance of a rule (or a standard) may be more or less egalitarian but, other things being substantively equal, a clear and simple doctrine is more socially progressive.
pertinent landowners is important because – assuming that democratic mechanisms make public officials accountable for their budget management – it helps to realign with the public interest the incentives to those officials making the crucial expropriation decisions. Therefore, so the argument goes, a bright-line rule of full compensation is tantamount to a built-in mechanism that verifies the authority is free to reach optimal planning decisions, and everyone gets the same level of compensation, thus making it both efficient and just.37

This position might be persuasive if receiving the fair market value of their expropriated land were to make all landowners indifferent to the possibility of public action infringing on their property. This assumption, however, is too farfetched. In some cases, fair market value may well measure the utility lost by the landowner due to the public action at hand. Reality, however, will often be different: transaction costs and subjective preferences may lead landowners to prefer the status quo, which includes the possibility of voluntary realization, to the forced transfer of their proprietary rights against its fair market value.38 Therefore, a regime of fair market value compensation for all is likely to lead landowners to try to shift the impact to other people’s land. The results of these efforts will likely be neither just nor efficient.

Consider, for example, Robert Caro’s description of the successful efforts of New York City’s ‘robber barons’ during the late 1920s to induce Robert Moses, the enormously powerful city planner, to change the route of the planned Northern State Parkway so as to avoid interference with their estates. The original route went through the middle of one millionaire’s private golf course and touched the estates of several others. The plan would have taken effect under the prevailing norm of American eminent domain law, which provides uniform full compensation for the affected parties. The robber barons lobbied anyway, through efforts that included a sizeable ‘donation’ to the Park Commission. New York City planners rerouted the Parkway through several small farms, depriving many farmers of their livelihoods.39

This vivid example demonstrates the systemic distortion in a compensation regime of fair market value for all. Full compensation is often necessary in order to address the concern that public officials are under-responsive to private costs unless those costs are properly internalized: where the injured party is part of the non-organized public (an ‘occasional individual’) or of a marginal group with minor political clout, under-responsiveness is a genuine danger that in many cases can only be mitigated by

compensation.\(^{40}\) This, however, is not always the case. Public action may also necessitate imposing costs on members of powerful and organized groups, which can be reasonably assumed to ensure adequate representation to the landowner’s interest, even in the absence of required compensation. The implication is that, ex post an expropriation, even if such a landowner eventually suffers a loss due to the public use, this loss is often offset by a quid pro quo elsewhere, either in planning issues or in other matters. This asymmetry also has an ex ante implication: unless the compensation regime interferes with the effort to balance the pressures confronting the public authority at the stage of choosing the tract of land that would be expropriated for the public project, the lobbying efforts of strong landowners will probably be far more effective than those of weaker ones. An indiscriminate regime of full compensation may distort the officials’ incentives by systematically incentivizing them to take land from members of the non-organized public or of marginal groups, even though the best planning choice would have been to place the burden on powerful or organized groups.\(^{41}\)

Hence, although a rule of full compensation across-the-board seems the perfect vindication of property law’s commitment to aggregate efficiency and individual liberty, it actually undermines both. By distorting the decisions of the public authority, such a rule is likely to impede allocative efficiency.\(^{42}\) Moreover, appreciating this incentive effect demonstrates the inevitable distributive dimension of property’s function in spreading power (decentralizing decision making) in order to preserve individual liberty. The same property rights that guarantee individual liberty are also the source of other people’s duties and liabilities. Therefore, a credible conception of property as the guardian of liberty necessarily requires “an ongoing commitment to dispersal of access”, and also demands that we design our property system so that it dynamically ensures that “lots of people have some” property and that “pockets of illegitimately concentrated power” (i.e., property) do not re-emerge.\(^{43}\) In order for property to serve its important role as a bastion of negative liberty, we must keep in mind that

\(^{40}\) That is why I have argued against the tendency of progressive authors to subscribe to a ‘no (or almost no) compensation’ rule (at least in the context of regulatory takings law), since such a rule not only undermines liberty unduly but is also inefficient and regressive. See H. Dagan, Property: Values and Institutions, Oxford University Press, New York, 2011, pp. 97-98, 142-144.

\(^{41}\) For a more detailed analysis and some responses to critics, see id., pp. 92-94, 123-137.

\(^{42}\) A full compensation rule is also likely to hinder efficiency by distorting owners’ incentives. More specifically, compensation is required to prevent risk-averse landowners – such as private homeowners, who are not professional investors and have purchased a small parcel of land with their life-savings – from under-investing in their property. By contrast, when a piece of land is part of a diversified investment portfolio, it may lead to inefficient over-investment. The possibility of an uncompensated investment is thus likely in the latter type of cases to lead to an efficient adjustment of the landowner’s investment decisions, commensurate with the risk that the land will be put to public use. See id., pp. 90-92.

concentrations of private property (i.e. private power) may, in themselves, become “sources of dependency, manipulation, and insecurity”.44

The prescription of securing wide access to property while preserving its protective role confronts property law with a complicated challenge. A uniform rule of full compensation threatens law’s ability to respond to this challenge, partly because this rule and its corresponding absolutist conception of property leave no room for social responsibility in our understanding of ownership.45 An across-the-board full compensation rule preserves the economic status quo in the course of implementing the pertinent public project, activity, or regulation, although it may ‘translate’ people’s assets into wealth without their consent. It thus underlines the significance of belonging to a community, and perceives our membership therein in purely instrumental terms. It defines our obligations qua citizens and qua community members as exchanges for monetizable gains, and thereby commodifies both our citizenship and our membership in local communities.46 To be sure, the impersonality of market relations is not inherently wrong; quite the contrary, by facilitating dealings “on an explicit, quid pro quo basis”, the market defines an important “sphere of freedom from personal ties and obligations”.47 A responsible conception of property can and should appreciate these virtues of the market norms. It should still avoid allowing these norms to override those of the other spheres of society, wherein property relations participate in the creation of some of our most cooperative human interactions, obliterating the sense of ownership as a locus of not only rights but also obligations.

The most attractive promise of partial compensation in non-deliberately-distributive expropriations is, as Gregory Alexander suggests, as a “via media between the two extremes of total compensation (that is, full fair market value) and no compensation whatsoever”, which can properly reflect this “social dimension of the constitutional property right”.48 The task of expropriatory compensation law is thus to devise a regime of partial compensation that complies with the rule of law and is also sensitive to property’s distributive dimension and to its functions in promoting social welfare and social responsibility. In so doing, however, this regime should not undermine the effects of ownership on the protection of individuals from the power of government,

particularly those politically weak or economically disadvantaged. To accomplish this task, we need to consider two other property values – personhood and community – that are marginalized in a uniform compensation regime. Accommodating these property values into a principled regime of partial compensation is also the key for addressing the difficulties involved in the full compensation rule and the pitfalls of an ad hoc discretionary norm of partial compensation, which were discussed above.

13.4 Partial Compensation and Property Values

To appreciate the significance of personhood and community to property and to see how these values can and should affect expropriation law, I need to briefly restate my understanding of property. This understanding may differ from the dominant voices in the field, but is still loyal to the practice of property. This view, which I defended in my book, *Property: Values and Institution*, rejects the misleading binarism of property as either a monistic form structured around Blackstone’s formula of ‘sole and despotic dominion’, or a formless bundle of rights. Instead, it conceptualizes property as an umbrella for a set of institutions bearing a mutual family resemblance. Normatively, my conception of property resists the tendency to discuss property through the prism of only one particular value, notably efficiency. It argues that property can, and should, serve a pluralistic set of liberal values.

Rather than a uniform bulwark of exclusion or a formless bundle of rights, the meaning of property, the content of an owner’s entitlements, varies according to the categories of social settings in which it is situated and according to the categories of resources subject to property rights. I do not argue that the categories on either dimension are in any sense natural or inevitable. In fact, I assume that they are legal artifacts. Their artificiality, however, by no means derogates from their normative significance. After all, all legal concepts and rules, including the concept of property itself, are artifacts and, as long as we do not essentialize them in a way that obfuscates the operation of the doctrine or inhibits its normative scrutiny, their artificiality is not, in and of itself, a condemning argument. Property institutions both construct and reflect the ideal ways of human interaction in a given category of social contexts (e.g. market, community, family) and regarding a given category of resources (e.g. land, copyright, patents). Therefore, the values that property institutions serve are, at least potentially, as diverse as the values served by legal institutions at large. In particular, property institutions serve or should serve individual liberty and personhood, as well as aggregate welfare, social responsibility, and distributive justice. At least ideally, the composition of entitlements that constitute each such property institution is determined by its character and thus its underlying normative commitments, namely, its local balance of property values.

49. See Dagan 2011.
Because the two most important dimensions that distinguish property institutions from one another are the nature of the resource and the type of human interaction at hand, these two dimensions should also entail differential constitutional protection to property.

* * *

Consider first how the personhood value of property helps to understand the heterogeneity of property institutions and may thus provide corresponding guidelines for the law of expropriatory compensation. According to personhood theory, our attachment to the resources we hold is explicated and justified to the extent that those resources reflect our identity. Because society regards different resources (such as land, chattels, copyright, and patents) as variously constitutive of their possessors’ identity, the law treats them differently and subjects them to different property configurations. Whereas the law vigorously vindicates people’s control of their constitutive resources, the more fungible an interest, the less emphasis property law needs to place on its owner’s control.50

To be sure: describing a human phenomenon does not necessarily justify its entrenchment in law, especially if we assume that the law has some expressive effect which would thus further reinforce it.51 Thus, while the role some property institutions play in the constitution of our personhood is manifested psychologically, the personhood function of property is not (merely) a matter of empirical investigation.52 Rather, its significance hangs on its normative validity. Personhood theory attempts to capture the way the objects we purposefully work to change, and even resources we simply


possess or the places in which we live, foster our moral development. As Jeremy Waldron explains, changing an object—and, we may add, integrating a resource (like our home) into our lives by shaping or organizing it in line with our conception of self and our private needs, inclinations, and desires, our own life-plans—makes a difference not only to the object. It also, and more significantly, registers the person’s will. The resource becomes a medium through which people identify themselves, an essential element of their self-consciousness. Modifying something in the external world, or even living with an object or in a place for a period of time, demonstrates a kind of responsibility. It imposes some sort of consistency, permanence, and stability on the resolutions, plans, and projects of the will. Moral development is thus fostered: our will becomes more self-disciplined and mature, and our abilities and self-conceptions are sustained and developed.

Appreciating the moral significance of the personhood value of property implies that the appropriate level of constitutional protection ensured to property should also depend on this dimension: expropriation law should treat constitutive property, which implicates its holder’s personhood, differently from fungible property, which is wholly instrumental. The implications of this prescription turn out to be quite complicated. Thus, the distinction between fungible and constitutive property should not imply that wholly fungible property, wealth as such, should have no constitutional protection. Such an extreme position ignores the simple truism that self-development also requires a degree of wealth, and exposes all owners—rich and poor, strong and weak—to the risk of being sacrificed for the public good. In some contexts, this risk may indeed be particularly real and potentially alarming to the unorganized segments of society, and even more so to the weak ones. Therefore, instead of granting the power to tax blanket immunity from constitutional scrutiny, a much more refined approach is required. This approach acknowledges the qualitative difference between constitutive and fungible property, and is also mindful of the unique role of tax law as the body of rules distinctly designed to redistribute wealth. It rejects, however, the view that the power to structure and allocate tax burdens is unlimited. It founds the legitimacy of current tax practice on its compliance with acceptable principles of distributive justice rather than on any kind of a priori immunity.

55. See Radin 1993, pp. 153-156.
56. Contra Alexander 2006, pp. 103, 127, who celebrates the German law prescription whereby “the property clause does not protect wealth as such” because “private wealth-creating property interests … are viewed as not immediately implicating the fundamental values of human dignity and self-realization”.
Nor does the distinction between fungible and constitutive property render fair market value an unacceptable measure in compensating for the expropriation of constitutive property. As Brian Lee has recently argued, because the market price follows “transactions that included each seller’s entire ‘subjective’ value, it [...] reflects the property’s typical subjective value”. Furthermore, providing “full compensation for idiosyncratically large amounts of subjective value in property that is taken for public use” is distributively unjust since it “imposes on other community members unreasonable burdens” and disregards the owners’ social duty of “not standing too much in the way of the public good”.58 And yet, expressing the qualitative difference between constitutive and fungible property in the compensation regime governing expropriations (by making the condemnation of a home, for example, more expensive than the condemnation of an equivalent real estate that is not an individual’s principal residence),59 is nonetheless important, both intrinsically and instrumentally. Insisting on a non-negligible difference between these two cases serves as a public vindication of this distinction’s moral significance, and provides a credibility check ensuring that legal recognition of it does not end up as hollow rhetoric.60 This expressive dimension also entails important ex ante effects because, without a price tag on the expropriation of homeowners’ land as opposed to that of fungible land (typically owned by real estate corporations and wealthy individuals), the latter’s excessive political power is likely to lead to the systemic targeting of the former.

The translation of the fungible/constitutive divide into legal doctrine should focus on the moral significance of constitutive resources; it should also beware of generating regressive outcomes or undermining the social responsibility of property. The former prescription implies that the practice, recently adopted in some American states, of adding fixed percentage bonuses to the fair market value where the expropriated land is constitutive is inappropriate, because it makes the difference between fungible and constitutive contingent upon the value of the land. As Lee claims, “the personhood of all owners, whether rich or poor, has equal value” and, therefore, rather than a fixed percentage of fair market value, its vindication “should be equal across all condemnees”, that is, it should take the form of a fixed-dollar-amount compensation for each condemnee”.61 To avoid a rule that encroaches upon owners’ social responsibility (as per the latter prescription), expropriation law should avoid using bonuses that render compensation larger than fair market value. It is at this point that partial

59. On its face, by making the content of rights dependent on the identity of their holders, this approach may put undesirable restraints on alienation. But expropriations are sufficiently infrequent in order to make this effect rather marginal.
61. Lee 2013, pp. 636-639, 645, 649. Lee’s critique of fixed percentage bonuses corrects a mistake incurred by many commentators, including this one. See Dagan 2011, p 149.
compensation becomes particularly helpful because it opens up a space for two measures of recovery – full and partial compensation – while preserving the status of fair market value as a cap. Thus, full compensation can apply to all (and only to) expropriations of constitutive property, while partial compensation applies only to expropriations of fungible property (and to all such cases).

* * *

Property institutions also differ from one another because of the type of human relationship they help to structure and regulate. This spectrum of human interactions goes from arm’s-length relationships between strangers (or market transactors), through relationships between landlords and tenants, members of the same local community, neighbors, and co-owners, up to intimate relationships between family members. Correspondingly, while some property institutions are structured along the lines of the Blackstonian conception of property, others (such as marital property) are dominated by a much more communitarian view of property, in which ownership is a locus of sharing. Many property institutions, governing relationships between people who are neither strangers nor intimates, lie somewhere along this spectrum from atomistic to communitarian norms.62

As noted, property law, at least at its best, prevents market norms from overriding the norms prevalent in other social spheres. Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. Imposing the market’s impersonal norms on these divergent spheres might effectively erase or marginalize these spheres of human interaction and human flourishing. On its face, these types of interactions can be facilitated by contractual arrangements between despotic owners.63 But as is the case more generally in private law, contractual freedom, however significant, cannot replace active legal facilitation. Lack of legal support could undermine more cooperative types of interpersonal relationships, for two reasons: (1) Many of these relationships rely on sophisticated governance mechanisms to overcome various types of transaction costs, such as information costs, cognitive biases, and heightened risks of opportunistic behavior that generate the endemic vulnerabilities of participants in these cooperative interactions. (2) Our property institutions play an important cultural role; like other social conventions, these institutions serve a crucial function in consolidating our expectations and in expressing normative ideals regarding the core categories of interpersonal relationships they participate in constructing.64

62. See generally Dagan 2011, Pt. III.
Again, takings law (and, for my current purposes, the law of expropriation) should follow suit. As I have argued, the main conceptual tool for this task is the maxim of long-term reciprocity, which is a prominent feature of American regulatory takings law. Long-term (and rough) reciprocity of advantage implies that a public authority need not pay compensation if, and only if, two conditions prevail. The first is that the disproportionate burden of the public action in question is not overly extreme. The second is that this burden is offset, or is highly likely to be so, by benefits accruing from other – past, present, or future – public actions that harm neighboring properties similar in magnitude to the landowner’s current injury. This prescription subtly captures a credible norm of social responsibility that, on the one hand, is always wary of sliding into excessive (and potentially self-defeating) injury to private interest. On the other, however, it rejects the strict short-term accounting of the full compensation norm and thus recognizes, preserves, and fosters the non-commodified significance of membership in a community, alongside the more calculated, and thus commodified, aspect of it.

Long-term reciprocity reminds us that injured landowners are members of a community and, as such, enjoy various social benefits for which they are not required to pay directly. Land ownership, like ownership at large, is thus perceived not merely as a locus of rights, but also as a social institution that creates bonds of commitment among landowners and between landowners and others who live, work, or are otherwise affected by the landowners’ properties. Hence, landowners should also bear obligations towards their communities. In some cases, this responsibility implies certain constraints regarding what they can do with their property, especially regarding uses that threaten or hinder quality of life for other members of their community. In other cases, it requires some uncompensated disproportionate impact on the distribution of burdens as a result of public actions meant to enhance the community’s well being. Admittedly, reciprocity of advantage does not establish a regime of complete non-commodification, meaning no monetary compensation, which might accord some ideal of citizenship (or membership). Reciprocity of advantage is cautious and not too utopian about citizenship, acknowledging the detrimental consequences of a no-compensation regime in our non-ideal world, hence requiring long-term rough equivalence of burdens and advantages. By rejecting strict short-term accounting, however, it stabilizes the coexistence of our plural and ambivalent understandings of citizenship as both a source of mutual advantage and as a locus of membership and belongingness.

Rather than imposing the same demand of social responsibility in all contexts, expropriation law should adjust its expected level of social responsibility to the scope of the social unit benefiting from the public action at stake. Here again, the possibility of divergent degrees of compensation is significantly helpful. Although aspiring to

65. See Dagan 2011, pp. 103-107, on which the following three paragraphs largely rely.
the coexistence of mutual advantage and belongingness at the macro level of citizenship may be a worthy aim, this coexistence is far more likely to be sustained at the micro level of our local communities, where our status as landowners also defines our membership. Local communities bound solely by a geographic common denominator may not be as strong as communities held together by bonds of ancestry or a common ideology. But even in our global, mobile, and interdependent world, geographic communities are quite significant. Many localities genuinely differ and offer their residents competing lifestyle options. Many people choose a specific locality, at least to some degree, according to the compatibility of its specific peculiarities with their own ambitions, goals, and needs. Insofar as we believe that structuring our geographic localities into such local communities fulfills an important human need and facilitates the pursuit of worthy civic virtues, we need to incorporate this vision into our legal rules as well as into the legal rhetoric that accompanies the invocation of these rules.

Expropriatory compensation law, like land-use law more generally, has a share in structuring our relationships as members of such localities. It shapes our conception of what it means to own land within a geographic locality and thus reinforces, modifies, and shapes our vision of our relationships as landowners in a particular locality. It can help to structure our localities, which would otherwise be merely the geographic locations where we happen to reside, as communities. One way of doing this is by drawing a distinction between expropriations of lots of land that benefit the public at large, and those benefiting the community to which the property owner belongs, so the latter lead to less than full compensation. The reduction, which should take the form of a fixed percentage rather than a fixed dollar amount, would serve to convey a heightened degree of responsibility towards one’s local community. It would also be justified because the smaller the scope of the benefited unit, the stronger the notion that its effects on the injured individual are likely to be offset in the long term.

13.5 Concluding Remarks

The discussion so far should be read as an attempt to offer a preliminary outline for a doctrine of partial compensation for expropriations, which avoids the form of open-
ended discretionary authority and thus abides by the rule of law. This doctrine, like most of property law, relies on the foundational normative commitments of property, that is, on the property values of liberty, personhood, community, aggregate welfare, and distributive justice, all of which point to severe pitfalls in a uniform rule of full market value. Although the precise meaning of these values is in dispute, their invocation creates a situation that is fundamentally different from an open-ended contextual judgment of the justice and equity of each particular case. To avoid the drawbacks of ad-hocism and comply with the rule of law requirement that law be capable of guidance and with its prescription that law not grant unconstrained power to officials, the resulting legal architecture should attempt to go even further. It should translate the injunctions of these normative concerns into a simple set of rules or informative standards that rely on even more tangible and somewhat less controversial variables, which serve as (by definition imprecise) proxies for these underlying normative distinctions.

The two most important variables identified above are the nature of the expropriated property (constitutive or fungible), and the question of whether the project at hand benefits the injured landowner’s local community, or rather the broader society or another subset thereof. Although neither variable mentions distributive justice, this important concern is significantly integrated in any compensation doctrine that, as noted, makes the targeting of owners of constitutive land – usually ordinary citizens with limited political influence – more expensive than that of owners of fungible land – typically real estate holding corporations and wealthy individuals. Admittedly, the distinctions between constitutive and fungible properties or between local communities and larger governmental bodies are not entirely clear. Given their prominence in other branches of property law, however, rule-of-law conscious legislators (or even judges) can use the thick body of law that already resorts to these distinctions to integrate them into the law of expropriatory compensation.


70. The requirement of simplicity is important because a thick cluster of complicated rules is subject to many of the difficulties of a vague standard: it upsets predictability and thus the rule of law; and it requires a specialist to orient the uninitiated in the legal labyrinth, thus undermining distributive justice.


72. Interestingly, these variables may be understood as specific interpretations of two of the five factors mentioned in the South African Constitution, namely: “the current use of the property”, and “the purpose of the expropriation”. See Constitution of South Africa 1996, s 25(3)(a), 25(3)(e). The remaining two factors – in addition to “the market value of the property” (Id., s 25(3)(c)) – seem specific to the South African post-apartheid context.
Once this step is properly implemented, the above analysis suggests the following scheme of compensation:

1. The clearest case for the application of partial compensation is one where the beneficiary of the public project at hand is one’s local community and the expropriated land had been held as an investment, meaning that the owner had held it as fungible property. In this type of cases, both a fixed percentage (as per the former concern) and a fixed dollar amount (as per the latter) should be deducted from the property’s fair market value.

2. By contrast, when the land is expropriated as part of a larger (such as a regional or state) governmental project and had previously served its owner for constitutive purposes (a home or possibly also a farm or a small business), full compensation (fair market value) should be awarded.

3. Between these two extreme categories are cases where constitutive land is expropriated for purposes that benefit its owner’s local community and cases where the use of fungible land benefits the broader society. These intermediate types of cases should trigger the award of intermediate measures of recovery where, respectively, either the fixed percentage deduction or the fixed dollar amount applies.
Anyone with knowledge of expropriation law in South Africa and with a specific interest in the compensation aspect of expropriation might feel uncomfortable with the title of this paper. I hope that by the end of the paper you will not only understand the formulation of the title but also share my sentiments.

In the book *The Seed is Mine,* Charles van Onselen tells the story of Kas Maine, a sharecropper. What made Kas a remarkable person is the fact that as a sharecropper, he never worked for anyone as a wage laborer and could therefore maintain economic independence. Despite this economic independence, Kas never owned land. As he said: “The seed is mine. The ploughshares are mine. The span of oxen is mine. Everything is mine. Only the land is theirs.” Over the years his good relations with his landlords turned into economic distance as segregation and the policies of apartheid widened the economic gap between the landlord and the sharecrop tenant. After a while, equal access to state resources precluded Kas from obtaining credit from the Land Bank. Policies made it possible for farmers to insist on wage labor, forcing many sharecroppers to drier areas. The Black Land Act in 1913 prevented black people from owning land and outlawed sharecropping in the agricultural heartland of the Highveld. Despite this, successful sharecroppers like Maine continued to contract with some poor white farmers to continue working on a sharecropping base. This practice came to an end in the mid-1930s when acts like the Marketing Act
guaranteed white farmers a minimum price for their grain, making them less depend-
able on sharecroppers. The sharecroppers had an option: wage labor, or moving to the
homelands. Maine was forced to farm on dry land in the homeland areas. As a result,
he led a substantially poorer and more difficult life than he would have, were it not for
colonialism and apartheid.

The ownership of land in South Africa today is still patterned on the complex history
of property relations during apartheid, of which Kas Maine’s volatile and insecure
relationship was only one. During apartheid, land law played a significant role in
social engineering, enabling the government to enforce and maintain spatial race seg-
regation. This effect was achieved by promulgating new legislation and manipulating
existing land rights. For example, the Group Areas Act and Native Lands Acts created
black and white areas where people were statutorily prevented from owning and
using land in an area that was assigned to another group. In the process, rights were
 customized to suit the perceived needs of each group, which in effect meant that black
land rights were downgraded to rights that were more insecure. Apartheid land law
was based on the ideology of racial segregation, and discrimination took place not
only in terms of prohibiting people to live in certain areas but also through regulating
their rights in property in general.

6. M. Chaskalson & C. Lewis ‘Property’, in M. Chaskalson et al. (Eds.), Constitutional Law of South Africa,
Cape Town, Juta, 1996, pp. 31-32.
7. 41 of 1950; 77 of 1957 and 36 of 1966.
9. A.J. van der Walt, ‘Dancing with Codes – Protecting, Developing, Limiting and Deconstructing Prop-
10. The first of the so-called ‘land acts’ was the Black Land Act 27 of 1913, which provided for the areas
where occupation was restricted to black persons only. In the urban areas, segregation was effected
by the Natives (Urban Areas) Act 21 of 1923; the Blacks (Urban Areas) Consolidation Act 25 of 1945;
and the Black Communities Development Act 4 of 1984. The Black Land Act was succeeded by the South
African Development Trust and Land Act 18 of 1936 which provided for ‘released areas’, which also
were restricted to black people. Later the Group Areas Act 41 of 1950 regulated the acquisition, alien-
ation and occupational rights to land and provided for four independent nation states, so-called home-
lands (Transkei, Bophuthatswana, Ciskei and Venda), and six self-governing territories (KwaNdebele,
QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal, and KaNgwane). The segregation of people and the
division of land was made possible by legislation authorising the (forced) removal and the eviction
of the people from their land. Every area had its own specific regulations and town planning rules.
At the time of the advent of the new South Africa, about 17,000 statutory measures had been issued
to segregate and control land division, there were 14 different land control systems in South Africa,
and an estimated 3.5 million people had been displaced by apartheid land law. For a more in-depth
discussion see P.J. Badenhorst, J.M. Pienaar & H. Mostert, Silberberg and Schoeman’s The Law of Property,
14.2 Negotiating a Property Clause

Maine did not live to see the end of apartheid, but there are many similar stories out there.\textsuperscript{11} The Constitutional Court in the Department of Land Affairs v. Goedgelegen Tropical Fruits (Pty) Ltd\textsuperscript{12} referred to this degradation of rights in land as a “systematic practice of exploiting black people as a cheap source of labour for the financial benefit of white farmers” that enabled landowners to “unilaterally [alter] the status of the claimants and their families without concerning themselves with the consequences of their actions.”\textsuperscript{13}

It is this injustice that the Constitution and the land reform program aim to redress.\textsuperscript{14}

Since Apartheid land law was one of the most important instruments that the then government used to advance its dream of a segregated nation, it was clear when the Apartheid government collapsed that corrective measures were needed. Land reform therefore became crucial for social transformation, as envisioned by the preamble of the Constitution. Karl Klare refers to this as ‘transformative constitutionalism’,

a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.\textsuperscript{15}

The first step was, of course, repealing all the unjust laws. But this was not enough. Given the history, it is not surprising that high on the agenda at the multi-party negotiating forum was the issue of the constitutional protection of property rights in the context of land law and land reform.\textsuperscript{16}

\begin{enumerate}
\item If one reads the court documents submitted to the Constitutional Court for the Mhlanganisweni Community v. Minister of Rural Development and Land Reform [2012] ZALCC 7 and reads Department of Land Affairs v. Goedgelegen Tropical Fruits (Pty) Ltd. [2007] ZACC 12, similar stories of systematic degradation of rights will be found.
\item [2007] ZACC 12.
\item [2007] ZACC 12.
\item At the conference Michael Heller asked me if one should allow for restitution, which would be difficult to accomplish because of all its complexities. He referred to the Russian example. For the purposes of this paper I accept that restitution is a valid outcome of the negotiations process in the broader context of restorative justice. I deal with what we have, and ask questions about that, rather than asking in this paper whether or not it was the right decision to take, and remains the right way forward. This I will do in another paper.
\item See J. Murphy, ‘Property Rights in the New Constitution: An Analytical Framework for Constitutional Review’, THRHR, Vol. 56, 1993, pp. 623-644 for a discussion of the Law Commission and the African National Congress’ proposals for a property clause, the debates surrounding the drafting of the property clause and Murphy’s suggestions on how, with reference to foreign law, the property clause should be interpreted.
\end{enumerate}
From the outset, the African National Congress made it clear that a constitutionalized property right should not hinder the transformation process, especially concerning the redistribution of land, while the National Party feared that the existing property rights of white owners might be compromised if they were not adequately protected by the Constitution. The National Party initially wanted the Constitution to protect the property rights of existing owners by stating that no expropriation might take place unless it were sanctioned by a court order for a public purpose and against the payment of strict market value compensation. Soon the National Party conceded that compensation for expropriation of property should not necessarily be tied to market value alone. This concession was important for the African National Congress, because if compensation were to be paid only at market value this would possibly impede land reform by making the process too expensive.

It was agreed that compensation should be ‘just and equitable’ taking into account various factors of which market value was only one. Chief Justice Corbett objected to the inclusion of this list of factors because he foresaw application and interpretation problems. Supported by the opposition parties, he wanted to leave it in the court’s discretion to determine what was ‘just and equitable’ in every case without reference to a list of factors. Other members of the Forum were skeptical that the inclusion of such a clause could lead to an interpretation where compensation at a rate higher than market value was possible. For Chaskalson the inclusion of such factors could lead to the opposite effect; compensation at less than market value. In the end, market value was listed as one of five factors to consider when calculating compensation, while the calculation of the compensation was left in the hands of government officials and the courts.

14.3 The Land Reform Programs

With land reform high on the agenda of the new government, legislation was promulgated to effect the transformation of land ownership through land reform. The

20. *Id*.
21. *See Id.*, where his opinion is based on comparative studies that have shown that in the absence of a list of factors, market value becomes the default method of calculating compensation. The list was initially removed from the draft, but re-inserted when the National Party insisted that there should be at least some mention of market value as a factor for the court to consider when calculating compensation.
22. *As part of the land redistribution program, the Land Reform (Labour Tenants) Act 3 of 1996, Extension of Security of Tenure Act 62 of 1997, Provision of Land and Assistance Act 123 of 1993 and the*
interim Constitution ordered the abolition of racially based measures along with the upgrade of certain weak land rights to ownership rights. The final Constitution provides explicitly for land reform in the property section, by requiring that the government take “reasonable legislative and other measures” to create conditions that will enable citizens to “gain access to land on an equitable basis.”

From the 1997, White Paper on South African Land Policy and the final Constitution evolved the three pillars of land reform, namely, redistribution, tenure reform, and


23. The notorious land acts were repealed using the Abolition of Racially Based Land Measures Act 108 of 1991, within the framework of the Interim Constitution ss 121-123.
25. S 25(5). S 28 of the 1993 Constitution did not provide for land reform, but statutory developments were provided for in ss 121-123, with a special focus on land restitution. Land reform was driven partially by these provision, by institutions like the Commission on the Restitution of Land Rights and the Land Claims Court (LCC), and partially by programmes such as the Reconstruction and Development Programme (RDP).
26. The land redistribution program aims at providing landless people with land through financial assistance from the government, mainly through programmes that provide inter alia for financial assistance through grants and subsidies. It is foreseeable that in order to distribute the land it might be necessary for the state to expropriate property. When land is so expropriated, compensation must be calculated with reference to Section 25(3).
27. Section 25(6) aims at securing the tenure of land that has been made insecure in the past by racially discriminating laws or practices. Land tenure reform should rectify social imbalances created under apartheid by providing access to land. In the case of tenure reform, land is not redistributed as such, but rights and interests in land are strengthened through the reform of the applicable laws. The beneficiaries of the tenure program are those people who already have interests or rights in land, but whose rights and interests are weak. They thus do not acquire land through restitution or redistribution, but their rights are legally redefined and thereby strengthened. There are various laws aimed at strengthening these rights. In order to transfer the land to the labor tenants or farm workers, the court might have to expropriate the property from the current owner. Therefore, in future the court might have to rule on expropriation cases where labor tenants or farm workers acquire the ownership of land or where the state has to expropriate land where illegal occupiers reside, in the tenure reform context. Restitution is managed by the Restitution of Land Rights Act 2 of 1994 (the Restitution Act). Restitution refers to those instances where individuals or communities that were deprived of their land under the apartheid laws can ask that their land rights be either restored or replaced by other equitable redress (usually monetary compensation). The requirements for restitution are set out in Section 2 of the act, and restitution is available to a person or community that was dispossessed of their land after June 1913 as a result of a past racially discriminatory law or practice, for which just and equitable compensation was not paid. It might be necessary for the state, in instances where the claimants claim their land back, to expropriate land in order to restore it to the previous owner. This is essentially what happened in Ex Parte Former Highland Residents; In Re: Ash and Others v. Department of Land Affairs [2000] 2 All SA 26 (LCC); Hermanus v. Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood 2001 (1) SA 1030 (LCC).
restitution. These programmes are aimed at redistributing the land to people who were previously denied access to land in accordance with the system of racial discrimination (Kas Maine is a prime example), improving the security of tenure especially for farm workers, and returning land to people who had been deprived of their land without the necessary compensation. Strengthening the land reform process, Section 25(4) states that the requirement that an expropriation must be in the “public interest” “includes the nation’s commitment to land reform”. In each of the three programmes, the expropriation of property may be necessary. And when property is expropriated, the question of the calculation of compensation arises.

Section 25 of the final Constitution should be understood in this context: as a compromise reached at multi-party negotiations with the aim of ensuring the regulated transformation of land-holding in South Africa. Section 25 is evidence of this compromise, as it not only protects existing property holdings from unlawful state interference, but also provides for land reform, including the possibility of expropriating property for land reform purposes. Section 25 states the following:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
   a. the current use of the property;
   b. the history of the acquisition and use of the property;
   c. the market value of the property;

28. See The White Paper Land Policy 1997 available at <www.ruraldevelopment.gov.za/legislation-and-policies/file/153> [as on 17 January 2014]. Paragraph 4.1 states that “Land Redistribution makes it possible for poor and disadvantaged people to buy and with the help of a Settlement/Land Acquisition Grant. Land Restitution involves returning land, or compensating victims for land rights lost because of racially discriminatory laws, passed since 19 June 1913. Land Tenure Reform is the most complex area of land reform. It aims to bring all people occupying land under a unitary legally validated system of landholding. It will provide for secure forms of land tenure, help resolve tenure disputes and make awards to provide people with secure tenure.”
31. S 25(3) read with s 25(4).
d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
e. the purpose of the expropriation.

4. For the purposes of this section
a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
b. property is not limited to land.

5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).

9. Parliament must enact the legislation referred to in subsection (6).

It has been said that an interpretation of Section 25 rests on three premises. The first of these is that all constitutional property clauses are subject to an inherent tension between the protection of existing rights and the state’s power to infringe on it. In this regard, the land reform provisions of Sections 25(5)-(9) only add a context-specific dimension to the idea that the state has the power to infringe on existing property rights, namely that the state may do so for land reform purposes. Secondly, the power to infringe on private property for the purposes of land reform developed from a specific historical context in South Africa. This historical context can therefore not be divorced from a proper interpretation of the property clause, when the state limits private property. Thirdly, the fact that the property clause is transformative does not imply that the Constitution does not value existing private property. It means that the classic protection of private property exists alongside the transformative purpose.

In this context, the court recently emphasized that an interpretation of Section 25 should include an acknowledgement of the role the property clause plays in “facilitating the fulfilment of our country’s nation-building and reconciliation responsibilities”, with

33. Id.
34. Id.
reference to opening up economic opportunities for all South Africans. This includes the interpretation of the compensation provision in Section 25(3) of the Constitution.

**14.3.1 The Requirements for a Valid Expropriation in a Reform Context**

What role do expropriation and specifically compensation play in the transformation context? Section 25(2) gives three requirements for a valid expropriation, namely that it must be carried out in terms of law of general application, secondly that it must be in the public interest or for a public purpose, and thirdly that compensation must be provided for.

The term ‘public purpose’ is used a few times in different subsections and different contexts. Section 25(2)(a) requires that the expropriation must be for a public purpose or in the public interest (the public purpose requirement), while Section 25(4) makes it clear that for the purposes of Section 25 public interest includes the nation’s commitment to land reform (as also to the reform of the holding of other resources).

The phrase ‘public purpose’ is repeated in Section 25(3). Section 25(3) determines that compensation must be just and equitable, striking an equitable balance between the person whose property is expropriated and public interest. All relevant circumstances must be taken into account, including the non-exhaustive list of factors in Section 25(3)(a)-(e), which in 25(3)(e) includes the purpose of the expropriation. Here the public purpose is a factor to take into account when determining compensation (public purpose as a factor).

It seems pretty clear: when the state expropriates property, there are three express requirements that must be met in terms of the constitution: a law, a purpose, and compensation. As far as the public purpose or public interest is concerned, other chapters in this volume deals with it in detail. The focus of this chapter is not on public purpose.

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35. Para 60.
36. The general norm that the compensation paid should be just and equitable is not strange. Similar norms are found in other constitutions. See A.J. van der Walt, *Constitutional Property Clauses: A Comparative Perspective*, Juta, Cape Town, 1999. The difference lies in the fact that in most other constitutions the Constitution merely instructs the legislator, not creating any direct rights that a person can rely on. In South Africa the bill of rights entrenches a right to just and equitable compensation, implying that a person expropriated can directly rely on the right to be compensated, as set out in the Constitution. A. Gildenhuys, *Ontieieningsreg*, 2nd edn, LexisNexis, Durban, 2001, p.163. Procedurally, this has been construed to mean that the plaintiff who relies on the Constitution must prove its applicability, as in *De Villiers en ’n Ander v. Stadsraad van Mamelodi en ’n Ander* 1995 (4) SA 347 (T) 35.
37. S 25(3) of the Constitution.
as a requirement but more on public purpose as a factor that can influence the amount of the compensation to be paid. Uneasiness with the title of the paper is about to set in.

14.3.2 South African Case Law on Section 25(3)(e)

Case law attests that the courts tend to confuse public purpose as a requirement with public purpose as a factor to take into account when determining just and equitable compensation. A discussion of a selection of the cases will show how this has led to counter-transformative results that can ultimately result in a failure to achieve social transformation.

The first case is the constitutional court case of Du Toit v. Minister of Transportation.38 This is a case that went from the Cape High Court39 through the Supreme Court of Appeal40 to the Constitutional Court.41 In this case, gravel was expropriated from a private pit to build a public road. The gravel was thus used for the upkeep of a national asset that was to be used by the general public. In accordance with the National Roads Act,42 compensation was calculated using the Expropriation Act.43 The courts correctly noted that the Expropriation Act must apply with due regard to the Constitution. Following the two-step approach set out in Khumalo v. Potgieter,44 the court calculated the market value of the property before it applied the factors listed in Section 25(3). In applying the factors, the Cape High Court reasoned that the public purpose to be served was the building of roads, and that such a purpose would be frustrated if the full market value of the gravel were to be paid to the owner. The market value compensation was reduced markedly because of this. The Constitutional Court in its own judgment endorsed this approach to Section 25(3)(e).

The Mhlanganisweni Community v. Minister of Rural Development and Land Reform45 case (commonly referred to as the MalaMala case) serves as an example of expropriation for land reform purposes. In this case, the court was tasked with giving a

38. Du Toit v. Minister of Transport 2003 (1) SA 586 (C); Minister of Transport v. Du Toit 2005 (1) SA 16 (SCA); Du Toit v. Minister of Transport 2006 (1) SA 297 (CC).
42. 54 of 1971.
43. 63 of 1975.
44. [1999] ZALCC 59. The court in this case stated that in order to calculate compensation in terms of the Constitution one should start at market value, since it is the only factor that can be determined with certainty. Thereafter the court could consider if the other factors justify a downwards or upwards adjustment of the market value.
45. [2012] ZALCC 7 par 73.
preliminary estimation of the compensation payable upon expropriation in order
to determine if restitution of the land (through expropriation) was feasible. The
court considered the impact of Section 25(8) of the Constitution on the factors in
Section 25(3). It considered that the aim of the inclusion of the public purpose
requirement and the inclusion of Section 25(8) was to lessen the amount of com-
pensation to be paid. Quoting Roux and Van der Walt, the court found that it saw

no logical reason why a land owner whose property is expropriated for purposes of land
reform, should receive less compensation than a land owner whose property is expropri-
ated for a more mundane purpose, such as a storage dam, a school or a hospital.

The court based this view on the fact that land reform is a legitimate part of the state’s
duties and “does not rank superior to any other legitimate purpose for which prop-
erty may be expropriated”. This means that determining compensation in cases of
land reform should not be treated differently from any other act of expropriation.

Both cases dealt with the expropriation of property. In both cases, the expropriation
took place in terms of law of general application. In both cases, they were performed
for a public purpose or in the public interest. In both cases, there was adherence to the
compensation requirement. And in both cases, the requirement that compensation
must take place for a public purpose or in the public interest was misconstrued. In
Du Toit the owner was unfairly burdened by receiving less than market value com-
pensation for a run-of-the-mill expropriation, while in MalaMala, the owners are to
receive full market value compensation when their land is expropriated for land
reform purposes. (The irony does not escape me that if the court treated this like
any other purpose, like the removal of the gravel in Du Toit, for instance, the court
would be able to lower the compensation amount.)

46. “25(8) No provision of this section may impede the state from taking legislative and other measures to
achieve land, water and related reform, in order to redress the results of past racial discrimination, pro-
vided that any departure from the provisions of this section is in accordance with the provisions of Sec-
tion 36(1).”
47. “It is possible that the amount of compensation required for expropriation could be beyond the state’s
resources and hence constitute a fundamental impediment to land, water and related reform. In these
circumstances, ss (8) could reduce the protection afforded by ss (2) and (3) regarding the amount of com-
48. “…since the purpose of the expropriation (e.g. land reform) is already taken into account in justifying
the expropriation, it should not be enough to override other factors in determining the amount of com-
50. Id.
For most people the *Du Toit* case will seem blatantly unfair: if the reasoning in *Du Toit* stands, the state can always expropriate resources from private citizens for the upkeep of national assets, paying substantially less than market value. This should not be the case. Normal run-of-the-mill expropriations can justifiably require market value compensation, paid from the fiscus, which relies on taxpayers’ money for the upkeep of public roads. When tax money is used, the cost of building or maintaining a national asset that will be used by the general tax-paying public is spread amongst the citizens in an indirect way. This seems fair, as no owner should be alone responsible for financing the upkeep of a national asset. Conversely, in view of the history of the privileged land ownership in South Africa and the Constitutional imperative to transform, one should acknowledge that market value cannot be treated as a strict requirement in a case such as *MalaMala*.51 Both cases are problematic insofar as they confuse the justification of the public purpose requirement with public purpose as a factor that can influence the compensation amount. On *Du Toit*’s logic, all expropriations that fulfill the constitutional requirements, specifically the public purpose requirement, would warrant a downward adjustment to market-value compensation. On *MalaMala*’s logic, Section 25(3)(e) is redundant, because regardless of the purpose of the expropriation, a valid purpose would always mean that full market value is payable. So, what now?

14.4 **An Alternative Interpretation of Section 25(3)(e)**

Van der Walt52 argues that the duty to consider public purpose as a factor influencing compensation implies that one should be sensitive to the context within which the property rights are affected by expropriation. The amount of the compensation can be less than market value. That does not imply, however, that the amount of the compensation should in all cases of expropriation be adjusted downwards to reflect the legitimacy of the public purpose the expropriations serve. This might not be just and equitable in every case.

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51. The case was set down for hearing in the Constitutional Court in early 2014, but was withdrawn because the state decided to settle it out of court. The state paid full market value. Although it is not clear why the state chose this route (the likelihood of the court’s ordering less than market value seemed fairly high), it does show that the state prefers market solutions above other solutions when it comes to acquiring land for land reform purposes. See S. Blain, ‘Zuma to Restore Land to *MalaMala* Claimants’, *Business Day*, 9 January 2014 [available at <www.bdlive.co.za/business/agriculture/2014/01/09/zuma-to-restore-land-to-mala-mala-claimants> as on 17 January 2014].

A better approach is that Section 25(3)(e) be applicable if there is a unique purpose or value, such as social justice and equitable access to land, as contained in the Constitution. The reference to the context and history in Section 25(3)(b) makes it clear that there is a specific aim that compensation must fulfill, a specific Apartheid wrong that must be made right, a precaution against allowing the beneficiaries of Apartheid land law to benefit twice (by payment of full compensation). This means that the purpose of the expropriation should have an influence on the compensation amount only in circumstances that deal with social transformation and equitable access to resources. Du Toit was not such a case.\textsuperscript{53} This is where the distinction between public purpose as a requirement for an expropriation should be distinguished from public purpose as a factor that should be taken into account when calculating compensation. Just because an expropriation can be justified because it serves a public purpose as required in Section 25(2) does not mean that the same public purpose should justify lower compensation when determining compensation as per Section 25(3)(e). It serves a different purpose in this context.

The argument the paper makes is fairly simple: when expropriation is performed for run-of-the-mill, business-as-usual projects (like building a road, a railway or parking), then market value would probably be just and equitable since that would strike the balance between the public interest and the interests of those affected. Conversely, given the historical context, as well as the context of Section 25(3)(e), when property is expropriated for a land reform purpose or some other reform purpose, the balance between the public interest and the interests of those affected might be struck by allowing the public purpose factor to play a bigger role in the reduction of market value compensation. In other words, just and equitable compensation in land reform cases demands that we consider the public purpose factor as playing a more prominent role than the other factors when calculating compensation. This line of argument has been accepted in foreign law.\textsuperscript{54}

14.4.1 Considering the Individual in a Societal Context: The German Approach

Article 14.3 of the German Constitution, the Grundgesetz (GG),\textsuperscript{55} states that an expropriation can take place only for a public purpose, and that the statute that authorizes the expropriation must say how such compensation must be calculated. Such

\textsuperscript{53} Van der Walt 2005, pp. 772-773. See also City of Cape Town v. Helderberg Park Development (Pty) Ltd 2007 (1) SA 1 (SCA), where the Constitution was likewise applied to an expropriation for the purpose of the canalization of storm water.

\textsuperscript{54} In terms of Section 39(c), courts may consider foreign law when interpreting the Bill of Rights.

compensation must reflect a just balance between the interest of the person affected and the public interest.\textsuperscript{56} In the context of German property law, it should be pointed out that when deciding on compensation, the individual in the societal context becomes the focus point. This is evident from Article 14.2, which makes it clear that property rights impose obligations on the owner and restrict an owner to using her property only in such a way as to serve the public interest. In the bigger context of the GG, individual property rights should be seen as being needed to protect personal liberty, the fundamental guarantee in the GG. Compensation is therefore paid not only to protect property as a market commodity but also in the context of enabling the individual to lead a self-governing life in society,\textsuperscript{57} while remembering that the use of such property must serve the public good. It is these two components that must be weighed up when restricting property rights.

The courts distinguish between the constitutional principles of compensation and the calculation of compensation. The constitutional requirement for compensation in Article 14.3.3 GG is that there must be an equitable balance between the interest affected (the interest of the owner) and the public interest.\textsuperscript{58} This balancing requirement means that in certain circumstances compensation that is less than market value would be permissible.\textsuperscript{59} While market value is important, balancing the irreversible impact of the expropriation on the landowner and the importance of the public purpose means that market value compensation is not the be-all and end-all.\textsuperscript{60} Public power cannot be abused by paying the landowner too little, but paying too much may also frustrate the public purpose.\textsuperscript{61} This balancing renders the determination of the compensation amount flexible, and seems to suggest that fixing compensation at less than market value should be possible.\textsuperscript{62} The calculation of compensation is thus a finding of where the interests of the two sides are balanced, with neither the individual nor the public interest weighing more.\textsuperscript{63}


\textsuperscript{59} BVerfGE 24, 367 [1968] (Hamburgisches Deichordnungsgesetz).

\textsuperscript{60} A.J. van der Walt, Constitutional Property Law, 2nd edn, Juta, Cape Town, 2005, p. 273.

\textsuperscript{61} W. Voss ‘Compulsory purchase in Poland, Norway and Germany – Part Germany’ a paper delivered at the XXIV FIG International Congress 2010, Sydney, Australia, 11-16 April 2010.


\textsuperscript{63} BVerfGE 24, 367 [1968] (Hamburgisches Deichordnungsgesetz) 420-421. The interest of the community is important since it ultimately has to pay the compensation (through taxes). See Schmidt-Aßmann 1990.
The legislature has a wide discretion to set the standards for compensation, and the Federal Constitutional Court has ruled\(^64\) that a “rigorous market value only oriented”\(^65\) approach is strange under the Constitution. The court ruled in the *Deichordnungs* case that compensation does not always mean that the expropriatee should be compensated for the “full equivalent of the value of that which is expropriated”.\(^66\) The legislature can enact laws that allow for compensation that is less than market value.\(^67\) The legislature must enact laws that adhere to these principles.\(^68\) The Court further ruled that the expropriating legislation must provide a framework for the calculation of compensation on the facts of each case. Market value and financial loss, although relevant, are the only factors and must be weighed against the public interest involved in expropriation. This means that while market value is the norm in most cases, compensation can legitimately be determined at less than market value.\(^69\)

### 14.4.2 The Influence of the Changing Social and Moral Fiber of Society on the Compensation Amount: The Indian Example

The Indian situation in the 1970s with regard to land reform and economic development provides an interesting comparison with the current South African situation.\(^70\) The Indian Constitution also had certain social reform objectives,\(^71\) and some expropriations

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64. BVerfGE 24, 367 (Hamburgisches Deichordnungsgesetz) (1968).
67. BVerfGE 24, 367 [1968] (Hamburgisches Deichordnungsgesetz) 421.
69. Van der Walt 1999, pp. 142, 151.
71. In *Kesavananda Bharati Spiradagalvaru v. State of Kerala* [1973] INSC 258 1863 states that “[a]rticle 38 shows that the first of the specific mandates to State organs says: ‘38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.’ In other words, promotion of a social order in which ‘justice, social, economic, and political’ was the first duty of all the organs of the State. The second specific mandate to State, organs, found in Article 39, contains the principles of what is known as the socialistic ‘welfare State’. It attempts to promote social justice by means of nationalisation and State action for a better distribution of material resources of the country among its citizens and to prevent the exploitation of the weak and the helpless. It runs as follows: 39. The State shall, in particular, direct its policy towards securing:
were performed to adhere to these reform objectives. As in South Africa, the compensation that the State offered and what the owners expected did not correlate.

What essentially transpired in the 1970s was a lock-down between the judiciary and the legislature on how to calculate compensation, and what the content of market value was. The now repealed article 31(2) of the Indian Constitution provided that no law can authorise an expropriation unless the law provides for the compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which the compensation is to be determined and given.

The Constituent Assembly hoped that this would enable the acquisition of property below market value. The judiciary, in *State of West Bengal v. Bela Banerjee*, interpreted the article as giving a narrow discretion to the legislature to determine compensation, requiring full indemnification of the expropriated owner.

An amendment to the Constitution by the legislature followed, to respond to *Banerjee*, adding to article 31(2) that “no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate”. Adequacy of compensation became the issue, not full market value. Therefore, a statute that allowed for adequate compensation even if it is not full market value did not offend the Constitution. In *Rustom Cavasjee Cooper v. Union of India*, the court stated that:

> [c]ompensation provided [by the law] was not the full market value at the date of acquisition. The law did not offend the guarantee under Art. 31(2) as amended, because the objection was only as to the adequacy of compensation. [...] [C]ompensation does not mean a just equivalent of the property. If compensation is provided by law to be paid and the compensation is not illusory or is not determinable by the application of irrelevant principles, the law is not open to challenge on the ground that compensation fixed or determined to be paid is inadequate. [...] (emphasis added)

A few years later, in *Kesavananda Bharati Sripadavaru v. State of Kerala* (a case dealing with the Kerala Land Reforms (Amendment) Act 25 of 1971) the court stated that the compensation amount must have a reasonable relationship with the value of the property taken. Sometimes the social and moral fabric of society changes to such an extent that the State feels compelled to deprive (confiscate or

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72. AIR 1954 SC 170 at 172.
74. AIR 1970 SC 564.
75. [1973] INSC 258.
expropriate) owners of property even without the payment of compensation. The example of the abolition of slavery used in the case shows that sometimes a justifiable confiscation of property might be inconsistent with the absolute theory of property, and yet it is tolerated because changes have taken place in the social and moral fabric of a society.76

In India, the legislature had to interfere substantially in the calculation of compensation to allow for compensation to be less than market value. When it did not provide clear guidelines, the courts were free to revert to full indemnity, or full market-value compensation. It was only after constitutional amendment (to allow for adequate compensation) that the courts allowed for less than market-value compensation where there were changes in the social and moral fiber of society.

The Indian example shows that it is within a legislature’s power to promulgate laws that allow for less than market-value compensation, where the purpose of the expropriation is linked to a change in the social and moral fabric of society, such as land reform.

14.4.3 Economic Reform and Measures to Achieve Greater Social Justice: European Court of Human Rights

Article 1 of the First Protocol of the European Convention 1950 requires a fair balance between public and private interests, with compensation being an important element in determining such a fair balance.77 Compensation should, however, not be seen in isolation, as there are other elements that can be important. For instance, the nature of the public interest may justify that the payment of compensation below market value, and sometimes the presence or absence of procedural rights might influence the balance. The Convention’s fair balance requirement sheds interesting light on the role of compensation.78

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76. Par 77.
77. An interesting case that illustrates the influence of proportionality on the calculation of compensation is Lithgow v. United Kingdom 8 EHRR 329 par 121. The European Court of Human Rights ruled that market value is not the decisive factor in calculating compensation, but rather that the amount should be “reasonably related to its value”.
78. S 25(3) of the Constitution. Article 1 of protocol no 1 of the Human Rights convention provides that: “(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.
Article 1 is generally accepted as placing a duty on a state to compensate if the deprivation of property is severe. The courts have interpreted this to mean that

an interference with the right to peaceful enjoyment of possessions must strike a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental right.\(^{79}\)

Although the taking of property without compensation would be a disproportionate interference with property rights that cannot be justified, the provision does not guarantee a right to full compensation in every instance, as the ‘public interest’ requirement may warrant compensation at less than market value.\(^{80}\) The court acknowledges that in the case of taking land for constructing a road or something similar, compensation at full market value might be the only reasonable price to pay for the property,\(^{81}\) but contrasts this with cases where property is taken pursuant to “measures of economic reform or measures designed to achieve greater social justice”.\(^{82}\) In such a case, the setting of compensation at less than market value should be possible.\(^{83}\) The court notes that “in such cases, the compensation does not necessarily have to reflect the full value of the property in question”.\(^{84}\) The court makes specific reference to the impact the change of political and economic regimes might have. In general, the European Court of Human Rights (ECHR) defers a lot of power to the State to determine the amount of compensation (and allows for below-market-value compensation). During a period of change in political and economic regimes marked with possible upheavals and uncertainties, the state is given a wide margin of discretion to determine the compensation.\(^{85}\) In Broniowski v. Poland\(^{86}\) with specific reference to the restitution of property the court allowed for the determining of compensation at below market value.\(^{87}\) Likewise, in Almeide Garrett v. Portugal\(^{88}\) the court found that


\(^{81}\) Former King of Greece and Others v. Greece § 78 ECHR 25701/94; Vistiņš and Perepjolkins v. Latvia ECHR (2011) 71243/01 at 110.

\(^{82}\) Vistiņš and Perepjolkins v. Latvia ECHR (2011) 71243/01 at 111.

\(^{83}\) James v. the United Kingdom ECHR (1986) 8793/79 at 123.

\(^{84}\) Vistiņš and Perepjolkins v. Latvia ECHR (2011) 71243/01 at 111.


\(^{88}\) ECHR (2000) 29813/96 at 51.
the interference in issue manifestly pursued a legitimate aim, as it cannot be unreasonable for a State to have regard to its financial and budgetary resources when implementing a major land reform with economic and social objectives that cannot be said to be unreasonable.89

From these cases, it seems clear that the ECHR makes a clear distinction between expropriation for non-political purposes and expropriation performed in the context of political and economic reform. In the first instance, the court would generally accept that full market value would be appropriate,90 but in the case of reform, the court accepts that compensation set at less than market value is possible.

14.5 Conclusion

Imagine Kas Maine is still alive. If you had read the book, you would know his intimate story. You would have learned that he was a great agriculturalist, that he was a successful sharecropper, and that he managed to live an independent life, avoiding the slavery of farm labor during apartheid. Maine had everything a successful agriculturalist needs. Except land. Not because of a lack of trying, but because Apartheid land policies succeeded in making sure that he would not own land.

Imagine that Maine succeeded in becoming a beneficiary in one of the government’s redistribution programmes. In order to complete the process, the government must now expropriate land to transfer to Maine. If the government must pay full market value it will be too expensive, and the process cannot be completed. If the government pays just and equitable market value, then the process can be completed, and Maine will be allowed to have a piece of land where he can pass on quietly, on which he will be buried, close to his family, who will from now on not have to fear eviction. Just as the story of Maine is not fictional, the possibility should not be hypothetical either. The Constitution allows for such a transaction; the preamble demands such social justice.

In Section 25, the Constitution requires that the interest of the individual be weighed against the interest of the public when it states expressly that “the amount must be just and equitable, reflecting the balance between the public interest and the interests of those affected”, and this means that the focus has shifted to the individual holding property rights in the context of society. Froneman J made this clear in Haffejee91 when he stated that

89. § 53.
91. Haffejee NO v. eThekwini Municipality 2011 (6) SA 134.
The purpose of section 25 is to protect existing private property rights and to serve the public interest, mainly in the sphere of land reform but not limited thereto. Its purpose is to strike ‘a proportionate balance between these two functions’.

The protection of vested rights (ownership) and transformation-orientated goals (land reform) need not stand opposed to one another. The protection of existing rights and the promotion of transformation are part of the same constitutional goal. When making compensation decisions there is no choice between either protecting the owner or promoting transformation by making land reform possible. Instead, the process is about promoting the spirit, object, and purport of the Constitution by weighing up the two issues. It is about balancing out and reconciling claims in a just manner.92 This has been done in Germany, India, and the European Court of Human Rights in a sensible manner, and should be possible in South Africa.

In the context of Section 25(2) – public purpose as a requirement can be considered similarly in both land reform and ‘normal’ expropriation cases. What is asked, then, is if property can be taken for that specific purpose. If the answer is yes, the same (or at least a very similar) purpose does play a role in the calculation of the compensation, but this time in a different context.93 If it is a gravel-for-roads case, then the likelihood of compensation being paid at a discounted rate is less than if it is for a reform purposes. Just as our sense of justice feels outraged that the courts paid less than market value compensation for Du Toit for using his gravel to build a public road, so it would if Kas Maine would not be able to get a piece of land because his previous landlords must be compensated at market value, making land reform too expensive, and restitution impossible. Just as we feel outraged that Du Toit had to subsidize a public road, we feel frustrated because the people who benefited from Apartheid land laws and policies benefit once again by receiving full market-value compensation.

It is time that the courts and the legislature (especially) dealt with this issue pertinently. The legislature could do this by making sure it provides clear guidelines on the calculation of just and equitable compensation, rather than a mere ‘copy and paste’ of Section 25(3).94 The courts could do this by consciously breaking away from the legal culture of full indemnity, especially in clear transformation-orientated cases like MalaMala. Our conception of what is just and equitable should be enriched by a vision of our proper historical context and the restorative and transformative aims of the Constitution. This entails a rich interpretation of the ‘public purpose’ factor in Section 25(3) that will allow, rather than hamper such transformation.

92. Port Elizabeth Municipality v. Various Occupiers, 2005 1 SA 217 (CC) par 23.
93. It is hard to foresee circumstances where public purpose as a requirement will be different from public purpose as factor.
The decision of the Australian High Court in favor of the Commonwealth in the tobacco ‘plain packaging’ case\(^1\) late in 2012 has already attracted extensive international attention. Not only was the case newsworthy from a general public health perspective in the on-going contest between transnational tobacco corporations and governments across many countries, but it also appears to have stimulated legal debate globally as to how the result might be replicated in other jurisdictions.\(^2\) The decision followed other recent High Court decisions, namely *Telstra v. Commonwealth*\(^3\) and *ICM v. Commonwealth*,\(^4\) where two other critical areas of governmental regulatory activity (namely, telecommunications privatization and the control of water supply) were challenged on the basis that they too involved acquisition of property without ‘just terms’ compensation. In these cases also, the High Court held that the relevant legislation was valid. These results were reached even though the statutory regimes in both cases made no compensation available despite the demonstrable diminution of the plaintiffs’ rights. These decisions will provide the basis for exploring the range of state actions that constitute expropriation of private property requiring the payment of just terms compensation.

But a focus on challenges to the legislation of the Federal Parliament provides only a partial snapshot of the broad domain of Australian expropriation law. This is because most expropriations take place at the state and territory, not federal level, where no constitutional property protection applies. Two recent decisions of the Australian
High Court, *Fazzolari v. Parramatta City Council*\(^5\) and *Griffiths v. Commonwealth*\(^6\) demonstrate this more complex picture. The former case involved an appeal against the compulsory acquisition of land by a local council in the state of New South Wales. The latter concerned the acquisition by the Northern Territory Lands Minister of land belonging to Aboriginal traditional owners for the purpose of re-grant to a private citizen. The federal position on the one hand, and state and territory position on the other hand, provide the opportunity not merely to contrast a constitutional form of property protection with an ordinary statute-based model in the Australian context, but they raise the question about the desirability or otherwise of constitutionalizing property law. My tentative conclusions are that the High Court of Australia has fairly consistently interpreted the constitutional provision in such a way as to provide the Federal Parliament considerable room to legislate without being subjected to the burdensome compensation requirements of constitutional law. In this way, it has achieved a reasonable balance between regulatory, public-interest objectives on the one hand, and proprietary protection on the other. It therefore avoids many of the criticisms made by theorists such as Jennifer Nedelsky\(^7\) about the problems of constitutionalizing property protection. These problems manifest themselves in the appearance of what she describes as a ‘guarantee-oriented’ jurisprudence, at once molded to favor existing patterns of wealth distribution, to strike down regulatory and redistributive government initiatives, and to foster a *laissez-faire* economic system. She contrasts this model of property protection that is ‘limitation-oriented’, that is to say, a more democratically accountable, more compatible with redistributive policies by governments, and better balancing private rights and the public interest. Despite the breadth of the Australian constitutional property protection provision, the large corpus of case law decided under it, including the most recent decisions, appears to fall into the ‘limitation-oriented’ category.\(^8\) This achievement is even more notable in the context of the growing popular movements that are very critical of regulatory inroads into property rights by governments that seek to protect the environment and public health.\(^9\)

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15.2 THE COMPLEXITY OF AUSTRALIAN EXPROPRIATION LAW

The complex fabric of Australian expropriation law is demonstrated by the recent decision of the High Court in Fazzolari v. Parramatta City Council. Fazzolari\(^{10}\) is a Kelo\(^{11}\) kind of story, that is to say, a case of a local government entering into a partnership with a private corporation (Grocon) to substantially redevelop a retail and business hub (called ‘Civic Place’). Without this partnership, the Council did not have the resources to proceed. The hub was to be situated in an area already occupied by businesses and residential premises, as in Kelo. However, the council faced two proprietors who were reluctant to sell. The solution was for the council to use its compulsory acquisition powers under the Local Government Act 1991 (NSW) to carry out the purchases, which were acquired solely for the purpose of later transfers to Grocon. The recalcitrant proprietors challenged the validity of the purchases.

That is where the similarities with Kelo end. Because this case involved an acquisition by local government, rather than the federal government, the relevant law is state rather federal law. Under federal law, property is constitutionally protected. By section 51(xxxi) of the Commonwealth Constitution, the Federal Parliament can make laws “to acquire property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”. Unlike the position in the United States, no constitutional impediment arises when acquisitions are effected by local councils, or by the state government. This is because the Commonwealth provision does not apply to the states, and the state constitutions do not contain comparable constitutional property protection provisions. No less significant is the fact that the federal government’s powers to legislate with respect to land and the environment do not in general extend to the states. Instead, this legislative power is the exclusive domain of the states.\(^{12}\) As a matter of statistical frequency, therefore, it is reasonable to conclude that most instances of expropriation property in Australia are not covered by the federal constitutional protection. A striking asymmetry therefore lies at the heart of Australian constitutional property law.

The New South Wales (NSW) Parliament is thus able, under the Constitution’s plenary power in s. 5 that provides that “The Legislature shall … have power to make laws for the peace, welfare and good government of New South Wales” to enact legislation to compulsorily acquire private property with limited or even no compensation because

\(^{10}\) Fazzolari v. Parramatta City Council (2009) 237 CLR 603.


\(^{12}\) Pye v. Renshaw (1951) 84 CLR 58 at 79-80. Exceptions are when the Commonwealth is performing a federal function which is located on land situated in states, such as defense bases, lighthouses, customs offices and the like.
such prescriptive terms as s. 51(xxxi) do not feature. The High Court has therefore concluded that the State’s legislative powers have the “widest possible operation.” This asymmetry of protection has been a frequent focus of political debate. For instance, a federal referendum was held in 1988 to change the federal constitution so as to extend it to the states, but it failed. It follows that in the increasingly prevalent case of large-scale public acquisition, namely the assembly of titles for urban redevelopment by a state or local government that are then transferred to a private developer, constitutional protections have no application.

Of course, the various states’ ordinary, as opposed to constitutional, property laws do indeed contain provisions to compensate citizens for expropriation of their property. In New South Wales, for example, the relevant principles are contained in both the Local Government Act 1991 (NSW) and the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). Notably, these statutes offer landholders limited protection. Like all ordinary statutes, they can be amended by legislation consistent with general principles of parliamentary sovereignty. In the Fazzolari case, there was no doubt that the council did have the right to purchase land under the Act, even with the sole aim of on-selling it to the developer. The public interest, as expressed in the legislation, merely requires councils who do adopt this development strategy to comply with relevant planning principles. Specifically, in New South Wales, section 188(1) of the Local Government Act provides that land may be acquired for the purpose of re-sale without an owner’s consent. But the power is subject to a constraint. By s. 188(2), the land must be part of, adjoin, or lie in the vicinity of other land acquired at the same time under Part 1 of Chapter 8 of the Local Government Act for a purpose other than re-sale. If this condition is not met, land may not be compulsorily acquired without the approval of the owner. The Council sent proposed acquisition notices to the plaintiffs. They challenged the proposed acquisitions on the basis that their land was being acquired in order to re-sell it to Grocon without other land being acquired for a purpose other than re-sale.

Before the New South Wales Land and Environment Court, the landholders successfully argued that the land could not be compulsorily acquired without their consent. On appeal, the NSW Court of Appeal upheld the Council’s argument that the land was being acquired to implement the Council’s ‘Civic Place’ project and not for the purpose of on-selling it to Grocon, so that the owners’ consent to compulsorily acquire the land was not needed. A further appeal to the High Court by the plaintiffs was successful. The Court considered that the acquisition of their land could be

15. As noted in Id. at 63.
characterized as steps along the way towards the ‘Civic Place’ re-development, but that did not mean that the Council’s purpose in acquiring the plaintiffs’ land was not to re-sell them to Grocon. Accordingly, this was not an acquisition permitted by the Act.

A further limitation in the protection of property holders is that in the states’ and territories’ land acquisition acts the definition of public purpose is very broadly defined. In New South Wales, for example, the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) s. 4(1) provides that ‘public purpose’ is defined to mean “any purpose for which land may by law be acquired by compulsory process under this Act”. Even broader provisions are evident in other Australian jurisdictions. So, in *Griffiths v. Minister for Lands, Planning and Environment* the High Court by majority held that s. 43(1) of the Lands Acquisition Act (NT), which conferred power on the Minister to acquire land ‘for any purpose whatsoever’, was unlimited in scope and therefore not subject to any kind of public interest or public benefit requirement. It therefore allowed the Minister to acquire land solely for the purpose of selling or leasing it to another person.

Opinions may differ as to whether the courts in the decisions adopted the preferable interpretation of the legislation by reference either to the broader public interest, or the importance of upholding private property rights. But importantly for this discussion, because the Council (in New South Wales) and the Minister (in the Northern Territory) do not confront the obstacle of an adverse constitutional ruling, it is possible for the relevant statutes to be amended to overturn these results. Given that a very pro-development state government is now in power in New South Wales, in the sense that it has indicated it will do its utmost to provide all available support to property developers, this may not be very difficult to achieve. Moreover, it was open to the council to go back to the procedure under the current Act and ensure that appropriate modifications are adopted in relation to this development so as to put into effect the original plan in substance if not in form. Moreover, being a statutory obstacle only, the Parliament was able to, and promptly did, amend the legislation requiring councils to specify their purpose, not being an on-sale purchase, when acquiring land in cases such as this.

Accordingly, the acquisitions were able to proceed, so that the development has now advanced to the next stage.

It is not my purpose in this paper to engage in an exercise of comparing different constitutional regimes. But the distinctiveness of the overall Australian framework of


17. By Land Acquisition (Just Terms Compensation) Act 1991 (NSW), Sch 3, cl 5.
protection at the various federal, state and local levels, can better be appreciated by looking at the United States model. By comparison with Kelo, the statutory procedures in Fazzolari proved to be a more effective mechanism for protection of the proprietors’ rights than the Fifth Amendment was in that case, even though an express power to on-sell by the expropriating power was conferred by the legislation. The delicate balancing between public and private interests was expressed in the relevant statutory provisions. The cumbersome nature of constitutional protection would not necessarily have delivered them a more favorable result. As will be examined below, it appears reasonably clear that even if a development of this nature were covered by s. 51(xxxi), or to be conducted in an area over which the Commonwealth does have legislative power, for example a purchase of properties which were then on-sold to a developer to build for a privatized function, it would face no ‘public purpose’ obstacles such as were raised, albeit unsuccessfully in Kelo. Perhaps the Fazzolari and Griffiths cases provides some support for Jennifer Nedelsky’s firm opposition to including a property protection provision in the constitution.18 This point will be discussed in more detail below.

15.3 Federal Constitutional Property Law in Australia: Section 51(xxxi) of the Commonwealth Constitution

Although the Australian constitution does not contain a Bill of Rights, it nonetheless includes a property protection provision that is a familiar feature of many other constitutions. Section 51(xxxi) is partly derived from the Fifth Amendment to the United States Constitution. The American provision is expressed as a limitation on power: “nor shall private property be taken […] without just compensation”. By contrast, the Australian provision is expressed as a grant of power: the Commonwealth Parliament may make laws with respect to “the acquisition of property […]”. An important qualification is that this power is subject to a condition, namely that the acquisition be ‘on just terms’. In this form, s. 51(xxxi) is both a head of power and a guarantee against the abuse of power.

The wording of s. 51(xxxi) is expansive and unqualified, which explains why the High Court has consistently concluded that the section has “the status of a constitutional guarantee of just terms”.19 In Trade Practices Commission v. Tooth & Co it was described

by Barwick CJ as “a very great constitutional safeguard”,20 and it has been held that the provision should be construed ‘liberally’ and ‘not pedantically’.21 But despite these interpretations, a distinctive feature of s. 51(xxxi) lies in its function of both enlarging as well as limiting the Commonwealth’s legislative power. The limits imposed are extensive since the provision operates to subject the acquisition of property in the exercise of any other legislative power to the just terms requirement. The reason for this result was explained by Dixon CJ in Attorney-General (Commonwealth) v. Schmidt:

[w]hen you have, as you do in par (xxxi), an express power, subject to a safeguard, restriction, or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any of other powers conferred in the context which would mean that they include the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification.22

On this interpretation, the effect of s. 51(xxxi) is to have primacy over other heads of legislative power where any acquisition of property is required. The conventional approach to construing the ambit of the various heads of power listed in s. 51 is to afford them complete independence from each other. Accordingly, one grant of power cannot be interpreted in a way as to undermine another. The exception to this principle is that, where a grant of power is subject to a specific qualification, another grant of power will not to be read in a way to circumvent that qualification. This approach was explained in Mutual Pools & Staff Pty Ltd. v. Commonwealth by Mason CJ, consistent with Dixon J’s approach above, on the following basis:

when a power is conferred and some qualification or restriction is attached to its exercise, other powers should be construed, absent any indication of contrary intention, so as not to authorise an exercise of power free from the qualification or restriction.23

The application of this principle in relation to s. 51(xxxi) is intended to ensure that the requirement to pay just terms cannot be obviated by construing other powers in a way as to limit the obligation. For example, on normal principles of construction, the legislative power as to ‘defense’ in s. 51 would entail the necessary implication that the power to legislate for the acquisition of land on which to locate defense facilities. However, in order that grants of power should not be construed to circumvent

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specific limitations, the Court has held that this normal ‘incident’ is excluded from this head of power. It follows that the acquisition of property for any legislative purpose set out in s. 51 is confined to s. 51(xxxi), requiring ‘just terms’. Brennan J summarized this aspect of the provision in Mutual Pools & Staff Pty Ltd. v. Commonwealth as follows:

First, it confers power to acquire property from any State or person for any purpose for which the Parliament has power to make laws and it conditions the exercise of that power on the provision of just terms. Second, by an implication required to make the condition of just terms effective, it abstracts the power to support a law for the compulsory acquisition of property from any other legislative power.24

The broad terms in which the provision is expressed are further reflected in the tendency of the courts to interpret the term ‘property’ expansively. The constitutional guarantee of just terms is to be given the liberal construction appropriate to such a constitutional provision as in Minister of State for the Army v. Dalziel.25 In this case, the definition of property for the purpose of the provision was held to extend to ‘innominate and anomalous interests’ that included ‘the assumption and indefinite continuance of exclusive possession and control for the purpose of the Commonwealth of any subject of property.’ Relevantly, the Minister, under the Wartime Regulations, declared a commercial property, used as a car-park, to be requisitioned for military purposes. Rather than specifying that he held the same interest in the land as the owner of the land, or the tenant in occupation under a weekly tenancy, the Minister assumed possessory rights of the land only. Although such rights are not a recognizable property right in land, falling outside the numerus clausus of established interests in land, they nonetheless were held to fall within the expansive definition of property in the provision, and hence required payment of just terms compensation. The tenant had been effectively deprived of beneficial enjoyment of the land by the expansive nature of the rights vested in the Minister. More recently, the High Court has held that term ‘property’ in this provision refers to “every species of valuable right and interest including … choses in action”.26

Moreover, the courts have held that the cognate term ‘acquisition’ is also to be construed ‘liberally’ and not ‘pedantically’.27 Accordingly, the provision has been interpreted broadly to cover acquisitions by parties other than the Commonwealth government. As long as the acquisition is for a Commonwealth purpose, the just terms requirement

24. Id., at 188.
will apply. For example, an acquisition is covered if the legislation authorizes a state government to acquire land for distribution to discharged members of the defense forces, or the legislation forces a transfer from one citizen to another. Insofar as the provision expressly confers power to make laws with respect to the acquisition of property, s. 51(xxxi) resolves any doubt that the Commonwealth Parliament’s other substantive heads of power might not authorize laws with respect to the acquisition of property.

Unlike some other constitutional property provisions, there is no express requirement in Australia that the acquisition be for ‘public benefit’ or for a ‘public purpose’. This does not mean that the notions of public benefit or public purpose are irrelevant to s. 51(xxxi). Rather, the requirements must be taken to be included as express purposes or benefits in the other specific legislative powers of the Commonwealth, such as the powers over taxation, defense, external affairs and so forth. On the one hand, these separate powers provide scope for a very broad notion of public benefit to apply. On the other hand, to the extent that expropriations under these powers are abstracted into s. 51(xxxi), a general presumption of just terms would appear to apply. What makes a very expansive protection of private property even more possible, at least theoretically, under this provision is that the courts have not been given any further express textual guidance from the constitution as to the limits of the applicable meaning of property. In the absence of any criteria specifying the conceptual boundary of the provision, the constitution has left it to the courts to determine its ambit from the implications in, or the presuppositions of, other legislative powers of the Commonwealth.

From the above, necessarily brief, overview, it may appear that this particular constitutional just terms obligation imposes a potentially very onerous burden on the Commonwealth to provide just terms compensation across the breadth of its legislative activities. As will be seen below, however, the courts have found a strikingly diverse number of ways of limiting the circumstances in which compensation is payable. In particular, it is possible to identify in the case law at least nine separate grounds upon which a particular diminution of property rights might not qualify for compensation on just terms. In doing so, the courts have succeeded in defining the extent of compensable acquisition in a way that achieves a fair balance between public interest or benefit on the one hand and private property protection on the other. A brief examination of these grounds follows. It will form the basis for examining the recent case law. The general conclusion reached is that what the very broad wording of s. 51(xxxi) apparently giveth, judicial interpretation taketh away.

28. PJ Magennis Pty Ltd. v. Commonwealth (1949) 80 CLR 382.
When Taking of Property Requires No Just Terms Compensation

Despite the very general terms that provide for protection of property in section 51 (xxxi), members of the High Court have found many ways to limit the payment of compensation where property rights have been infringed by legislative provisions. It is possible to identify no less than nine possible approaches to explain why the s. 51(xxxi) requirement of just terms was not attracted on the facts of particular cases. Space does not allow for consideration of these categories in detail, but it is important to at least list them to demonstrate the various ways in which the courts have sought to balance the protection of property with broader policy objectives in the public interest. In particular, the High Court has found that the requirement of just terms is not attracted even if rights in the nature of proprietary interests are diminished in no less than nine separate categories.

While these many exceptions may be seen to provide rich evidence to counter objections, such as those of Nedelsky, that constitutional property provisions have the inherent tendency to produce undesirable anti-public interest, anti-regulatory and anti-redistributive effects, they have also had the effect of cumulatively providing significant uncertainty as to determining when a particular piece of legislation will fall foul of the requirement to pay just terms. As many of the cases demonstrate, even when judges have agreed in the result, they have often disagreed on the grounds on which that result was reached. For example, in Mutual Pools, the judges advanced no less than four of the above nine grounds for justifying a result in favor of the Commonwealth.

This aspect of the law concerning public acquisitions is unfortunate, as it makes the question of predicting where the limits of the requirement to pay just terms end, and where no compensation is payable, very difficult. Yet it is nonetheless possible to see


in the case law three fundamental categories of rationale in resolving the question of whether s. 51(xxxi) applies to require just terms compensation, and into which the above nine categories can be fitted. Thus, the Court can be seen to resolve these disputes by means of applying three criteria: (1) by determining the definition of ‘property’ in a way sensitive to broader policy objectives; (2) by a strict delineation between ‘acquisition’ by the Commonwealth and ‘deprivation’ by regulation of private property; (3) by interpreting other legislative powers which entail the acquisition property by the Commonwealth as being beyond the reach of s. 51(xxxi).

Each of these strategies will be examined separately as a prelude to looking at the most recent case law. The results in these cases suggest that it is reasonable to conclude, in the terms expressed by Van der Walt in an early analysis of the High Court’s approach, that it has broadly achieved ‘interpretational balance’ between a ‘guarantee-oriented’ and a ‘limitation-oriented’ constitutional property jurisprudence.34

15.4.1 Criterion 1 – Defining Property – ‘Liberally’, but Conventionally

It was noted above that the broad terms deployed in s. 51(xxxi) has induced courts to define property in expansive terms, not ‘pedantically’ but ‘liberally’. However, a countervailing tendency, particularly evident in the recent case law, is for courts to narrow the definition of property. This exercise has been conducted in two different ways. First, the alleged interest in question has been held not to be property for the purposes of s. 51(xxxi). In Health Insurance Commission v. Peverill35 the Commonwealth enacted legislation that had a retrospective effect, depriving the respondent medical practitioner of the higher fees he would have been entitled to under the former state-financed regime of medical testing. For Brennan J (Dawson and Toohey JJ agreeing),

The right so conferred on assignee practitioners is not property: not only because the right is not assignable [...] but, more fundamentally, a right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is not susceptible of any form of repetitive or continuing enjoyment and cannot be exchanged for or converted into any kind of property [...] It does not have any degree of permanence or stability. That is not a right of a proprietary nature.36

The retrospective legislation therefore reduced Peverill’s legal entitlements to payment substantially but without the requirement of just terms. This right is to be compared with an accrued cause of action to sue for compensation for negligence. The

36. Id., at 243-244.
High Court held in *Georgiadis v. Australian and Overseas Telecommunications Corporation*\(^{37}\) that a statutory scheme capping entitlements to compensation well below common law amounts awarded at common law infringed the plaintiff’s proprietary rights. These two cases can be reconciled on the basis that the former right was granted under a statutory scheme and could therefore be modified or cancelled at any time, while the latter was a chose in action, a recognized category of intangible, assignable proprietary interest.

A second way in which property has been held to be immune from the requirement of compensation when acquired by the Commonwealth, or other persons in pursuance of Commonwealth policy, is where the property is ‘inherently susceptible of variation’. In *Commonwealth v. WMC Resources Ltd*\(^{38}\) a majority of the Court held that there was no acquisition of property where an exploration permit over part of the continental shelf was extinguished by Commonwealth legislation. The relevant rights were purely based in a statutory regime. Like other statutes in general, the regime was inherently susceptible to variation. A further reason advanced by the Court for not seeing this type of right as property for the purposes of s. 51(xxxi) was seeing its origin as exclusively sourced in statute: because the grant of the exploration right was not carved out of any pre-existing rights held by the Commonwealth to the continental shelf its status was inherently at odds with the kinds of property that s. 51(xxxi) was intended to protect.

The proprietary status of various water rights, in the form of statutory groundwater bore licenses, issued pursuant to the Water Rights Act 1912 (NSW), was recently explored by the High Court in *ICM Agriculture Pty Ltd. v. Commonwealth*\(^{39}\). These bore licenses were replaced by aquifer access licenses issued under the Water Management Act 2000 (NSW). The plaintiffs alleged this act amounted to an acquisition of property under s. 51(xxxi) and therefore required the Commonwealth to pay just compensation. It was acknowledged by the Court that the replacement would substantially reduce the plaintiffs’ rights, specifically resulting in a decrease of approximately 70% in their water allocation entitlements. The new regime was part of a general Commonwealth plan to sustainably ration water resources across the Murray-Darling Basin. It claimed that these rights were inherently variable, finding their source solely in statute, and were therefore not liable to generate rights to compensation if modified or extinguished. The legislation provided for compensation for adversely affected license-holders based on the value of their entitlements under the former regime. These rights to compensation were referred to not as just terms, but as “ex gratia structural adjustment payments”.\(^{40}\)

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40. The plan originated in June 2004 when the Commonwealth, NSW, Victorian, Queensland, SA, ACT and NT governments entered into the ‘Intergovernmental Agreement on National Water Initiative’ (NWI).
A majority of the High Court held that the replacement of the bore licenses with the aquifer access licenses did not constitute an acquisition of property and therefore the Commonwealth was not required to provide just compensation. They concluded that while the bore license had some proprietary characteristics, its fundamental status as a statutory privilege meant that it was inherently susceptible to variation by the Crown. It followed that s. 51(xxxi) had no application. The majority judges split into two groups of three in delivering their judgments. French CJ, Gummow, and Crennan JJ focused on the common law precursors of these licenses up until their extinguishment by s. 12(1) of the Water Act 1912 (NSW). They noted how under common law, usufructuary and appropriation entitlements to flowing and ground-water were recognized as institutional forms of property at that time. However, the statutory license entitlements that succeeded them were not statutory replicas of those rights. It followed that the rights conferred by the statute had to be considered in detail to determine whether or not property rights had been created. While the use rights, and the transferability of the licenses indicated proprietary status, the requirement of Ministerial approval, and the various limitations and conditions affecting the duration of the entitlement to a license indicated an “insufficient degree of permanence or stability to merit classification as proprietary in nature.”

For Hayne, Kiefel, and Bell JJ, the absence of any recognized property right pre-existing the statutorily sourced property rights was a significant factor, as it had been in Commonwealth v. WMC, noted above. The Court referred to case law indicating that water was not private, but common property at common law, and also to the fact that all water in the state had been declared property of the state by the Water and Drainage and Artesian Wells (Amending) Act 1906 (NSW). These regimes pre-existed the legislation that conferred rights on the plaintiffs. It could not be said, therefore, that the statutory rights in question in this case were derived from or modifications of existing common law rights. They held that the licenses had some identifiable proprietary characteristics, however, particularly insofar as they were alienable. But being wholly creatures of statute, and in light of the many conditions and qualifications that were imposed by the legislation, and Ministerial discretion, they were inherently amenable to variation, so were beyond s. 51(xxxi).

Another recent case which was decided on the basis of the legislative source of the alleged property rights was Telstra v. Commonwealth. It concerned the rights of the privatized
telecommunications entity, Telstra. The government’s policy was to break its monopoly by allowing access to its cabling systems to competitors. Telstra objected on the basis that this right of access to its infrastructure involved an acquisition of its property. But the Court examined the legislative history of its rights to the various elements of what were formerly publicly owned assets. It found that Telstra’s rights could properly be called proprietary in the sense that they were an identifiable ‘bundle of rights’. But the bundle in question was no more affected by the rights conferred on a current competitor than its rights were formerly: the Court concluded the various forms of legislation governing telecommunications had generally provided that Telstra was subject to similar kinds of access rights. It followed that its bundle of rights remained the same.

Of course, all rights to resources that have been conferred in a legislative scheme are inherently variable, because statutes may always be amended. But this does not make the rights “inherently susceptible to variation or extinguishment” and so not qualify for s. 51(xxxi) protection. First, the right in question may be a statutory form of a pre-existing common law property right, such as copyright. Second, the legislation itself may create a right which has a distinct proprietary character to it. The distinction between these two different forms of property rights sourced in legislation is demonstrated in two recent Northern Territory decisions. In *Newcrest Mining (WA) Ltd. v. Commonwealth* a right to extract minerals from land vested in the Commonwealth was extinguished. Unlike the position in the *Tasmanian Dam* case, where the rights in question were also held to be ‘sterilized’ in relation to certain types of activity, the State of Tasmania’s were nonetheless not completely extinguished. By contrast, in *Newcrest* the mining corporation’s rights were effectively extinguished for all purposes. The rights to mine were extracted out of the Commonwealth’s rights over that portion of land, which were eventually restored after being freed from the mining rights. As a result, compensation was payable. This case can be reconciled with *Commonwealth v. WMC Mining* on the basis that in *Newcrest*, the Commonwealth effectively held those recognizable proprietary rights before the statutory rights were created in favor of the mining corporation. In *WMC Mining*, the rights were created for the first time out of a legislative scheme.

Likewise, in *Wurridjal v. Commonwealth* the Aboriginal plaintiffs successfully claimed compensation from the Commonwealth when their land rights, in the form of leases granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), were made subject to leases granted to the Commonwealth. A majority of the High Court held that such leases constituted an acquisition of property. According to French CJ:

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[w]hen the property said to have been acquired is of statutory origin the terms of the statute and the nature of the property to which it gives rise require consideration to see whether or not it attracts the protection of s. 51 (xxxi).45

Because the object of this legislation was to “confer some of the important benefits of ownership of land upon traditional Aboriginal owners […]”, they had property for the purposes of the provision. This should be contrasted with the kinds of rights conferred to the provision of health services, to water, and to seabed exploration where no comparable object of conferring proprietary entitlement was evident. As Heydon J noted:

Putting to one side statutory rights which replace existing general law rights, the extent to which a right created by statute may be modified by subsequent legislation without amounting to an acquisition of property under s. 51(xxxi) must depend upon the nature of the right created by statute. It may be evident in the express terms of the statute that the right is subject to subsequent statutory variation. It may be clear from the scope of the rights conferred by the statute that what appears to be a new impingement on the rights was in fact always a limitation inherent in those rights. The statutory right may also be a part of a scheme of statutory entitlements which will inevitably require modification over time.46

It follows that the state action that amounts to compensable ‘expropriation’ in the Australian context has been restricted by a substantially conventional interpretation of the term ‘property’ by the judges, one that closely tracks the spectrum of interests that the label covers in the sphere of private law. Certainly, there appears to be little evidence to substantiate Jennifer Nedelsky’s fears about such constitutional provisions. This point is further corroborated by the other two major ways in which loss of property rights does not entitle the citizen to compensation.

15.4.2 Criterion 2 – Differentiating Takings, Deprivation, and Expropriation from ‘Acquisition’

The constitutional jurisprudence surrounding governmental ‘takings’ differs internationally by reference to the wording used in the various provisions to define the diminution of rights of the property holder. Section 51(xxxi) of the Australian constitution is distinctive to the extent that it emphasizes ‘acquisition’ of property. This term is to be differentiated from what in other jurisdictions may be characterized as an expropriation, deprivation or a ‘taking’ of private property. Arguably, these terms are more or less synonymous in common parlance. Yet the case law of the High Court indicates a critical distinction between them. For the Australian courts, the term ‘acquisition’

means something very different from both ‘deprivation’ and ‘taking’. ‘Taking’ has been held to refer to the subjective deprivation of rights, benefits or advantages experienced by holder of property: when my rights have been reduced by another’s act, it is appropriate to say that they have been ‘taken’ from me. By contrast, ‘acquisition’ refers to the perspective of the acquirer of rights, in this instance the state. It follows that the extinguishment of rights does not of itself amount to an acquisition. Because the acquisition involves an additional requirement, it presents a higher hurdle for the property holder to clear in order to establish a right to just terms. Mason J addressed this question in the *Tasmanian Dam* case where the High Court was asked to assess the constitutionality of legislation that prohibited the state of Tasmania from building a dam in a listed world heritage area. The Court recognized that the legislation had a sterilizing effect on the state’s property rights over the area. However,

To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.48

In stark contrast, Deane J took a strict approach to the question of ‘acquisition’. First, he said that where the Commonwealth or another entity obtains “an identifiable and measurable advantage [...] it is possible that an acquisition for the purposes of s. 51 (xxxix) is involved”.49 Second, he concluded that the absence of a material benefit of a proprietary nature did not resolve the question as to whether there had been an acquisition of property in that case. Significantly, however, no other judge agreed with him on this point. And this line of argument has not been supported in any of the later cases. It follows that any reference to “an identifiable and measurable advantage” must refer to an advantage of a proprietary nature. As Mason J said:

In terms of its potential for use, the property is sterilized, in much the same way as a park which is dedicated to public purposes or vested in trustees for public purposes, subject, of course, to such use or development as may attract the consent of the Minister. In this sense, the property is ‘dedicated’ or devoted to uses, i.e., protection and conservation which, by virtue of Australia’s adoption of the Convention and the legislation, have become purposes of the Commonwealth. However, what is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property. The power of the Minister to refuse consent under the section is merely a power of veto. He cannot positively authorize the doing of acts on the property. As the State remains in all respects, the owner the consent of the Minister does not overcome or override an absence of consent by the State in its capacity as owner.

A similar formulation of the test was advanced by Deane and Gaudron JJ in *Mutual Pools*, emphasizing that a person must obtain “at least some identifiable benefit or advantage relating to the ownership or use of property”. It follows that there must be an acquisition of property.50

The question of what constitutes an acquisition was raised in an acute way most recently in *JT International v. Commonwealth*,51 colloquially known as the ‘plain-packaging’ case. In order to further diminish the sale and consumption of tobacco in the interests of public health, the Federal Government in its Tobacco Plain Packaging Act 2010 (Cth) (the TPP Act) imposed a requirement that all packets containing tobacco would henceforth be devoid of any of the trademarks and advertising, and instead be in plain, light-brown packaging. As they had foreshadowed when the legislation was being considered by the Federal Parliament, the tobacco corporations challenged the Act on the basis that it entailed a breach of the s. 51(xxxi) requirement to pay just terms on the acquisition of its intellectual property, in the form of trademarks, goodwill and designs.

They submitted that the Commonwealth obtained a benefit or advantage from the tobacco corporations’ obligations under the TPP Act, and this benefit or advantage qualifies as ‘property’ for the purposes of s. 51(xxxi) on the basis of earlier decisions of the Court. All these arguments sought to assert, in one way or another, that the TPP Act takes the tobacco companies’ intellectual property. The plaintiffs argued that ‘benefit or advantage’ was manifested variously as ‘use’ or ‘control’ of the tobacco packaging; free advertising space; and prohibition of use of, and exploitation of images and designs on retail packaging and thus ‘control’ over the ‘exploitation’ of that packaging. These use and control rights were argued to be so extensive as to be tantamount to the obtaining of property by the Commonwealth of that packaging. There was no doubt in this case that the tobacco corporations were being deprived of the substantial value that these trademarks represented. But in the Australian context, ‘value’, economic or otherwise, is not property for the purposes of constitutional protection. The legislation clearly deprived them of the benefits of their intellectual property rights, but is deprivation enough to constitute a taking of property, and is a taking of property enough to constitute an ‘acquisition’ of property so as to constitute the obligation to pay just terms? These different terms need to be separately defined to answer these questions.

The plaintiffs sought to place a broad construction on a statement made by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd. v. Commonwealth*52 to support their claim

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that there was an acquisition of their rights in this case. In particular, they argued that the TPP Act gives the Commonwealth the use of, or control over, tobacco packaging because the TPP Act imposed certain requirements on the packaging. They claimed the Commonwealth was said to have acquired proprietary rights in the physical packaging that the tobacco companies use to sell their products by obtaining the ‘use’ of, or ‘control’ over, that packaging.

The Court rejected that argument by pointing out that the requirements of the TPP Act are no different from other kinds of legislation that requires warning labels of all kinds. It does not matter how extensive those warning labels are. Accordingly, those required by the TPP Act effect no acquisition of property. Although the Court expressly avoided offering a definition of the term ‘property’ in s. 51(xxxi), it found that the rights it held to compel compliance with the Act could not be considered ‘proprietary’. The control that the Commonwealth has over the packaging cannot ‘create a legal relation that the law describes as ‘property’. Compliance with the TPP Act creates no proprietary interest’. The tobacco companies also argued that the ‘identifiable and measurable countervailing benefit or advantage’ that the Commonwealth obtains from their compliance with the TPP Act could be considered to be ‘property’ for the purposes of s. 51(xxxi).

The Court accepted that the Commonwealth obtained an ‘identifiable benefit or advantage’ in terms of its proposed public health policy, but the key question was whether the Commonwealth obtained a benefit or advantage of a proprietary in nature. The Court held it did not.

Statutory requirements for warning labels on goods will presumably always be intended to achieve some benefit: usually the avoidance of or reduction in harm. But the benefit or advantage that results from the tobacco companies complying with the TPP Act is not proprietary. The Commonwealth acquires no property as a result of their compliance with the TPP Act. [...] The TPP Act is not a law by which the Commonwealth acquires any ‘interest in property, however slight or insubstantial it may be’ [Tasmanian Dam 158 CLR, 145]. The TPP Act is not a law with respect to the acquisition of property.54

The Court went on to hold that there are essentially two kinds of benefit that would constitute an ‘acquisition’. The first is the paradigm case of the acquisition of land by state or any authorized resuming authority, where what was taken was the same as what was acquired. The second case is where there is a reduction in rights of the property holder, and a countervailing benefit or advantage of a proprietary nature. An example of this latter case is when benefit or advantage is conferred on the person...
who is released from an obligation to the holder of an extinguished or modified chose in action, as in Georgiadis.\textsuperscript{55} The effect of the statutory provisions in that case was to confer a benefit corresponding to the plaintiff’s loss.

In dissent, Heydon J held that the TPP Act, by prohibiting the use of the intellectual property on the cigarette packets, “denies to the proprietors the use of the last valuable place on which their intellectual property could lawfully be used”. Prior to the Act, the packaging was the only place where rival corporations could advertise. There is some force in his argument that “[a]fter the impugned legislation, they could not even do that. The legislature therefore brought about ‘an effective sterilization of the rights constituting the property in question’”.\textsuperscript{56} However, as the majority noted in the Tasmanian Dam Case, sterilization, absent acquisition, does not trigger a right to compensation under s. 51(xxxi). It follows that the concept of ‘regulatory takings’ that is prominent in the constitutional property jurisprudence of many jurisdictions has no place in Australian law, and this proposition has been further entrenched after JT International v. Commonwealth.

15.4.3 Criterion 3 – The Acquisition of the Property in Question Is Permitted under Another Head of Power

Although s. 51(xxxi) has been held to be the exclusive provision dealing with expropriations of property, so that where the exercise of other heads of power involve acquisition, such as the defense power, s. 51(xxxi) is brought into play, in some situations the essential nature of those powers may make an incidental acquisition of property by the Commonwealth or a third party lawful. The various examples of these non-compensable acquisitions were described by Brennan J in Mutual Pools as “sundry laws providing for the acquisition of property which are supported by heads of power other than s. 51(xxxi)”. He gave as examples: laws providing for the imposition of a tax, as is provided for in s. 51(ii); the seizure of the property of enemy aliens under the war power; the sequestration of bankrupts’ property; and the forfeiture of prohibited imports or the exaction of fines and penalties.

Although the examples are obvious, no clear and unambiguous statement of principle has been offered by the courts to best explain these exceptions. As noted above, various formulations include (1) that the payment of compensation would be ‘irrelevant and incongruous’; (2) that the acquisition “clearly encompass[es] … acquisition of property unaccompanied by any quid pro quo of just terms”; (3) “a necessary or characteristic means of achieving an objective within power”; and (4) was not an acquisition “for any purpose in respect of which the Parliament has power to make

\textsuperscript{55} Georgiadis v. Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297.

laws” as s. 51(xxxi) specifies. But it is possible to identify a clear unifying rationale underlying these apparently divergent formulations by examining briefly some of the cases where they have appeared. For example, in *Theophanous v. Commonwealth*, the High Court held that there was no acquisition by a law that deprived a politician of parliamentary superannuation benefits because he had been convicted of a criminal offence for corruption. Because there is clear constitutional power to enact such criminal laws, it is inherent in them that such penalties may apply. Likewise, the power over customs necessitates that where illegally held goods have been confiscated no compensation is payable. And because s. 51(xviii) confers power to pass laws in relation to “Copyright, patents of inventions and designs, and trademarks” it necessarily follows that integral to that power is the modification of rights over such forms of intellectual property so as to affect the pre-existing distribution of rights.

Perhaps the most obvious case is the power to levy taxation as provided for in s. 51(ii). It would completely undermine the operation of this provision if just terms compensation were payable when law required taxation to be paid to the state. In general, therefore, these supposed ‘exceptions’ to the requirement of just terms compensation may be rationalized on the basis that if their exercise is integral or essential to the operation of another legislative power, then compensation cannot be payable. By contrast, if the acquisition is incidental to the exercise of that power, compensation will be required in accordance with s. 51(xxxi). To take the example of taxation again: the requirement on a citizen to pay specific taxes will not require compensation, as this imposition is but an exercise of the power conferred. But the acquisition of land to build a regional office for the Australian Taxation Office would come within s. 51(xxi) because it is an acquisition for the purpose of taxation, which is a “purpose in respect of which the Parliament has power to make laws”.

15.5 Conclusion

In light of these recent decisions of the Australian High Court, it is possible to revisit the argument advanced by Jennifer Nedelsky above that was critical of constitutional property provisions on the ground that they pose major problems for regulatory states seeking to impose limitations on property holders in the broader public interest. It can be seen that the trajectory of the High Court’s recent constitutional property decisions represents a prudent balancing of public and private interests. The public interest in terms of environmentally sustainable water policy, public health awareness campaigns, and

the fostering of effective competition in the communications sector has been achieved without overly burdensome just terms requirements imposed on private individuals. As variously the buy-back of water licenses, the tobacco plain-packaging requirements, provision of more open access to state-funded communications infrastructure have been held to be valid, constitutional acquisitions private property interests, private property has not been sacrificed for the public good. Rather, it has been regulated in the public interest. And the recent case law has shown that where there have been substantial inroads into private rights, such as the cancellation of a uranium-mining lease and the imposition of a fixed-term tenancy on an indigenous landowner, just terms compensation has been held payable as the constitution requires. In each of these cases, the alleged property right claimed has attracted compensation the closer it has been to the traditional meaning of the term ‘property’ and so most plausibly proximate to the meaning that was in the minds of the drafters of the paragraph over 100 years ago.60

What is noteworthy about the clarification provided by the recent body of case law is that it has developed in the context of much more ideologically charged political climate than the earlier decisions were. In Australia in recent years, a robust political alliance of anti-environmental, anti-regulatory movements modeled on the Property Rights Movement in the United States has engaged in various forms of activism against governmental initiatives.61 It has specifically called on governments to curtail dramatically its regulation of the economy and the environment and give greater priority to the rights of private property holders. They borrow extensively on work from various neo-conservative think tanks as well as academic writings such as those of Richard Epstein.62 These groups have been very active in making submissions to various government inquiries. Yet this form of ideological theorizing has not found its way into the general pattern of judicial reasoning in the constitutional property cases.

The clearest indication of the non-ideological trajectory of the High Court’s recent constitutional property jurisprudence is to contrast the decisions with both the mode of argument and the conclusions reached in the strong dissents of Heydon J in both *ICM Water Management* and *JT International* discussed above. In the former case, referring explicitly to F.A. Hayek63 and other leading advocates of economic and political

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liberalism, and noting that such theories were in the minds of the framers of the Australian Constitution when the property clause was being formulated, Heydon J adopted a very different perspective to the majority. He expressly advocated a ‘wider rather than a narrower concept of property’. This led to the conclusion that the bore licenses were ‘property’ for the purposes of s 51(xxxi), even though the licenses were not common law rights.64 In reaching this conclusion, Heydon J relied upon the essential characteristics of property as detailed by Lord Wilberforce in National Provincial Bank Ltd. v. Ainsworth, namely, the need for the interest to be ‘definable, identifiable by third parties, capable in its nature of assumption by third parties, and to have some degree of permanence or stability’.65 In the latter case, Heydon J emphasized how:

by prohibiting the use of the intellectual property on the cigarette packets, [the legislation] denies to the proprietors the use of the last valuable place on which their intellectual property could lawfully be used.66

In taking both a broad concept of property, and an expansive definition of acquisition, defined as “a newly acquired right […] to command the publication of messages […] without charge, to the public”, the TPP Act fell foul of s. 51(xxxi).

By avoiding such politically colored originalism, and by means of a more formalist approach to the constitutional provisions, a more ‘limitation-oriented’, and therefore public interest-sensitive, jurisprudence is steadily evolving in the Australian context.

64. ICM Agriculture Pty Ltd. v. Commonwealth (2009) 240 CLR 140 at 197.