Contents

1 Introduction and Summary of Main Themes

> Thieves respect property; they merely wish the property to become their property that they may more perfectly respect it.[1]

> [Granting] a takings power, then, may not be viewed as an act that wrenches away property rights and places an asset outside the world of property protection. Rather, it may be seen as an act within the larger super-structure of property.[2]

This thesis addresses so-called economic development takings, which occur when government sanctions the taking of property to stimulate economic growth. The canonical example is *Kelo v City of New London*, which brought the category of economic development takings into focus in the US, resulting in great controversy and a surge of academic work on legitimacy of takings.[3]. The *Kelo* case concerned a house that was taken by the government in order to accommodate private enterprise, namely the construction of new research facilities for Pfizer, the multi-national pharmaceutical company.

The home-owner, Suzanne Kelo, protested the taking on the basis that it served no public use

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1 G.K. Chesterton, *The man who was Thursday: A nightmare*.

2 Abraham Bell, Private Takings, p. 583.

3 *Kelo v City of New London* 545 US 469 (2005).

and was therefore illegitimate under the Fifth Amendment of the US Constitution. The Supreme Court eventually rejected her arguments, but this decision created a backlash that appears to be unique in the history of US jurisprudence. In their mutual condemnation of the *Kelo* decision, commentators from very different ideological backgrounds came together in a shared scepticism towards the legitimacy of economic development takings.[4]

Interestingly, their scepticism lacked a clear foundation in US law at the time, as the *Kelo* decision itself did not appear particularly controversial in light of established eminent domain doctrines in the US. Hence, when the response was overwhelmingly negative, from both sides of the political spectrum, it seems that people were responding to a deeper notion of what counts as a legitimate act of taking.

If the law is about delivering justice to the people, widely shared intuitions about legitimacy deserve attention from legal scholars. In the US, legitimacy intuitions pertaining to economic development takings have received plenty of it after *Kelo*. In the context of US law, it is now hard to deny that *Kelo* belongs to a separate category of takings that raises special legal questions.[5] Because this change in the narrative was largely the result of a popular movement, there is reason to think that economic development takings is a powerful conceptual category, also outside of the US.

Moreover, as soon cases like *Kelo* are portrayed as being primarily about bestowing a benefit on powerful commercial interests, it seems natural to expect that people will have a tendency to judge the issue of fairness similarly, irrespectively of differences in the surrounding legal framework. Two questions arise. First, when is it appropriate to deride economic development takings in this way?

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4 See generally Ilya Somin, 'The Politics of Economic Development Takings' (2008) 58 Case Western Reserve University Law Review 1185.

5 See, e.g., Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183.

Second, if it is appropriate, should the law recognise a justiciable basis for the courts to intervene, to strike down illegitimate takings?

Both of these questions will be addressed in this thesis. To address them effectively, it should be acknowledged from the start that there is at least a *risk* that takings for economic development can be improperly influenced by commercial interests. The risk of such capture, moreover, is clearly higher in economic development situations than in cases when takings take place to benefit a concretely identified public interest, such as the building of a new school or a public road. Hence, it seems intuitively reasonable to single out economic development takings for special attention at the political and normative level. However, should the categorisation also be recognised as a basis for justiciable restrictions on the use of eminent domain?

This is not obvious. For instance, it seems that many European jurisdictions implicitly reject such a perspective, because the state is regarded as having a "wide margin of appreciation" when it comes to deciding on legitimate takings purposes.[6] This points to the first main theme of this thesis: an analysis of economic development takings as a conceptual category for legal reasoning.

1.1 Economic Development Takings as a Conceptual Category

This thesis will argue that the category of economic development takings should be recognised already at the theoretical level. However, this claim will be made relative to a theory of property that is broader than typical approaches to property in legal scholarship. Specifically, the theory of property that will form the backbone of this thesis will encompass more than just the entitlements of owners.

The theoretical framework is discussed in more depth in Chapter 2 of this thesis. There it will

6 See *James and others v United Kingdom* (1986) Series A no 98.

be argued that a social function understanding of property should be adopted, with an emphasis on *human flourishing* as a normative foundation for property. In short, property should be protected because it can help people flourish. Moreover, property is meant to serve this function not only for the owners themselves, but also for the other members of their communities.

This ambitious take on property must necessarily also give rise to a broader assessment of legitimacy when the state interferes. This, in turn, is what inspires my initial discussion on economic development takings in the first chapter. There I will present the basic definition of the notion and discuss the *Kelo* case in some more detail. Specifically, I will argue that Justice O'Connor's strongly worded dissent – finding that the taking should be struck down – embodies a social function perspective on property.

Chapter 3 follows up on this by studying the legitimacy of economic development takings in more depth. Several approaches to this issue are considered, culminating in a recommendation for a perspective based on institutional fairness that I trace to recent developments at the ECtHR. Specifically, the Court in Strasbourg has begun to look more actively at the systemic reasons why violations of human rights occur, in order to address structural weaknesses at the institutional level in the signatory states. This approach is arguably the one that fits best with the sort of analysis carried out by Justice O'Connor in *Kelo*, more so than the approach usually induced by the public use restriction in the US Constitution.

Importantly, the institutional perspective appears to be a sensible middle ground between procedural and substantive approaches to legitimacy, directing us to focus on decision-making processes and structural aspects without giving up on substantive fairness assessments. To strike a fair balance, in particular, is not just about reaching an appropriate outcome, but also about how that outcome came about, and how often dubious outcomes are likely to result from the way the system is organised. This way of thinking about legitimacy brings me to the second focus point of the thesis.

1.2 A Democratic Deficit in Takings Law?

To make the theoretical work on legitimacy more concrete, Chapter 3 provides a proposal for a legitimacy test that can be applied to economic development takings. This test consists of a list of indicators that can suggest eminent domain abuse. The first six points are due to Kevin Gray, while the final three are additions I propose on the basis of the work done in this thesis.[7] I call the resulting list the Gray test, a heuristic for inquiring into the legitimacy of an economic development taking.

Arguably, the most important indicator is also the least precise, namely the one pertaining to the *democratic merit* of the taking (one of my additions). By itself, such a broad indicator might not offer much guidance. However, the idea is that when taken together with the other points, this indicator will induce an overall assessment of the other points against the decision-making process as a whole, not only the final outcome. Hence, this addition is specifically aimed at emphasising the institutional fairness perspective. If a taking fails the legitimacy test on this point, moreover, it might indicate an existing weakness or a pernicious deterioration of the decision-making framework more generally.

Admittedly, asking courts to test for legitimacy is an incomplete response to the worry that illegitimate practices surrounding economic development takings signify a democratic deficit in takings law. Moreover, some US scholars have argued that increased judicial scrutiny is neither a necessary nor a sufficient response to concerns about the institutional legitimacy of takings such as *Kelo*.[8] Instead, these authors point out that the traditional takings procedure does not in any case seem particularly suited for bringing about this kind of economic development.

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7 For Gray's original points see Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011).

8 See generally Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704; Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465.

This observation has been accompanied by proposals for structural takings law reform, most notably the work of Heller and Hills.[9] This work proposes that a new type of institution, a so-called Land Assembly District, can replace the traditional takings procedure in cases where property rights are fragmented and the potential takers have commercial incentives. The basic idea is that the owners themselves should be allowed to decide whether or not development takes place, by some sort of collective choice mechanism (possibly as simple as a majority vote). In this way, the holdout problem can be solved (individual owners cannot threaten to block development to inflate the value of their properties). At the same time, however, the local community's right to self-governance is recognised and respected.

The proposal for Land Assembly Districts is linked to more general ideas about self-governance and sustainable resource management, particularly the theories developed by Elinor Ostrom and others.[10] On the basis of a large body of empirical work, these scholars have formulated and refined a range of design principles for institutions that can promote good self-governance at the local level.[11]

At the end of Chapter 3, I argue that this work can be used to address the legitimacy of takings in a principled way, to arrive at refinements or alternatives to the proposal made by Heller and Hills. Specifically, it seems that alternatives to expropriation based on self-governance can be a powerful way to address the worry that economic development takings might otherwise be associated with a democratic deficit. At the same time, the context-dependence of solutions along these lines make sweeping reform proposals unlikely to succeed. Rather, it is important that the institutions that are used are appropriately matched to local conditions.[12]

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9 See Heller and Hills (n 8).

10 See Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge University Press).

11 See M Cox, G Arnold and SV Tomas, 'A Review of Design Principles for Community-based Natural Resource Management' (2010) 15(4) Ecology And Society 38.

12 See Ostrom, *Governing the commons: the evolution of institutions for collective action* (n 10) 92.

For instance, a setting where property is evenly distributed among members of the local community might suggest a very different type of institution compared to a setting where the relevant property rights are all in the hands of a small number of absentee landlords. In short, the idea of using self-governance structures in place of eminent domain necessitates a more concrete approach, a move away from property theory towards property practice. This sets the stage for the second part of the thesis, consisting of a case study of takings for Norwegian hydropower development.

This first key objective of this case study is to apply the theory developed in the first part to analyse the legitimacy of takings for hydropower. The second objective is to study a concrete institutional alternative to expropriation in more depth, namely the system of *land consolidation courts*. In Norway, these courts are empowered to set up self-governance organisations for local resource management and economic development, if necessary against the will of individual owners.

1.3 Putting The Theory to the Test

In Norwegian law, the story of legitimacy more or less begins and ends with the issue of compensation.[13] If an owner has grievances about the act of taking as such, not the amount of money they receive, takings law has very little to offer. In fact, it does not appear to offer anything that does not already follow from general administrative law. The owner can argue that the decision to take was in breach of procedural rules, or grossly unreasonably, but the chance of succeeding is slim.[14]

In cases involving hydropower development, the position of local owners is also affected by a number of additional variables that pertain specifically to the licensing framework in place to ensure government control over the use of water resources. Chapter 4 presents this framework in some detail, before discussing administrative practices and commercial practices characterising the

[13] See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

[14] See **dyrkolbotn15b**

hydropower sector today. A first important observation is that the hydropower sector in Norway was liberalised in the early 1990s.[15] This means that the hydropower companies that expropriate are now commercial enterprises, not public utilities.

A second important observation is that the property rights that the energy companies tend to take from local owners are not merely ancillary rights that are needed in order to develop water resources. Rather, the relevant water resources themselves are also taken. In Norway, the right to harness the power of water is a property right, typically owned by members of the rural community in which the resource is found.[16]

Hence, the hydroelectric companies in Norway are traditionally dependent on taking natural resources from local communities in order to exist and make money for their shareholders. Since deregulation, however, local owners have begun to resist such takings. This has been motivated by the fact that owners can now undertake their own hydropower projects as a commercial pursuit; unlike the situation before liberalisation, owner-led development projects can now demand access to the electricity grid as producers on equal terms with established energy companies.[17] Unsurprisingly, this has led to heightened tensions between takers and owners, tensions that the water authorities are now forced to grapple with on a regular basis.

Chapter 4 sets the stage for studying these tensions in more depth. The chapter argues that despite their improved position following liberalisation, local owners remain marginalised under the regulatory framework. Specifically, despite political support for locally organised small-scale development, the large energy companies have continued to enjoy a privileged position in their dealings with the water authorities. Lately, the political narrative appears to be changing, with large-scale development becoming the preferred mode of exploitation also among politicians.

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15 The crucial legislative reform was the Energy Act 1990.

16 See Water Resources Act 2000 s 13.

17 See, e.g., *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

Building on these observations, Chapter 5 goes on to discuss expropriation of waterfalls in more depth. Specifically, the chapter tracks the position of owners under the law and administrative practice. The key finding is that expropriation is usually an *automatic consequence* of a large-scale development license.[18] That is, commercial companies that succeed in obtaining large-scale development licenses will almost always be granted the right to expropriate. This rights will be granted, moreover, without any assessment taking place as to the appropriateness of depriving local owners of their resources.

Moreover, the owners' position during the licensing assessment stage is extraordinarily weak.[19] The fact that expropriation tends to follow automatically from a license to develop has led the water authorities to regard the licensing question and the associated procedures as exhaustive in all cases. No distinction is made between cases involving expropriation and cases that do not. This has a dramatic effect on the level of protection available to local owners. According to written testimony during a recent Supreme Court case on legitimacy, the water authorities do not even recognise a duty to inform local owners of pending applications that will involve expropriation.[20]

In relation to the compensation issue, the owners' position initially improved after liberalisation, as the lower courts began to compensate local owners on the basis of what they lost from being unable to carry out their own development project.[21] This led to a dramatic increase in compensation payments compared to earlier practice.[22] However, a recent decision from the Supreme Court appears to largely reverse this development, since a large-scale license may now itself be considered proof that alternative development by owners was always unforeseeable.[23]

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18 In some cases, this follows explicitly from the water resource legislation, while in other cases it follows from administrative practice. For further details, see below in Chapter 5, Section 5.3.

19 See especially the discussion in Chapter 5, Sections 5.7 and 5.8.

20 See Chapter 5, Section 5.8. The case in question was *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393.

21 See *Uleberg* (n 4).

22 See especially the discussion in Chapter 5, Section 5.6.

23 See *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612.

In light of this and other data discussed in Chapter 5, my conclusion is that today's typical takings for hydropower do not appear to pass the Gray test. However, Norwegian law also offers a promising institutional path towards the restoration of legitimacy in economic development contexts. Specifically, the institution of land consolidation, as understood in Norway, could serve such a function. Moreover, it already does so in the context of hydropower development, when local owners wish to undertake development themselves but disagree about how it should be done. This brings me to the fourth key theme of this thesis.

1.4 A Judicial Framework for Compulsory Participation

The final key theme of this thesis, presented in Chapter 6, consists of an assessment of land consolidation and its potential function as an alternative to takings when compulsion appears warranted to ensure economic development. This is an especially fruitful topic because land consolidation is presently being used in this way to facilitate hydropower development. The large energy companies never use it, but local owners often do.[24] In these cases, the consolidation courts have proved themselves highly effective in making self-governance work.

The land consolidation alternative can make a great difference, because it strives to ensure legitimacy through participation. The potential democratic deficit associated with compelled economic development is dealt with by efforts to raise owners to take active part in the management of their property in the public interest. At the same time, the procedure can be reasonably effective, since participation is compulsory and the judge may intervene to settle conflicts. In Chapter 6, I discuss possible objections to the procedure, but conclude that the continued development of the land consolidation institution provides the best way forward for addressing problems associated with economic development takings in Norway.

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[24] In 2009, land consolidation had facilitated a total of 164 small-scale hydropower projects with a total annual energy output of about 2 TWh per year (enough electricity to supply a city of about 250 000 people), see **gevinst09**

If the integrity of the procedure can be secured, adopting it to organise larger scale development involving external actors seems like a very promising approach to legitimacy more generally. Moreover, while the system is designed to work in a setting of egalitarian property rights, it is interesting to also consider the possibility key features of the procedure might also inspire solutions to the takings problem in other jurisdictions.

It might well be, for instance, that a land consolidation approach coupled with a human flourishing understanding of property can be a good way of including non-owners in the process. Possibly, a modification of the framework in settings where many property dependants do not have property rights, is to enlarge the set of legal persons with legal standing before the court. This might give rise to increased complexity of the procedure and new risks of abuse by local elites, but it seems like an interesting idea to explore in future work. In short, the consolidation alternative seems like a good starting point for an approach to legitimacy that truly takes into account a wider notion of what property is, and what it can and should be in a democracy where everyone is meant to be equal before the law.