

# On the Legitimacy of Economic Development Takings

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# Overview

# My personal motivation

- ▶ Grew up on a farm, that held hydropower rights developed in an owner-led small-scale plant.
- ▶ Worked as a lawyer, specialising in hydropower cases, especially cases involving expropriation of hydropower from local community owners.
- ▶ A lack of interest in legitimacy issues in these cases, which suggested a comparative look, fuelled initially by comparison with the US debate following Kelo.

# Main challenges

- ▶ The case law on expropriation for hydropower in Norway necessitated a view of property that is distinct from the typical liberal or neo-liberal accounts.
- ▶ To connect the theoretical work on property and its social functions with the case study on hydropower; needed to cover quite a lot of ground in relatively short amount of space – a challenge of balancing the need for maintaining a clear direction in the argument, without oversimplification of various issues encountered along the way.
- ▶ A new theoretical foundation needed to break away from the narrow entitlements-based narrative that often reduces legitimacy issues to compensation questions; needed also to highlight the link between property and social and economic rights in the context of Norwegian hydropower.

# Main contributions

- ▶ Contributing to the development of a new approach to legitimacy of economic development takings, inspired by the social function perspective and illustrated by a case study.
- ▶ Further developing the Gray test, placing it in the comparative landscape of different approaches to judicial review of takings, and testing it by applying it to the case of waterfalls.
- ▶ Further developing the idea that institutions for self-governance and common pool resource management can be used to restore legitimacy. A novel assessment of the Norwegian land consolidation courts as meta-level institutions that can be used to set up self-governance frameworks in a democratically legitimate way, while ensuring congruence with local conditions and appropriate nesting of decision-making.
- ▶ Hopefully also showing that a social function view of property can be used to anchor discussions on issues that are also closely intertwined with, and sensitive to, the issue of environmental and social justice, including rights of

# Why property? What is property?

- ▶ First, because I felt it was the most relevant way to approach the Norwegian cases. In Norway, hydropower is controversial for two reasons: effect on local property-owning communities and effect on environment. Today, environment quite well protected (increasingly so), while local property rights are being completely undermined (Example: the “deal” between DNT and BKK).
- ▶ More generally, when applicable, property provides a very firm and concrete anchor for social and economic rights of marginalised groups – clearly an underlying political issue, embedded in a property narrative. Arguably, under some understanding of what property is, some ESC rights *are* property rights and obligations, e.g., the right of local residents with respect to development that result in dispossession can be understood as proprietary rights under a bundle perspective – a system granting (property) rights to local people in the development potential of local resources. (Example: property rights to unemployment benefits)

- ▶ Culminates in proposal that private property might *not* be what the neo-liberals claim it to be. A need for broader notions, potentially beneficial also to broader narratives of environmental and social justice.
- ▶ Why should the neo-liberals have a monopoly on using property narratives to further their commercial and political interests?
  - ▶ The narrative impact: Property intuitions deeply rooted in human nature, a powerful image that is presently used mainly by one side of the debate on environmental and social justice.
  - ▶ The substantive impact: Property arrangements are well-known, can be moulded largely within the sphere of private and can be highly precise and efficient at delivering new solution (e.g., if knowledge of the DNA sequence of a particular seed can count as private property, why should not ESC scholars also be able to refer to some ESC rights as arising from property, either through rights or responsibilities? Why not protect ESC rights and the environment through the law of property, e.g., propose reforms in the law of adverse possession or attach positive environmental obligations to private property (e.g., as found in the riparian law of the UK).)

# Is it not harder to make property egalitarian than to introduce ESC rights?

- ▶ If by ESC rights one means rights that are secure, and that apply also in cases when national interests (or big business) want to negate those rights, then probably not.
- ▶ Also, egalitarianism might become the consequence, rather than a necessary condition, for a successful implementation of social function ideas; responsibility of large and powerful owners might help fulfilment of basic rights to non-owners, while also providing incentives (or nudges) towards greater egalitarianism (e.g., many responsibilities towards non-owners plus restrictions on sale to non-locals or rights of pre-emption/first refusal, will eventually result in locals taking over the ownership in an egalitarian manner – as happened in Norway during the 18th century.)



# What about the non-owners and the environment?

- ▶ The social function theory and corresponding emphasis on property should not replace state regulation or independent state responsibility for ESC rights, but complement it and prevent the regulatory power of the state from taking forms that can lead to oppression or abuse by elites.