

Contents

1	Introduction and Summary of Main Themes	1
1.1	Property Lost; Takings and Legitimacy	1
1.2	Economic Development Takings as a Conceptual Category	5
1.3	A Democratic Deficit in Takings Law?	10
1.4	Putting The Traditional Narrative to the Test	12
1.5	A Judicial Framework for Compulsory Participation	14
1.6	Structure of the Thesis	16
I	Towards a Theory of Economic Development Takings	22
2	Property, Protection and Privilege	23
2.1	Introduction	23
2.2	Donald Trump in Scotland	27
2.3	Theories of Property	34
2.3.1	Takings under Bundle and Dominion Accounts of Property	38
2.3.2	Broader Theories	41
2.4	The Social Function of Property	44
2.4.1	Historical Roots and European Influence	45
2.4.2	The Impossibility of a Socially Neutral Property Regime	49
2.4.3	The Regulating Effect of Property	51
2.4.4	The Descriptive Core	55
2.4.5	Rooting out Fascism	61
2.5	Human Flourishing	65
2.5.1	Property as an Anchor for Economic and Social Rights	66
2.5.2	Property as an Anchor for Democracy	74
2.6	Economic Development Takings	79
2.6.1	<i>Kelo</i>	81
2.6.2	Justice O'Connor as a Social Function Theorist	84
2.7	Conclusion	89

3	Taking Property for Profit	93
3.1	Introduction	93
3.2	The “Underscrutinised” Language of Economic Development	96
3.3	Economic Development Takings in England	101
3.3.1	<i>Sainsbury’s Supermarkets Ltd v Wolverhampton City Council</i>	106
3.3.2	<i>Smith & Others v Secretary of State for Trade and Industry</i>	108
3.3.3	<i>Alliance Spring Co Ltd v The First Secretary of State</i>	110
3.4	The Property Clause in the European Convention of Human Rights	112
3.4.1	<i>Hutten-Czapska v Poland</i>	113
3.4.2	How would the ECtHR approach an economic development taking?	120
3.5	The US Perspective on Economic Development Takings	121
3.5.1	The History of the Public Use Restriction	123
3.5.2	Industrialisation and increased attention to the meaning of “public use” . .	126
3.5.3	Legitimacy in State Courts	127
3.5.4	Legitimacy as Discussed by the Supreme Court	133
3.5.5	Economic Development Takings after <i>Kelo</i>	142
3.6	Institutional Proposals for Increased Legitimacy	146
3.6.1	Special Purpose Development Companies	146
3.6.2	Land Assembly Districts	155
3.7	Conclusion	162
II	A Case Study of Norwegian Waterfalls	167
4	Norwegian Waterfalls and Hydropower	168
4.1	Introduction	168
4.2	Norway in a Nutshell	172
4.3	Hydropower in the Law	177
4.3.1	The Water Resources Act	180
4.3.2	The Watercourse Regulation Act	183
4.3.3	The Industrial Licensing Act	187
4.3.4	The Energy Act	191
4.3.5	The Licensing Procedure	192
4.4	Hydropower in Practice	199
4.5	<i>Nordhordlandsmodellen</i>	207

4.6	The Future of Hydropower	212
4.7	Conclusion	218
5	Taking Waterfalls	220
5.1	Introduction	220
5.2	Norwegian Expropriation Law: A Brief Overview	222
5.2.1	The Public Administration Act	226
5.3	Special Rules for Waterfalls	229
5.4	Taking Waterfalls for Progress	232
5.4.1	The Supreme Court on the Rule of Reversion	235
5.4.2	The <i>Alta</i> Controversy	238
5.5	Taking Waterfalls for Profit	245
5.5.1	<i>Sauda</i>	248
5.6	<i>Ola Måland v Jørpeland Kraft AS</i>	250
5.6.1	The Facts	252
5.6.2	The Legal Arguments	256
5.6.3	The District Court	258
5.6.4	The Court of Appeal	260
5.6.5	The Supreme Court	261
5.6.6	A Perverse Result?	264
5.7	Conclusion	266
6	Compulsory Participation in Hydropower Development	268
6.1	Introduction	268
6.2	Land Consolidation as an Alternative to Expropriation	271
6.3	Land Consolidation in Norway	278
6.3.1	The Consolidation Process	285
6.3.2	Joint use, Joint action and Joint investment	289
6.4	Compulsory Participation in Hydropower Development	294
6.4.1	<i>Vika</i>	295
6.4.2	<i>Oma</i>	298
6.4.3	<i>Djønno</i>	301
6.4.4	<i>Tokheim</i>	303
6.5	Assessment and Future Challenges	305
6.6	Conclusion	310

7	Conclusions	313
7.1	Many Aspects of Taking	313
7.2	Some Ways of Giving Back	318
7.2.1	Locating Primary Stakeholders; The importance of Communities	318
7.2.2	Making Influence Proportional to Stakes; the Closeness-to-Consequences Test	318
7.2.3	Robust and Flexible Institutions for Collective Action; the Possibility of a Judicial Approach	318
7.2.4	Beware of Big Units; the Fine Line between Representation and Usurpation	318
7.2.5	The Importance of Redundancy; Property Regained	318

5 Taking Waterfalls

5.1 Introduction

In this chapter, I address expropriation of waterfalls in more depth, particularly the administrative practices that have evolved in relation to such expropriation. My main aim is to shed light on how these practices impact on the position of owners and local communities.

In Norway, the water authorities tend to consider expropriation of riparian rights as a natural component of hydropower development. In particular, a license to expropriate from local owners is typically considered a more or less automatic consequence of a development license. Moreover, as discussed in the previous chapter, the administrative licensing assessment tends to focus on the environmental consequences of development, not how interference in property affects owners and local communities.

As a result, a *presumption* has developed, whereby the administrative decision-makers consider a license to undertake large-scale development as an indication that an expropriation order should also be granted.¹ Importantly, this presumption still remains in place, even though the regulatory and economic context of riparian expropriation has changed dramatically as a result of the liberalisation of the electricity sector in the early 1990s.

In this chapter, I give a detailed presentation of the relevant statutory rules, the history of the

¹ The leader of hydropower licensing division of the NVE made an explicit statement to this effect in Rune Flatby, ‘Småkraftverk og ekspropriasjon – NVEs praksis’ [2008] (1) Småkraftnytt 20.

law in this area, and current administrative practices. I then illustrate how the water authorities and the courts perceive and apply the law in this area, by carefully presenting the recent Supreme Court case of *Jørpeland*.²

The structure of the chapter is as follows. I begin in Section 5.2 by giving a brief overview of expropriation law generally, as well as special statutory rules relating to hydropower. In Section 5.4, I present the historical context to these rules. In short, I argue that because hydropower development was carried out by public utilities, expropriation for hydropower development enjoyed a high degree of political legitimacy. In addition, the lack of an open market meant that owners could not benefit commercially from developing hydropower themselves. Hence, their financial loss following expropriation was limited. In fact, expropriation (or voluntary sale) of riparian rights was usually the best an owner could hope for in terms of benefiting financially from hydropower.

As discussed in the previous chapter, this changed following liberalisation of the electricity sector in the early 1990s. Ten years later, a new expropriation authority was also introduced, in the Water Resources Act 2000. For the first time in Norwegian history, waterfalls and rivers could now be expropriated for purely commercial gain, also by private companies. In Section 5.5, I place this change in the law in an historical context, before presenting the expropriation framework currently in place. I note that apart from the increased scope of expropriation, the framework developed prior to liberalisation remains largely in place.

In Section 5.6, I use the case of *Jørpeland* to show how the expropriation framework currently in place leaves owners particularly marginalised. Moreover, I note that their standing is very weak under administrative law, as a result of how the expropriation issue is overshadowed by the licensing question.

I then argue that the Supreme Court adheres to a narrow perspective on the meaning of property protection, taking it to be an issue that begins and ends with the question of compensation. In my

² See *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393.

opinion, this fails to do justice to the most important issue that arises when waterfalls are taken for profit, namely the question of democratic legitimacy.

I conclude the chapter by elaborating on this theme, connecting it also with the theoretical discussion in Part I of the thesis. This sets the stage for the final chapter, where I consider land consolidation as a democracy-enhancing alternative to expropriation in hydropower cases.

5.2 Norwegian Expropriation Law: A Brief Overview

As mentioned in Chapter 3, the right to property is entrenched in section 105 of the Norwegian Constitution. There it is made clear that when property is taken for public use, full compensation is to be paid to the owner. The public use requirement is understood very broadly. According to leading legal scholars in Norway, it places no practically significant limit on the state's authority to expropriate.³

However, it is a rule of unwritten constitutional law that administrative decisions which affect the rights of individuals can only be carried out when they are positively authorised by law.⁴ Moreover, the Constitution is not understood as providing an authority for the state to expropriate, it merely expresses the presupposition that expropriation is possible.⁵ Hence, when applying eminent domain, the government needs to justify this on the basis of specific authorising provisions.

Historically, there was no general act relating to expropriation, and a range of different acts provided the necessary authority to expropriate for specific purposes such as roads, public buildings, and schools.⁶ Today, many of these authorities have been collected, broadened, and included in

³ ...

⁴ See generally Alf Petter Høgberg and Morten Kinander, 'Det formelle legalitetsprinsippet og rettskildelæren' [2011] *Tidsskrift for Rettsvitenskap* 15.

⁵ See, e.g., Carl August Fleischer, 'Grunnlovens § 105' [1986] *Jussens Venner* 1, 6.

⁶ See NUT 1954:1 (Utkast til lov om ekspropriasjon av fast eiendom m.v.) 11-12.

5.2. NORWEGIAN EXPROPRIATION LAW: A BRIEF OVERVIEW

the Expropriation Act 1959.⁷ Still, some specific authorities remain, such as section 16 of the Watercourse Regulation Act 1917, which authorises expropriation for watercourse regulation.

Following the introduction of the Water Resources Act 2000, the general authority used to expropriate waterfalls has been included in the general act on expropriation.⁸ Here it is stated that expropriation may take place in order to facilitate “hydropower production”. In addition, it is made clear that expropriation can only be authorised if the benefits undoubtedly outweigh the harms.

This sets expropriation orders apart from the various hydropower licenses discussed in Sections 4.3.1-4.3.4 of Chapter 4. For an applicant to obtain development licenses, it is sufficient to show that the benefits outweigh the harms, it need not be ascertained that this is *undoubtedly* the case. However, the practical significance of this difference is limited. According to the Supreme Court, the additional requirement in expropriation cases means only that it should be clear that the benefit is greater, it does not imply that the benefit has to be qualitatively more significant than in the licensing cases.⁹

The authorising authority is the King in Council. However, this authority can be delegated to ministries or other state bodies that the King in Council can instruct.¹⁰ The compensation to the owner is determined following a judicial procedure administered by the so-called appraisal courts.¹¹ This is the name given to the regular civil courts when they hear appraisal cases, observing the special procedure set out in the Appraisal Act 1917. The appraisal procedure emphasises the importance of factual assessment and lay discretion (the appraisal court typically

⁷ Act no 3 of 23 October 1959 Relating to Expropriation of Real Property.

⁸ Expropriation Act 1959, s 2 no 51.

⁹ See *Løvenskiold-Vækerø Carl Otto Løvenskiold v Staten (Landbruks- og matdepartementet)* Rt-2009-1142.

¹⁰ See Expropriation Act 1959, s 5.

¹¹ Expropriation Act 1959, s 2.

5.2. NORWEGIAN EXPROPRIATION LAW: A BRIEF OVERVIEW

sits with four lay judges).¹² In addition, there are special rules regarding costs, indicating that the expropriating party is usually required to pay for the procedure, include the owners' legal expenses.¹³ In other regards, the appraisal procedure resembles a typical adversarial process before a civil court.¹⁴

The Expropriation Act 1959 states that unless the Kind in Council decides otherwise, expropriation orders may only be granted to state or municipality bodies. This is formulated as a limiting principle, but in effect it serves as a general authorisation for the executive to decide, without parliamentary involvement, that a larger class of legal persons may be granted expropriation licenses.

For many purposes, directives have been issued that extend the class of possible beneficiaries to any legal person, including companies operating for profit. In 2001, such a directive was issued for the authority to expropriate in favour of hydropower production.¹⁵

In addition to providing a general authority for expropriation, the Expropriation Act 1959 also contains several procedural rules. These are collected in Chapter 3 of the Act. Here the Act sets out minimal requirements for what an application for an expropriation license must include, stating that it should make clear who will be affected, how the property is to be used, and what the purpose of acquisition is.¹⁶ In addition, the Act requires the applicant to specify exactly what property they require, and to include information about the type of property in question and the current use that is made of it.

The owners must be notified, and the starting point is that every owner should be given individual notice, although this obligation is loosened when it is "unreasonable difficult" to fulfil¹⁷ In

¹² See Appraisal Act 1917, s 11-12.

¹³ See Appraisal Act 1917, s 54.

¹⁴ 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).

¹⁵ See Directive no 391 of 06 April 2001.

¹⁶ See Expropriation Act 1959 s 11.

¹⁷ See Expropriation Act 1959, s 12, para 2.

5.2. NORWEGIAN EXPROPRIATION LAW: A BRIEF OVERVIEW

such cases, it is sufficient that the documents of the case are made available at a suitable place in the local area. In addition, a public announcement must then be made in the official notification publication of the government, as well as in two widely read local newspapers.¹⁸

The licensing authority is required to ensure that the facts of the case are clarified to the “greatest extent possible”.¹⁹ This formulation seems very strict, but is also highly non-specific. In practice, the level of scrutiny given to the expropriation question under Norwegian law varies greatly depending on sector-specific administrative practices.

Established practice from several fields, including the hydropower sector, suggests that when expropriation takes place to implement a public plan or a licensed development, little attention is devoted to expropriation as a special issue.²⁰

A decision to grant an expropriation license must be justified, and the parties should be informed of the reasons for the decision.²¹ This expropriation-specific rule is largely superfluous, however, as the obligation to give reasons would in most cases follow independently from general administrative law, c.f., Section 5.2.1.

The applicant must cover costs incurred by owners in relation to a pending application for expropriation.²² The exact formulation is that the applicant is obliged to cover the costs that “the rules in this chapter carry with them”. That is, the applicant is obliged to cover the costs that are related to the owners’ rights pursuant to Chapter 3 of the Expropriation Act 1959. In practice, an owner will be denied costs if the competent authority takes the view that they are unreasonable

¹⁸ See Expropriation Act 1959, s 12.

¹⁹ The Norwegian expression is “best råd er”, which literally means “best possible way”. See Expropriation Act 1959, s 12, para 2.

²⁰ In relation to zoning plans, this has been made clear in a series of Supreme Court decisions, see *Namsos Kommune v Braaholmen sameie* Rt-1998-416; *Harald Bø v Radøy kommune* Rt-1999-513. In relation to hydropower, see Section 5.6.

²¹ See Expropriation Act 1959, s 12, para 3.

²² See Expropriation Act 1959, s 15.

5.2. NORWEGIAN EXPROPRIATION LAW: A BRIEF OVERVIEW

or disproportionate to their interests in the case.²³

In addition to the procedural rules in the Expropriation Act 1959, many rules of administrative law apply in expropriation cases. In the next section, I give a brief overview of administrative law in Norway, including the most relevant rules of the Public Administration Act 1967.

5.2.1 The Public Administration Act

Starting in the late 19th century, the importance of public administration gradually increased in Norway.²⁴ This development gained momentum after the Second World War, when administrative bodies also came to be placed more directly under centralised political control. At the same time, the traditional administrative ideal based on strict adherence to the letter of the law was replaced by a form of management that actively sought to pursue political goals.²⁵ The ambit of administrative decision-making power widened significantly. Many new administrative bodies were set up, while many of those already established were empowered greatly as new statutory rules were introduced that specified the competence of administrative bodies in broader and broader strokes.

As administrative bodies became increasingly powerful, concerns arose regarding the relative lack of procedural safeguards to protect the individuals affected by administrative decisions. This concern was also fuelled by the fact that as the importance of state regulation increased, so did the power of the administrative branch to make decisions that would directly affect the rights and obligations of specific individuals.²⁶

In response to this, minimum standards of administrative due process were encoded in the

²³ If the case progresses to an appraisal dispute, the competent authority to decide on costs is the appraisal court. Otherwise, the decision is left with the executive. See Expropriation Act 1959, s 15.

²⁴ See NUT 1958:3 (Innstilling fra Komiteen til å utrede spørsmålet om mer betryggende former for den offentlige forvaltning,) 8-12.

²⁵ See generally Tore Grønlie (ed), *Forvaltning for politikk: norsk forvaltningspolitikk etter 1945* (Fagbokforlaget 2000).

²⁶ See NUT 1958:3 (n 24) 12-16.

5.2. NORWEGIAN EXPROPRIATION LAW: A BRIEF OVERVIEW

Public Administration Act 1967.²⁷ This Act sets out the fundamental procedural principles that government bodies must follow when preparing to make administrative decisions. Some rules apply to any such decision, but a particularly important class of rules apply specifically to so-called *individual decisions*, namely those that affect the rights and responsibilities of one or more specific legal persons.²⁸ Clearly, owners of property targeted by an expropriation application fall into this category, so the Public Administration Act 1967 applies in expropriation cases.

Many of the rules in the Public Administration Act 1967 mirror those of the Expropriation Act 1959. However, the Public Administration Act 1967 tends to include broader and more detailed formulations. For instance, the duty to give advance notice is accompanied by more information about what kind of information such a notice must contain.²⁹ In particular, it is said that “the advance notification shall explain the nature of the case, and otherwise contain such information as is considered necessary to enable the party to protect their interests in a proper manner”.³⁰

Hence, it is not enough simply to inform the party that a case is under way, the Act also stipulates that the notice has to meet a minimum standard of quality. In relation to expropriation of waterfalls this becomes potentially significant, especially in light of the practice I discussed in Chapter 4, whereby applicants send out these notices themselves. One may ask, in particular, what owners are supposed to think when they receive a letter from a commercial company stating that unless a friendly settlement can be reached, their waterfalls and rivers will be expropriated.³¹

²⁷ Act no 86 of 10 February 1967 Relating to Procedure in Cases Concerning the Public Administration.

²⁸ Public Administration Act 1967, s 2.

²⁹ See Public Administration Act 1967, s 16. Just like the Expropriation Act 1959, the rule in the Public Administration Act 1967 makes clear that individual notices are not required if the parties are difficult to reach.

³⁰ Public Administration Act 1967, s 16.

³¹ Such a formulation is typical, used for instance by the expropriating party in *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723. In general, according to my own experience, a generic letter is sent by the developer to those private individuals who may be affected, with no individuation based on their interests in the case (e.g., based on whether they stand to lose a small-scale hydropower potential or are affected in some (minor) ways by building works). Clearly, this approach can discourage riparian owners from engaging in the administrative process in a manner commensurate with the fact that they own the natural resource in question.

5.2. NORWEGIAN EXPROPRIATION LAW: A BRIEF OVERVIEW

The duty to assess cases also follows from the Public Administration Act 1967, mirroring the rules of the Expropriation Act 1959. The formulation is similarly imprecise, as it is declared that cases must be “clarified as thoroughly as possible” before a decision is made.³² Importantly, the Public Administration Act 1967 includes specific rules that oblige the authorities to inform parties about information they retrieve during their assessment of the case, and to actively solicit further comments from the parties.³³

The duty to justify and give reasons for administrative decision is also expressed in the Public Administration Act 1967. The duty applies to most individual decision, with some narrowly defined exceptions concerning cases when no party can be assumed to be dissatisfied, or when giving grounds would involve disclosing privileged information.³⁴ As to the content of the reasons given, the authorities should mention the relevant rules authorising the decision, outline the factual assessment, and describe the main considerations that have been decisive for the use of discretionary power.³⁵ In case law, the duty to give reasons has some practical significance, since the Supreme Court has declared that insufficient reasons can be taken as an indication that the decision itself suffers from a shortcoming.³⁶ In hydropower cases, however, the duty to give reasons is understood to pertain to the licensing question as a whole, so that the authorities are not obligated to give individuated reasons to riparian owners, pertaining specifically to the expropriation question.³⁷

Sometimes, the parties to an administrative decision are ill-equipped to look after their interests, even if the safeguards mentioned above are respected. This situation often occurs in hydropower

³² Public Administration Act 1967, s 17.

³³ See paras 2 and 3 of Public Administration Act 1967, s 17.

³⁴ See Public Administration Act 1967, s 24. Moreover, the King is authorised to limit the duty to give grounds when “special circumstances so require”.

³⁵ Public Administration Act 1967, s 25.

³⁶ See *Isene v Staten (Landbruksdepartementet)*; *Hauge v Staten (Landbruksdepartementet)* Rt-2000-1066.

³⁷ See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 31); *Jørpeland* (n 2) (discussed in more depth in Section 5.6).

cases, as riparian owners often lack the technical, commercial, and legal knowledge necessary to understand the value of their property and their own legal position as owners. The Public Administration Act 1967 establishes a general duty to provide guidance, to ensure that the parties are able to look after their interests in the “best possible way”.³⁸ However, it is explicitly stated that the level of guidance must be adapted to the circumstances and the capacity that the government agency has for offering such assistance. At the same time, it is made clear that the decision-making agency must assess, on their own motion, the parties’ need for guidance.

To summarise, both the law of expropriation and general administrative law impose a range of procedural rules that ordinarily apply to expropriation cases. In principle, these apply also when rivers and waterfalls are expropriated. In practice, however, they are completely overshadowed by the special rules that regulate the licensing procedure in such cases. I return to this issue in more depth in Section 5.6. First, I elaborate on statutory rules that specifically target expropriation for hydropower, within the context of the relevant licensing procedures.

5.3 Special Rules for Waterfalls

As I mentioned in Chapter 4, Section 4.3.2, the Watercourse Regulation Act 1917 establishes an automatic right to expropriate rights needed to undertake a watercourse regulation. This is not understood to include a right to expropriate rivers and waterfalls needed for the hydropower development. However, it includes a right to transfer water away from a river for development somewhere else.

This is of course a *de facto* license to expropriate riparian rights, since the water as such is taken by the expropriating party. Moreover, it has always been treated as expropriation of riparian rights in relation to the compensation issue.³⁹ Formally, however, the interference is not considered

³⁸ Public Administration Act 1967 s 11.

³⁹ See *Jørpeland* (n 2).

5.3. SPECIAL RULES FOR WATERFALLS

a riparian expropriation, but rather seen as an expropriation of a right to deprive rivers of water, a sort of easement whereby the developer acquires the right to interfere with the rights of riparian owners in source rivers.

In theory, the rules in the Expropriation Act 1959 and the Public Administration Act 1967 still apply in such cases. Indeed, the rules in the Public Administration Act 1967 express general principles of administrative law, pertaining to all kinds of individual decisions, including both expropriation and licensing decisions. The Expropriation Act 1959, for its part, explicitly states that it applies to property interferences authorised under the Watercourse Regulation Act 1917.⁴⁰ However, it is also stated that the rules in the Expropriation Act 1959 only apply in so far as they are “suitable” and do not “contradict” sector-specific rules.⁴¹ This points to the potential caveat that while a range of procedural rules apply in theory, they may be ignored in practice, in so far as they are deemed “unsuitable” by some competent state body.

This is practically significant in hydropower cases. In particular, the established practice among the water authorities is to regard the procedural rules in the Watercourse Regulation Act 1917 as exhaustive.⁴² In addition, the material assessment requirement in the Expropriation Act 1959 is not considered to have any independent significance alongside the assessment criterion in the Watercourse Regulation Act 1917.⁴³ This is so even though case law on the former assessment criterion emphasises the interests of affected property owners in a way that case law on the licensing issue does not.⁴⁴

⁴⁰ See Expropriation Act 1959 s 30.

⁴¹ Expropriation Act 1959, s 30.

⁴² This was made clear through the case of *Jørpeland* (n 2), where this practice also got a stamp of approval from the Supreme Court.

⁴³ Again, see *Jørpeland* (n 2).

⁴⁴ In addition, the formulation in Expropriation Act 1959 s 2 contains the additional qualification that the benefit of interference must “undoubtedly” outweigh the harm. No corresponding formulation is included in the Watercourse Regulation Act 1917, s 8. Instead, the formulation there is that a license should “normally” not be given, unless the benefits outweigh the harms.

5.3. SPECIAL RULES FOR WATERFALLS

As a consequence of how the law is understood on this point, it is very hard for owners to challenge the legality of a decision to allow expropriation of their riparian rights, especially when expropriation takes place pursuant to the Watercourse Regulation Act 1917.⁴⁵ Moreover, even if section 16 of the Watercourse Regulation Act 1917 does not apply, the water authorities tend to approach the affected owners in a similar way. In particular, the practices observed with regards to the issue of property interference is largely the same in all cases when the administrative branch classifies the license application as pertaining to a large-scale project.⁴⁶

For such projects, the water authorities rely on a presumption that the conditions to permit expropriation are fulfilled whenever a development license may be granted.⁴⁷ Hence, in order to defend themselves, owners must proceed in a roundabout manner by addressing the licensing question as such. In practice, there is little or no room for arguing on the basis of rules that protect private property. Moreover, in order to argue that the expropriation is unlawful on procedural grounds, the owners must effectively demonstrate that the water authorities dealt with the case in contravention of sector-specific rules and practices pertaining primarily to the licensing question. This is a daunting task, particularly in light of case law developed during the period of monopoly regulation. This body of case law suggests that the courts will largely defer to the administrative branch, even when it comes to interpreting the relevant procedural rules.⁴⁸

As a consequence, procedural objections pertaining to the administrative assessment of existing property interests are unlikely to be successful. I am not aware of any case where such an argument has succeeded. In Section 5.6, I will further demonstrate the present situation by tracking in detail the extent to which the Supreme Court is prepared to tolerate procedural shortcomings pertaining

⁴⁵ It follows from the discussion in Chapter 5 that large-scale development projects almost always involve a license pursuant to the Watercourse Regulation Act 1917 (or such that the rules from this Act, including s 16 on expropriation apply pursuant to the Water Resources Act 2000).

⁴⁶ See Flatby (n 1).

⁴⁷ See Flatby (n 1).

⁴⁸ The deferential stance was expressed most clearly in the *Alta* case discussed in Section 5.4 below.

to the expropriation issue in hydropower cases.

First, I give a chronological presentation of how the law on expropriation of waterfalls has developed as part of the legal framework for management of hydropower. I begin with the period prior to the reform implemented by the Energy Act 1990.

5.4 Taking Waterfalls for Progress

Historically, Norwegian law did not contain a general authority for expropriation of riparian rights.⁴⁹ In the Water Systems Act 1888, a range of provisions authorised appropriation of water rights and land for specific purposes, but the criteria were narrow.⁵⁰ Rivers and waterfalls as such could never be made subject to expropriation, and expropriation of other water rights could only be permitted in so far as the affected owners were not thereby deprived of any water power that they could reasonably make use of themselves.⁵¹

Specifically, expropriation for hydropower development was not permitted, except to the benefit of riparian owners who needed to acquire surrounding land in order to exploit their existing water rights.⁵² At the same time, riparian owners could apply for licenses to engage in various industrial exploits, in some cases also when this would prove damaging to other landowners, for instance through deprivation of water or flooding.⁵³ These rules are similar to many of the rules found in contemporaneous mill acts from the US, c.f., the discussion in Chapter 3, Section 3.5.1. As in the US, the kinds of takings in question here could be classified as economic development takings.

⁴⁹ See Olaf Amundsen, *Lov om vasdragsreguleringer av 14 december 1917 (nr. 17) med senere tillæg og forandringer: med kommentar* (Aschehough 1928) 29.

⁵⁰ See WS Dahl, *Den Norske Vasdragsret* (Den Norske Forlagsforening 1888) 69-85. In addition, the purpose of expropriation was largely understood to be binding also on future use, so that the taker would not gain unrestricted control over the rights they acquired. Rather, they were obliged to use these rights to pursue the specific public purpose for which expropriation was authorised. See, e.g., Per Rygh, *Ekspropriantens raadighet over ekspropriet ting* (Rt-1912-113) 133-140.

⁵¹ See Dahl (n 50) 58,60.

⁵² See the Water Systems Act 1888, s 15-16. See also the commentary in Dahl (n 50) 60-65.

⁵³ See Water Systems Act 1888, s 14. See also the commentary in Dahl (n 50) 54-60.

5.4. TAKING WATERFALLS FOR PROGRESS

However, the source of the economic development potential was never taken from the owners in these cases. Rather, the takings only targeted additional rights that were needed in order for the existing owners to realise the full potential of their own resources.

In fact, an important principle of expropriation law at this time was that no property could be taken if the taker's interest in that property was the same as that of its current owner.⁵⁴ This applied regardless of whether or not the owners, subjectively speaking, were likely to pursue those interests optimally. Hence, expropriation of water power was ruled out already as a matter of principle. In particular, as the regulatory system of the day made private hydropower development possible, a private riparian owner was regarded as possessing a hydropower interest. As a result, such owners could not be deprived of their rights by a taker whose interest was also to undertake hydropower development.

Following industrial advances, the interest in hydropower exploded in the late 19th century.⁵⁵ As a result, the state increasingly came to see it as a political priority to sensibly regulate the hydropower sector. As discussed in Chapter 4, the most important expressions of this came in the form of two new licensing acts, namely the Watercourse Regulation Act 1917 (Section 4.3.2 and the Industrial Licensing Act 1917 (Section 4.3.3).

Following up on this, parliament soon passed legislation that authorised expropriation of riparian rights for the benefit of public bodies, also when the purpose was hydropower development.⁵⁶ In 1940, these authorities were consolidated and integrated in the general water resources legislation, through the Water Systems Act 1940.⁵⁷ According to this act, the authority to expropriate

⁵⁴ See Dahl (n 50) 168-170.

⁵⁵ See Thor Falkanger, 'Acquisition of Real Property and State Approval' (1987) 31 *Scandinavian Studies in Law* 57, 58-59. See also the discussion in Chapter 4 Section ??.

⁵⁶ Legislation that made it possible to expropriate waterfalls to the benefit of the municipalities was introduced in 1911, and a similar authority that authorised expropriation in favour of the state appeared in 1917, see Amundsen (n 49) 29.

⁵⁷ This act has since largely been replaced by the Water Resources Act 2000.

5.4. TAKING WATERFALLS FOR PROGRESS

waterfalls could be granted only to the state and the municipalities. Moreover, the municipalities could only expropriate waterfalls when the purpose was to provide electricity to the local district.⁵⁸

Private parties could only expropriate in exceptional circumstances, when they already owned more than 50 % of the riparian rights that sought to exploit.⁵⁹ Moreover, whenever expropriation took place, it was felt that benefit sharing with local owners was required. Hence, special rules were introduced to ensure that takers would have to pay *more* than full compensation (typically a 25 % premium, but in some cases the owner was also given a right to opt for compensation in the form of a proportion of the electricity output of the plant).⁶⁰

As I showed in Chapter 5, the electricity supply in Norway just after the passage of the Water Systems Act 1940 was already well developed, with 80 % of the population having access to electricity. Moreover, in the rural areas the supply often came from one among a vast number of small, local, power plants. In light of the progress already made and the highly decentralised structure of the hydroelectric sector at this time, one might have expected expropriation to remain a relatively rare occurrence.

However, the use of expropriation to facilitate hydropower development increased greatly after the war, as the state itself became engaged much more actively with hydropower development, also for commercially oriented industrial purposes.⁶¹

Hence, despite the spirit and wording of the Water Systems Act 1940, this was the time when expropriation of rivers and waterfalls became a measure to facilitate economic development. At first, this would still take place on non-commercial, politically governed, terms. But the increased

⁵⁸ See the Water Systems Act 1940, s 148. See also the commentary in A Hugo-Sørensen and Birger Olafsen, *Lov om vassdragene av 15. mars 1940: med kommentarer* (Tanum 1941) 201-210.

⁵⁹ See the Water Systems Act 1940, s 55. See also the commentary in Hugo-Sørensen and Olafsen (n 58) 70-74. I remark that this was a novel rule in the 1940 Act, which contradicted earlier theories about the legitimacy of allowing expropriation for private benefit.

⁶⁰ See Hugo-Sørensen and Olafsen (n 58) 70-91, 184, 210.

⁶¹ See Lars Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (Ad notam Gyldendal 1996) 59-71. See also Dag Ove Skjold, *Statens Kraft 1947-1965: For Velferd og Industri* (Universitetsforlaget 2006).

prevalence of expropriation seen during this time had little to do with a pressing need to supply electricity to the people. Rather, it was a consequence of an increased political demand for industrial hydropower, combined with the fact that the hydropower sector was reorganised and brought under increasingly centralised political control.⁶²

As I mentioned in the previous chapter, many local, privately owned, hydropower plants were shut down during this period, as a result of an explicit policy meant to create government monopolists.⁶³ Moreover, as a result of centralisation, a growing share of the financial benefits from development would also accrue to urban areas, as local development companies were replaced by state companies and companies dominated by prosperous city municipalities.⁶⁴ The interpretation of the supply requirement in the Water Systems Act 1940 was also significantly relaxed, especially following the development of the national electricity grid. It was no longer obvious, from a technical point of view, when exactly a hydropower development could be said to qualify as making a contribution to the local electricity supply. The electricity was not necessarily used locally. Indirectly, however, one could still argue that the local supply situation would improve whenever more electricity was supplied to the national grid.

5.4.1 The Supreme Court on the Rule of Reversion

The period before liberalisation was not free from conflict regarding the legitimacy of measures undertaken to facilitate hydropower. Already the first assertion of state control, embodied in the licensing acts of the early 20th century, resulted in significant controversy. At this time, there was a feeling of unease regarding the extent to which the state could regulate the hydropower sector

⁶² See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 69-71.

⁶³ See Chapter 4 Section ??.

⁶⁴ In 2007, as the result of a gradual centralisation process, the 15 largest hydropower companies in Norway, which are largely controlled by the state and some city municipalities, owned roughly 80% of Norwegian hydropower, measured in terms of annual output. In 2006, the public owners of hydropower in Norway benefited from receiving more than NOK 9 billion in dividends. See Ot.prp.nr.61 (2007-2008) , 28.

5.4. TAKING WATERFALLS FOR PROGRESS

without offending against the property clause in the Constitution.

This debate culminated in the conflict surrounding the rule of reversion that was introduced by the licensing acts passed between 1906 and 1917. As mentioned, the rule of reversion meant that in order to purchase riparian rights from private owners, the purchaser had to agree to a licensing condition stating that eventually, after at most 60 years, the state would acquire the waterfalls without paying compensation.

The question that arose was whether this should be regarded as a form of expropriation. If so, compensation would have to be paid pursuant to section 105 of the Constitution. This question resulted in fierce conflict, with some influential legal scholars attacking the rule as a ploy by the state to confiscate Norwegian rivers without compensating owners.⁶⁵ However, in a 4-3 decision, the Supreme Court held that section 105 did not apply, since reversion was a licensing condition, not an independent act of property deprivation.⁶⁶ No owner was compelled to hand over their rights to the state.⁶⁷ Moreover, no owner was compelled to sell their rights. Rather, their willingness to do so was a precondition for the rule of reversion to apply.

One of the judges summed up the majority reasoning by commenting that he would not regard it as expropriation if the state were to forbid sale of riparian rights to private parties altogether.⁶⁸ Why then, he asked, should it be regarded as expropriation if such a sale was allowed to take place only on specific conditions? Against this, the minority argued that the licensing requirement as such was so severe that it had to be regarded as a *de facto* expropriation, a regulatory taking in US terminology.⁶⁹ In addition, the minority argued that as the purpose of the reversion rule was

⁶⁵ See Bredo Morgenstierne, *Konfiskation eller Ekspropriation* (Rt-1914-208, 1914).

⁶⁶ *Johansen v Den norske Stat ved 1 Regjeringens chef, 2 A/S Furuberg ved dets direktions formand* Rt-1918-403.

⁶⁷ See **johansen15**

⁶⁸ See *Konsesjonsdommen* (n 9) 407.

⁶⁹ See *Konsesjonsdommen* (n 9) 412-413. For a brief discussion on regulatory takings, see Chapter **chap:1** Section ??.

5.4. TAKING WATERFALLS FOR PROGRESS

to ensure that water rights were eventually brought under state ownership, this rule itself could not be understood merely as an act of regulation. According to the minority, the rule also invoked the power of eminent domain.⁷⁰ By contrast, the majority chose to regard the eventual transfer to state ownership as a secondary purpose only, which could justifiably be pursued solely on the basis of the state's regulatory power.⁷¹

After the Supreme Court upheld the rule of reversion, the legal foundation for tight state regulation of the hydropower sector solidified. As discussed in the previous chapter, the state pursued increasingly complex hydropower projects after the Second World War. At this time, it also became common to divert water over great distances, to collect water from several different rivers in a common reservoir for joint exploitation. Such projects became known as “gutter” projects. Since such projects were covered by the Watercourse Regulation Act 1917, the practical importance of the expropriation authority in section 16 of this act also increased dramatically.⁷²

As discussed in Section ?? of the previous chapter, the opposition to hydropower grew proportionally to the scale and complexity of typical development projects. The critical focus was often on environmental effects, but the interests of local people also featured in these debates. Moreover, local interest were often aligned with the environmental interests. In a situation when local owners could not themselves benefit commercially from hydropower, their response was often to oppose it.

The controversies regarding large-scale development culminated in the case of *Alta*, still argu-

⁷⁰ See *Konsesjonsdommen* (n 9) 415-416.

⁷¹ See *Konsesjonsdommen* (n 9) 407.

⁷² See **insst59** This was a proposition to parliament regarding an amendment of the Watercourse Regulation Act 1917. The amendment proposed to remove an earlier rule that applied only to diversion regulations, whereby a license to divert water from a river should *normally* only be granted when the riparian owners in the source river agreed to the measure. This rule made licenses harder to obtain in the diversion cases. However, following the department's recommendation, the rule was removed in 1959. The department argued that the rule had an “unfortunate effect” on the administrative procedure in large-scale diversion cases, noting also the vastly increasing complexity and scale of typical diversion regulations. The minority in the parliamentary committee recommended against the amendment, noting that it would “greatly increase” the authority to expropriate waterfalls, contrasting with the expropriation rules in the Water Systems Act 1940, see Innst.O.I. (1959) 14. The majority countered this argument by maintaining that the regulatory power of the state would be used to prevent any abuse of power, and that the practical significance of the amendment would be limited to ensuring a “more rational” procedural approach to large-scale applications, see Innst.O.I. (n 14) 14.

ably the most important Supreme Court precedent in the area of hydropower law.

5.4.2 The *Alta* Controversy

The *Alta* case went before the Supreme Court in 1982 after a long period of high-intensity conflict going back to the mid-seventies.⁷³ In *Alta*, the affected local population largely lacked formal title to the property they sought to defend. This was because the development in question would take place in the northernmost part of Norway, in the native land of the Sami people.⁷⁴

Norway has a history of discrimination against the Sami, and as their culture is largely nomadic, their land rights were never formalised in private law.⁷⁵ As a result, land and natural resources in the county of Finnmark are largely owned by the state, at least in the sense of the state appearing as the nominal *in rem* owner.⁷⁶

Due to the sensitive context of interference, the *Alta* plans met with particularly strong criticism, both from environmental groups and groups fighting for aboriginal rights. A broad political movement was mobilised in opposition to the plans, eventually resulting in several serious cases of civil disobedience.⁷⁷ The case also came before the courts, as the local population and environmental groups claimed, primarily on the basis of administrative law, that the development licenses

⁷³ See *Alta Laksefiskeri Interessentskap and others v Staten (Norges Vassdrags- og elektrisitetsvesen) and others* Rt-1982-241. For commentaries, see Torstein Eckhoff, 'Alta-dommen' [1982] *Lov og Rett* 399; Erik Boe, 'Altadommen – en rettslig løsning på konflikten mellom energiforsyning, naturvern og minoritetsbeskyttelse' (1983) 6(3) *Retfærd* 76; 'Alta-dommen og Høyesteretts oppgave. En studie i forholdet mellom jus og økologi' [1988] (4) *Kart og Plan* 401.

⁷⁴ For Sami law generally, see Susann Funderud Skoglund, *Samerett: om samenes rett til en fortid, nåtid og fremtid* (Universitetsforlaget 2002).

⁷⁵ See Øyvind Ravna, 'Samerett og samiske rettigheter i Norge' in Tore Henriksen og Øyvind Ravna (ed) (Gyldendal juridisk 2012) 149-156

⁷⁶ In the past 30 years, partly as a response to the controversy of the *Alta* case, there has been a gradual change in attitude, whereby the rights of the Sami people receives greater legal recognition. In 2007, formal title to most of the land in the county of Finnmark was transferred to a special state agency which is regulated by a special statute that obliges it to manage the land with due regard to customary and prescriptive rights of aboriginal groups and local people. See generally **bull08**

⁷⁷ This included hunger strikes and attempts at sabotage, see Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(01) *Historisk tidsskrift*, 80-83. For the *Alta* controversy generally, see **altawiki;hjorthol06**

5.4. TAKING WATERFALLS FOR PROGRESS

that had been granted were invalid.⁷⁸

The *Alta* case did not involve expropriation of the right to harness hydropower. Hence, one might think that the case has limited relevance to the issues addressed in this thesis. However, because of the priority given to the licensing procedure over specific expropriation procedures, the principles expressed in *Alta* also largely determine the legal position of waterfall owners whose rights to hydropower are expropriated.⁷⁹

Alta was admitted to the Supreme Court in plenum, directly on appeal from the district court.⁸⁰ The presiding judge commented that as far as he knew, it was the longest and most extensive civil case that the Court had ever heard.⁸¹ In an opinion totalling 138 pages, the Court considers a long range of objections against the development licenses, all of which are either rejected or held to provide insufficient reasons to declare the licenses invalid.

The opponents of the *Alta* development also argued on the basis of human rights and international law.⁸² As noted by Eckhoff, these arguments raised subtle legal questions about how to apply the relevant principles of international law to a concrete dispute over hydropower development.⁸³ However, the Court refused to consider such questions, finding that the negative effect of

⁷⁸ See Eckhoff (n 17).

⁷⁹ See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 31); *Jørpeland* (n 2).

⁸⁰ This is a special arrangement available in cases that raise important questions of principle, cf., Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes s 30-2 and Courts Act 1915, ... S 5.

⁸¹ *Alta* (n 16) 254.

⁸² First, on the basis of articles 1 and 27 of the International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI) [1966]. Second, on the basis of , Indigenous and Tribal Populations Convention (26th June 1957) (later replaced by , Indigenous and Tribal Peoples Convention (27th June 1989)). Third, on the basis of P1(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, as amended by Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 13 May 2004, entered into force 1 June 2010) CETS No 194 (ECHR).

⁸³ See Eckhoff (n 17) 351-352. One of the most important international instruments, namely ILO Convention No 107, was not ratified by Norway at the time of *Alta* (Norway later ratified its replacement, ILO Convention No 169). However, it was argued that it had the status of customary international law. See generally Arbjørn Eide, 'Menneskerettigheter og samenes rettigheter' [1980] Lov og Rett 139.

5.4. TAKING WATERFALLS FOR PROGRESS

the hydroelectric plant was not so severe as to raise human rights issues.⁸⁴

Instead, the Supreme Court approached the case on the basis of administrative law, focusing on the procedural rules of the Watercourse Regulation Act 1917. In this regard, the opponents of the *Alta* development had pointed to a large number of purported shortcomings of the decision-making process.

First, it had been argued that the original licensing application did not meet the requirements stipulated in section 5 of the Watercourse Regulation Act 1917. Essentially, the original application contained little more than technical details about the planned development, with hardly any identification or assessment of deleterious effects.⁸⁵ This shortcoming had been openly acknowledged by the water authorities themselves, who had nevertheless initiated a public hearing.⁸⁶

The Supreme Court concluded that this was “clearly unfortunate”.⁸⁷ However, several reports and assessments had subsequently been provided by the water authorities, to fill the gaps left open by the initial application. For this reason, the Supreme Court held that the initial mistakes were irrelevant, since it was the licensing process as a whole that should be assessed.⁸⁸ Shortcomings at specific stages in the assessment would not be given weight unless they could be seen to imbue the process with a dubious character overall.⁸⁹

The Court then moved on to assess whether the process as a whole fulfilled procedural requirements, particularly those laid down in sections 5 and 6 of the Watercourse Regulation Act 1917. In addition, it had to be considered whether the assessment of the licensing criteria in section 8 of

⁸⁴ See *Alta* (n 16) 299-300. See also Eckhoff (n 17) 351-352.

⁸⁵ See *Alta* (n 16) 264-265.

⁸⁶ See *Alta* (n 16) 265.

⁸⁷ *Alta* (n 16) 265.

⁸⁸ See *Alta* (n 16) 265-266.

⁸⁹ *Alta* (n 16) 265.

5.4. TAKING WATERFALLS FOR PROGRESS

the Watercourse Regulation Act 1917 had been sufficiently detailed.⁹⁰

In this regard, those who objected to the licenses pointed to a range of negative effects that they believed had not been considered, or had not been considered in enough depth. In relation to nomadic reindeer interests, it was argued that the water authorities had failed to adequately consider the indirect negative consequences of hydroelectric development on reindeer farming the local area.⁹¹ These effects were described as “practically catastrophic” by some expert witnesses.⁹² By contrast, the water authorities had not devoted much attention to the possibility of indirect consequences, citing the difficulty (described as an “impossibility”) of attempting to quantify such effects.⁹³

After considering the reports and assessments in some depth, the Supreme Court did not find fault with the procedure in this regard. Importantly, the Court stressed that the water authorities had been well aware of the possibility of indirect negative consequences. The water authorities had simply chosen, as a matter of expert discretion, not to place much weight on such consequences.⁹⁴ This, according to the Supreme Court, could be regarded as an expression of disagreement with those claiming that the effects would be catastrophic.⁹⁵ As a result, the grounds for claiming procedural error disappeared, as the lack of attention directed at indirect consequences was held to reflect an (implicit) factual assessment to the effect that they were not particularly severe.

The structure of the argument used here is more interesting than the factual basis for claiming that the effects would be catastrophic. The argument structure, in particular, serves to recast a lack of assessment, a possible procedural error, as an exercise of factual discretion.

⁹⁰ Recall section 16 of the Public Administration Act 1967, requiring assessments to be as detailed as “possible”.

⁹¹ See *Alta* (n 16) 176-179.

⁹² See *Alta* (n 16) 278.

⁹³ See *Alta* (n 16) 277.

⁹⁴ See *Alta* (n 16) 279.

⁹⁵ See *Alta* (n 16) 278.

5.4. TAKING WATERFALLS FOR PROGRESS

The *Alta* Court also made some apparent statements of principle in this regard. In particular, the Court held that since the licensing decision itself is discretionary, it is appropriate to grant the executive some margin of appreciation also with regards to the question of how to interpret vague requirements of administrative law.⁹⁶

The Court made a second decision of principle when it supported the state's contention that the administrative licensing assessment did not have to be as thorough as that required in a subsequent appraisal dispute.⁹⁷ Hence, the meaning of the obligation to clarify cases to the best possible extent is put into perspective: assessments of deleterious effects may sometimes be omitted at the decision-maker's discretion, also in circumstances when such assessments will be needed later to clarify the owners' actual loss for the purpose of calculating compensation.

In relation to the negative effects on fishing, the Court conceded that the assessments could have been better, but went on to point out that the purpose of assessment was only to answer yes or no to development, not to give a detailed presentation of its effects.⁹⁸ Crucially, the Court notes that if additional negative effects are uncovered after the licences have been granted, this can be addressed through compensation payments and future regulatory measures.⁹⁹

In effect, the risk of factual error is downplayed by making reference to the owners' compensation right and the regulatory power of the state. This echoes the dichotomy mentioned in Chapter 4, whereby there is a tendency in Norwegian law to perceive the interests of local people as revolving around financial entitlements.

In *Alta*, the Court agreed that erroneous information had been provided in relation to some issues, particularly regarding alternative ways to meet the need for electricity in Finnmark.¹⁰⁰

⁹⁶ See *Alta* (n 16) 262-264.

⁹⁷ See *Alta* (n 16) 279.

⁹⁸ *Alta* (n 16) 330.

⁹⁹ *Alta* (n 16) 330.

¹⁰⁰ See *Alta* (n 16) 346-357.

5.4. TAKING WATERFALLS FOR PROGRESS

However, the Supreme Court did not regard the factual errors in this regard as relevant to the licensing decision.¹⁰¹

Here a third clarification of principle took place. The Court held, in particular, that the duty to consider alternatives – different ways in which the public purpose could be satisfied – is very limited in hydropower cases.¹⁰² This position of principle, in turn, was the key building block that the Court used to argue that errors and inadequacies in the information provided about alternatives were irrelevant.¹⁰³

The Court's perspective in this regards appears to have been somewhat at odds with how the parliament approached the case. There was little doubt that the favourable political assessment of the *Alta* development depended heavily on the perceived electricity crisis in Finnmark and the supply situation in Norway generally, as well as the perceived inadequacies of alternative solutions.¹⁰⁴

In relation to this question, the legal counsel acting for the state in *Alta* suggested explicitly that as these aspects came into focus only at the political stage of the decision-making, they were largely irrelevant.¹⁰⁵ This line of argument is rather striking, since the decision to grant the license was in fact made by parliament, which had dealt with the case on three separate occasions.¹⁰⁶

The Supreme Court did not address the state's arguments in this regard explicitly. However, it is worth noting how briefly the Court comments on the issue of factual errors concerning alternatives.¹⁰⁷ By contrast, the Court goes into painstaking detail regarding issues that seem to have

¹⁰¹ See *Alta* (n 16) 346.

¹⁰² See *Alta* (n 16) 346.

¹⁰³ *Alta* (n 16) 346.

¹⁰⁴ See *Alta* (n 16) 338-347.

¹⁰⁵ *Alta* (n 16) 341.

¹⁰⁶ See *Alta* (n 16) 342.

¹⁰⁷ See also the surprise expressed in Eckhoff (n 17) 349-351.

5.4. TAKING WATERFALLS FOR PROGRESS

been far less important to the political decision-makers.

The dismissive attitude towards the duty to correctly assess alternatives is a controversial aspect of the *Alta*-decision.¹⁰⁸ More generally, the decision in *Alta* has met with criticism from commentators arguing that the decision shows the extent to which the courts tend to identify themselves with other organs of state.¹⁰⁹ Some argued that *Alta* would have a limited impact as a precedent.¹¹⁰

However, this has not proved accurate. Indeed, *Alta* continues to receive regular citations by the Supreme Court. It stands as a crucial, yet controversial, precedent, not only in hydropower law, but also in administrative law more generally.¹¹¹

However, it should be mentioned specifically that after the *Alta* decision, the legal position of the Sami people have greatly improved.¹¹² Moreover, the controversy surrounding *Alta* has been regarded as a catalyst for change in this regard.¹¹³ Hence, it is unlikely that the courts today would be as quick as the *Alta* court to dismiss arguments based on aboriginal rights.¹¹⁴

With regards to the position of local owners, on the other hand, the *Alta* decision is regarded to express key principles that still apply.¹¹⁵ That said, administrative practices have changed since *Alta*, arguably also in direct response to the criticism that was directed at this decision.¹¹⁶

¹⁰⁸ See **folk** For criticism of the Supreme Court on this point, see Inge Lorange Backer, *Naturvern og Naturinngrep* (Universitetsforlaget 1986) 580-584.

¹⁰⁹ See Hans Petter Graver, 'Norms and Decisions' (1988) 32 *Scandinavian studies in law* 49, 64 (commenting also that "government prestige" was at stake).

¹¹⁰ See Backer, *Naturvern og Naturinngrep* (n 108) 580-584.

¹¹¹ See *Naturvernforbundet i Oslo og Akershus med flere v Staten v/Miljøverndepartementet og Oslo Kommune* Rt-2009-661; *Jørpeland* (n 2).

¹¹² See generally **gausaa07** Gauslaa presents the emergence of *Sami law*, a collection of rules and principles serving to protect established land use patterns and the Sami way of life while also giving the Sami people a better opportunity to partake in decision-making processes that affect them as group.

¹¹³ See Ravna, 'Samerett og samiske rettigheter i Norge' (n 75) 156.

¹¹⁴ See **gausaa07**

¹¹⁵ See *Jørpeland* (n 2). See also **folk**

¹¹⁶ See Inge Lorange Backer, 'Åpenhet - betraktninger fra en jurist' (2010) 27 *Nytt norsk tidsskrift* 186, 122-123.

Today, the assessment of licensing applications typically involve a more extensive assessment of environmental effects and possible alternatives weighed against their effects in this regard.¹¹⁷

However, as I will discuss in more depth below, the position of local owners during the assessment stages appears unaltered by the increased intensity of assessment regarding environmental effects. This demonstrates a failure to adapt administrative procedures to the new reality that has emerged following liberalisation of the electricity sector. Today, the taking of a waterfall affects the owner in a very different way than it did prior to liberalisation.

First, as discussed in the previous chapter, takings of waterfalls now have the effect of depriving original owners of a resource that they could potentially develop themselves. Second, as I discuss in the next section, takings of waterfalls have become pure takings for profit.

5.5 Taking Waterfalls for Profit

After the legal and regulatory reforms of the 1990s, takings of waterfalls for hydropower have become takings for profit. However, this change in the function of expropriation received little attention when these reforms were introduced. Moreover, when the Water Resources Act 2000 was proposed, the new expropriation authority was not singled out for political consideration. In fact, the increased scope of expropriation was not mentioned at all when the Ministry presented their proposal to parliament. Rather, the new expropriation authority was described merely as a “simplification” of existing law.¹¹⁸

This was grossly inaccurate. For the first time in Norwegian history, private commercial interests would be able to expropriate waterfalls. The original proposal to this effect stemmed from the report handed to the Ministry by a commission appointed to prepare a new act relating to water

¹¹⁷ For an overview of current procedures, see Chapter 4 Section ?? . See also Backer, *Naturvern og Naturinngrep* (n 108) 625-659.

¹¹⁸ Ot.prp.nr.39 (1998-1999) (Proposal to parliament for the Water Resources Act 2000,) 223-225.

5.5. TAKING WATERFALLS FOR PROFIT

resources. The commission report mentions briefly that the proposed expropriation authority would imply increased scope for expropriation. However, it does not discuss the desirability of this in any depth.¹¹⁹

The report totals almost 500 pages, but devotes only three of those pages to discussing the new expropriation authority. Here the committee notes that a range of different authorities for expropriation has long co-existed in the law, with many of them positing strict and concrete public interest requirements as a precondition for granting a license. This, the commission argues, is not a very “pedagogical” way of providing expropriation authorities.¹²⁰ Moreover, the commission notes that it runs the risk of omitting important purposes for which expropriation should be possible. Hence, the commission proposes to replace all older authorities by a sweeping authority that makes expropriation possible for any project that involves “measures in watercourses”.¹²¹

The commission comments that their formulation might seem wide, but remark that this is not a problem since the executive can simply refuse to issue an expropriation order when they regard expropriation as undesirable.¹²² The commission does not reflect on the constitutional consequences of such a perspective, neither in relation to property rights nor in relation to the balance of power between the legislature, the executive and the courts. Instead, the commission offers a brief presentation of the rationale behind dropping the local supply restriction for municipal expropriation. They comment that these rules complicate the law and might make desirable expropriations impossible.¹²³ Nothing is said to clarify what kind of desirable expropriations the committee think might be left out.

¹¹⁹ Lov om vassdrag og grunnvann, ‘NOU 1994:12’ (Report to the Ministry of Business and Energy from a special committee appointed by the Crown Prince Regent in Council 09 November 1990,) 235-237.

¹²⁰ Lov om vassdrag og grunnvann (n 119) 235.

¹²¹ Lov om vassdrag og grunnvann (n 119) 235-236.

¹²² Lov om vassdrag og grunnvann (n 119) 235.

¹²³ Lov om vassdrag og grunnvann (n 119) 235.

5.5. TAKING WATERFALLS FOR PROFIT

Importantly, the committee do not relate their proposals to the recent market-based reform of the energy sector. Hence, the obvious practical consequence of their proposal, namely that expropriation of waterfalls would be made available as a profit-making mechanism, is not discussed or critically assessed.

The issue of *who* should be permitted to benefit from an expropriation license is also dealt with very superficially. In this regard, the commission structure their presentation around the so-called *redemption* rule of the Water Systems Act 1940. As mentioned briefly in Section 5.4, this rule made it possible for the majority owners of a waterfall to compulsorily acquire minority rights, if this was necessary to facilitate hydropower development. Hence, it was a rule that provided only a limited opportunity for private takings, restricted to owners themselves or external developers that had been able to reach a deal with a locally based majority.

The main justification given by the commission for introducing a general private takings authority is that the special redemption rule had not been much used in practice.¹²⁴ Why this is an argument in favour of opening up for private expropriation in general is not made clear. Indeed, it seems just as natural to regard it as an argument *against* doing so. Why extend the possibility for private expropriation if the demand for such expropriation has been limited?

Presumably, the commission thought there would be a demand for such expropriation in the future, but this is not stated explicitly, nor is the appropriateness of it discussed. As to the requirement that private takers must already control a majority of the waterfall rights in the local area, the commission only remarks that it regards such a restriction as old-fashioned.¹²⁵ No discussion is offered regarding the consequences for local owners.

Since the passage of the Water Resources Act 2000, it has become clear that the new authority for expropriation is a highly significant and controversial aspect of the act. Today, practically all

¹²⁴ Lov om vassdrag og grunnvann (n 119) 236.

¹²⁵ Lov om vassdrag og grunnvann (n 119) 236.

cases of waterfall expropriation imply that local owners are deprived of a small-scale development potential in favour of a commercial company.

5.5.1 *Sauda*

In *Sauda*, a case before the court of appeal, the riparian owners formally protested a license that granted a private company the right to expropriate their rivers and waterfalls.¹²⁶ The owners' principal argument was that the executive could not grant such a right to a private party, since this had not been sanctioned by parliament.

This argument appeared weak, since the Expropriation Act 1959 had been amended to ensure that the executive would be authorised to decide what legal persons could expropriate for hydro-power purposes. However, the owners argued that the executive had not appropriately informed parliament that this would be the consequence of the amendment. In particular, the amendment itself had been passed as a mere formality following the adoption of the Water Resources Act 2000.

The owners presented the written testimony of two members of the parliamentary committee that had prepared the Act. Neither of them could recollect that they had been aware that the Act would make private expropriation possible. This was not conveyed to them by the executive. Moreover, it was not explicitly stated anywhere in the Act itself. Rather, it followed implicitly from three different sections in two separate acts. In the entire collection of preparatory documents, the change was discussed only once, in the report from the committee to the Ministry.

On this basis, the owners argued that the purported expropriation authority was not constitutionally valid, since parliament had not intended it. Unsurprisingly, this argument was rejected. According to the court, it had to be assumed that parliament understood the consequences of their own legislative actions.

However, while the owners lost the validity dispute, the level of compensation they received

¹²⁶ See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 31).

5.5. TAKING WATERFALLS FOR PROFIT

was dramatically increased compared to earlier practice. Because of this, the development company appealed the decision to the Supreme Court, with the owners lodging a counter-appeal regarding the question of legitimacy. The Supreme Court decided not to hear the case.

Indeed, it had recently addressed the compensation question in the case of *Uleberg*.¹²⁷ Here a new principle of market-value compensation was introduced, for those cases when small-scale development by owners was deemed to have been “foreseeable” in the absence of expropriation.

If this requirement is met, the owners can now expect at least 10-20 times more in compensation than they would get under the traditional approach, which was based on a theoretical estimation of the value of the riparian rights.¹²⁸

In addition to raising the compensation issue and the issue of constitutional legitimacy, *Sauda* raised procedural questions. The owners argued that mistakes had been made and that the administrative expropriation decision was therefore invalid. The court did not agree.

The procedural arguments made here foreshadow the later case of *Jørpeland*. Here the owners were initially successful, as the district court held that the decision to expropriation was invalid due to procedural mistakes. In particular, the district court held that the practices developed during the monopoly era were no longer appropriate.¹²⁹

This decision was overturned on appeal, a decision that was in turn upheld by the Supreme Court. Eventually, the case was decided by an application of the precedent set by *Alta*, demonstrating the continued importance of this case in the context of expropriation for commercial development.¹³⁰ In the next section, I will consider the *Jørpeland* case in some depth, to bring out how administrative practices relating to expropriation for hydropower can work in practice.

¹²⁷ See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

¹²⁸ For a more in-depth presentation of compensation issues, I refer to Dyrkolbotn, ‘On the compensatory approach to economic development takings’ (n 14) 71-76.

¹²⁹ See the decision by Stavanger Tingrett in *Jørpeland Kraft AS v Ola Måland and others* TSTAV-2007-185495.

¹³⁰ See the decision by Gulatings Lagmannsrett in *Jørpeland Kraft AS v Ola Måland and others* LG-2009-138108. See also the Supreme Court decision in *Jørpeland* (n 2) (*Jørpeland*).

5.6 *Ola Måland v Jørpeland Kraft AS*

The expropriating party was a public-private commercial partnership, Jørpeland Kraft AS. This limited liability company is jointly owned by Scana Steel Stavanger AS, with 1/3 of the shares, and Lyse Kraft AS, with the remaining shares. The former is a private steelworks company located in the small town of Jørpeland in Rogaland county, south-western Norway. Historically, this company was a major employer in Jørpeland, which is located by the sea, next to a mountainous area.

The main source of energy for the steel industry in Norway is hydropower and Scana Steel Stavanger AS was no exception. The company used energy harnessed from the rivers in the area, particularly the river which reaches the sea near Jørpeland. Moreover, the water from this river is supplemented by water from other rivers in the area that are diverted so that it can be exploited along with the water from the Jørpeland river.

Recently, Norwegian steel companies have become less profitable, due largely to increased foreign competition and a significant increase in costs of operation associated with this type of industry in Norway.¹³¹ This has led to many such companies shifting their attention away from labour-intensive steel production, focusing instead on producing electricity, selling it directly on the national grid. Jørpeland Kraft AS was established as part of such a move to exploit the energy resources in Jørpeland.

The role played by the majority shareholder, Lyse Kraft AS, is important in this regard. Indeed, as I discussed in Chapter 4, Norwegian law favours companies where the majority of the shares are held by the state or the municipalities. Lyse Kraft AS operates for profit, organised as a limited liability company, but it is publicly owned, with the city of Stavanger as the main shareholder. Hence, it is a very valuable partner to Scana Steel. In addition to being under public ownership,

¹³¹ Salary costs, in particular, have become prohibitive. See, e.g., *Information Booklet about Norwegian Trade and Industry*, published by the Ministry of Trade and Industry in 2005.

Lyse Kraft AS is responsible for the electricity grid in the region, so is well-positioned to access the electricity market.

Lyse Kraft AS was established as a merger between several former monopoly companies in the Stavanger region. These were all reorganised following liberalisation of the sector in the early 1990's. As discussed in Chapter 4, old monopolists still enjoy considerable power and influence, particularly with regards to state bodies that are tasked with regulating the industry. This is another important reason why they can serve as valuable partners for private companies wishing to make a profit from Norwegian rivers and waterfalls.

As attention shifts from harnessing rivers for the purpose of industrial production to the purpose of producing electricity to sell on the national grid (and, increasingly, to export abroad), new variables determine the degree of profitability. On the cost side, what matters most is the one-time investment required to construct the hydropower plant. Maintaining and operating a hydropower station tends to be comparatively inexpensive. On the income side, what matters is the price of energy on the electricity market, a market that is no longer anchored in local conditions of supply and demand.

Importantly, as long as energy production is the sole focus, the business no longer depends in any significant way on the local labour force. Hence, large-scale exploitation becomes much more profitable than the medium or small-scale power plants that would otherwise be suitable for local industrial exploits. Indeed, it was in keeping with a general trend in Norway when Jørpeland Kraft AS, following their new commercial strategy, proposed to undertake measures to increase their energy output. This could be achieved relatively cheaply, by further constructions aimed at diverting water away from nearby rivers into dams that were already built to collect the water from the Jørpeland river.

5.6.1 The Facts

One relatively small river from which Jørpeland Kraft AS suggested to extract water is owned by Ola Måland and five other local farmers. This waterfall is not located in Jørpeland kommune and it does not reach the sea at Jørpeland. Rather, it runs through the neighbouring municipality of Hjelmeland, on the other side of a mountain range, until it eventually reaches the sea at Tau, another neighbouring municipality.

The plans to divert the water would deprive the original owners of water along some 15 km of riverbed, all the way from the mountains on the border between Hjelmeland and Jørpeland, to the sea at Tau. Not all the water would be removed, but the flow of water would be greatly reduced in the upper part of the river known as *Sagåna*, the rights to which is held jointly by Ola Måland and five other local farmers from Hjelmeland.

The water in question comes from a lake called *Brokavatn*, located 646 meters above sea level, where altitude soon drops rapidly, making the river suitable for hydropower development. Plans were already in place for such a project, which would use the water from just below the altitude of Brokavatn, to the valley in which the original owners' farms are located, about 80 meters above sea level.

A rough estimate of the potential of this project was made by the NVE itself, stating that the energy yield would be 7.49 GWh per annum.¹³² This is about five times more energy than the water from Brokavatn would contribute to the project proposed by Jørpeland Kraft AS.¹³³

Importantly, the estimate was not made in relation to the expropriation case, but as part of a national project to survey the remaining energy potential in Norwegian rivers.¹³⁴ Ola Måland and

¹³² See *Jørpeland Kraft AS v Ola Måland and others* (n 129).

¹³³ See *Jørpeland Kraft AS v Ola Måland and others* (n 129).

¹³⁴ The survey was carried out in 2004 and its results are summarised in Torodd Jensen (ed), *Beregning av Potensial for Små Kraftverk i Norge* (Rapport nr. 19-2004, NVE 2004).

the other owners of the river were not identified as significant stakeholders and were not notified of the assessment that had been made. Moreover, when Jørpeland Kraft AS submitted an application to the NVE for permission to divert the water, the owners were not notified by the NVE.¹³⁵

Rather, the approach to the case was the traditional one, with an assessment directed at evaluating the environmental impact. Many interest groups were called on to comment on environmental consequences, and public debate arose with respect to the balancing of commercial interests and the desire to preserve wildlife and nature.

Despite not being asked to do so, one of the local owners, Arne Ritland, also commented on the proposed project. He did this in an informal letter sent directly to Scana Steel Stavanger AS. In this letter, he inquired for further information and protested the proposed diversion of water from Brokavatn. He also mentioned the possibility that an alternative hydropower project could be undertaken by original owners, but he did not go into any details, stating only that a locally owned hydropower plant had previously been in operation in the area.

The plant he was referring to dates back to the time before there was a national grid. It ensured a local supply of electricity, but has since been shut down, in keeping with the general trend mentioned in Chapter 4.¹³⁶

Arne Ritland received a reply from Scana Steel Stavanger AS, which stated that more information on the project and its consequences would soon be provided. Ritland did not pursue the matter further at this time. Meanwhile, Scana Steel Stavanger AS submitted his letter to the NVE, who in turn presented it as a comment directed at the application.

This prompted Jørpeland Kraft AS to undertake their own survey of alternative hydropower in Sagåna. The conclusions, but not the report itself, were sent to the water authorities. The owners

¹³⁵ However, a generic orientation letter was apparently sent by Jørpeland Kraft AS, a letter that the owners themselves could not remember having received.

¹³⁶ See *Jørpeland Kraft AS v Ola Måland and others* (n 129).

were not informed that such an investigation was being conducted by the expropriating party, as a response to Ritland's letter.

Moreover, the water authorities did not take steps to investigate the commercial potential of local hydropower on their own accord. Instead, they referred to the conclusion presented by Jørpeland Kraft AS, stating that if the local owners decided to build two hydropower plants in Sagåna, then one of them, in the upper part of the river, would not be profitable, neither with nor without the contested water. The other project, in the lower part, could apparently still be carried out, even after the diversion.

No mention was made of what the original owners stood to lose, nor was there any argument given as to why it made sense to build two separate small-scale power plants in Sagåna. Nevertheless, the NVE handed the expropriating party's findings over to the Ministry, without conducting their own assessment and without informing the original owners.

In addition to the report made by Jørpeland Kraft AS, Hjelmeland kommune, the local municipality government, also commented on the possibility of local hydropower. In their statement to the NVE, they directed attention to the data in the NVE's own national survey, which suggested that a single hydropower plant in Sagåna would be a highly beneficial undertaking. On this basis, they protested the diversion, arguing that original owners should be given the possibility of undertaking such a project.

This statement was not communicated to the original owners, and in their final report the NVE dismissed it by stating that the most efficient use of the water would be to transfer it and harness it at Jørpeland.

In addition to the statement made by Ritland, one other property owner, Ola Måland, commented on the plans. He did so without having any knowledge of the commercial potential of the waterfall. Moreover, he had not been informed of the statement made by Hjelmeland Kommune. On this basis, he expressed his support for Jørpeland Kraft's plans, citing that the risk of flooding

in Sagåna would be reduced. He also phrased his letter in such a way that it could be interpreted as a statement on behalf of the owners as a group. However, Måland was the only person who signed.

In the final report to the Ministry, the NVE refer to Måland's letter and state that the original owners are in favour of the plans. For this reason, the NVE argues, the opinion of Hjelmeland kommune should not be given any weight. The NVE neglects to mention that Arne Ritland's statement strongly opposed expropriation. Moreover, earlier in the report, where all incoming statements are reported, Ritland is referred to as a private individual, while Ola Måland is referred to as a property owner who speaks on behalf of the owners as a group.

The report made by the NVE was not communicated to the affected local owners at all, so the owners had no chance of correcting mistakes. However, the report was sent to many other stakeholders, including Hjelmeland kommune. In light of NVE's conclusions, the municipality changed their original position and informed the Ministry that they would not press for local hydropower, since this was not what the original owners wanted.

All of this happened without the owners' knowledge. However, while the case was being prepared by the water authorities, the original owners had begun to seriously consider the potential for hydropower on their own accord. In late 2006, Jørpeland Kraft's application reached the Ministry and a decision was imminent. At the same time, the owners were under the impression that they would receive further information before the case progressed to the assessment stage.

As the owners had now come to realise the commercial value of the water from Brokavatn, they approached the NVE, inquiring about the status of the plans proposed by Jørpeland Kraft AS. They were subsequently informed that an opinion in support of the transfer had already been delivered to the Ministry. This communication took place in late November 2006, summarised in minutes from meetings between local owners, dated 21 and 29 November. On 15 December 2006, the King in Council granted a concession for Jørpeland Kraft AS to transfer the water from

Brokavatn to Jørpeland.

At this point, it had become clear to the original owners that the water from Brokavatn would be crucial to the commercial potential of their own project. They also retrieved expert opinions that strongly indicated that the NVE was wrong when they concluded that diverting the water would be the most efficient use of the water. In light of this, the owners decided to question the legality of the licence (with the corresponding permission to expropriate). They argued, in particular, that the administrative decision to grant the license was invalid.

In the following section, I present the main legal arguments relied on by the parties, as well as a summary of how the three national courts judged the case.

5.6.2 The Legal Arguments

First, the owners argued that procedural mistakes had been made by the water authorities when preparing the case. This, in turn, had resulted in factual mistakes forming the basis of the decision to grant the development license. Since the outcome might have been different if these mistakes had not been made, the owners concluded that the development license could not be upheld.

Second, the owners argued that expropriation of their rights would result in the loss of an economic development potential. Moreover, they argued that the economic loss would be greater than the gain even for the public, since the owners were in a position to make more efficient use of the water rights in question. Therefore, allowing expropriation would only serve to benefit the commercial interests of Jørpeland Kraft AS, to the detriment of both local and public interests. On this basis, the owners contended that the decision to grant the licence was a manifestly ill-founded decision that could not be upheld.¹³⁷

Third, the owners argued that the government had not fulfilled its duty to consider the case with due care. In particular, the assessment of local community interests and the interests of local

137 ...

owners had not been satisfactory. Particular attention was directed at the fact that local owners had not been informed about the progress of the case, and had not been told of assessments pertaining to their interests.

Fourth, the owners argued that irrespective of how the matter stood with respect to national law, the expropriation was unlawful because it would be in breach of the provisions in P1(1) of the ECHR regarding the protection of property.

Jørpeland Kraft AS protested, arguing that it was the responsibility of the owners to actively provide information about possible objections against the project and that the process had therefore been in accordance with the law. Unfortunate misunderstandings, if any, were due to the fact that the owners had neglected their responsibilities in this regard. Moreover, Jørpeland Kraft AS argued that it was not for the courts to subject the assessment of public and private interests to any further scrutiny, since this was a matter for the administrative branch.

Finally, Jørpeland Kraft AS argued that there was no issue of human rights at stake in the case. They argued for this by pointing to the fact that the procedural rules had been followed and that the material decision was beyond reproach. Moreover, Jørpeland Kraft AS suggested that since the owners would be compensated financially by the courts for whatever loss they incurred, no human rights issues could possibly arise.

The matter went before the district court in the city of Stavanger, which decided in favour of the owners on 20 May 2009.¹³⁸ In the following, I offer a presentation of the reasons given by this court, leading to the conclusion that the expropriation was unlawful and that the diversion of Brokavatn could not be carried out.

¹³⁸ See *Jørpeland Kraft AS v Ola Måland and others* (n 129).

5.6.3 The District Court

The district court of Stavanger agreed with the original owners that the decision to grant the license was based on an erroneous account of the relevant facts. Moreover, the court concluded that it was evident, from the assessment carried out by the NVE themselves (in their national survey of small-scale hydropower potential), that allowing the applicants to use the water from Brokavatn in their own hydroelectric scheme would be the most efficient way of harnessing the hydropower potential. This, the court noted, directly contradicted what the NVE had stated in their report.

In addition, the court noted that Hjelmeland kommune had in fact referred to the national survey in their objection against the application. Hence, the court found that the NVE were obliged to at least consider the assessment of hydropower potential contained therein.

The court substantiated their decision by giving several direct quotes from the report made by the NVE. For instance, from p 199, as quoted by the district court:

Hjelmeland kommune would like the hydroelectric potential in the waterfall to be exploited by local property owners. This contrasts with the statement given by the property owners themselves, who wish that the transfer of water takes place, so that damage due to flooding can be somewhat reduced. NVE thinks that the best use of the water with respect to hydroelectric production is to allow a transfer, since this means that the water can be exploited over the greatest distance in elevation. When this is also the property owners' own wish, we will not attribute any weight to the views of Hjelmeland kommune.

The district court concluded that as this was a factually erroneous account of the situation, the decision made to allow transferral of the water could not be upheld. The court offered the following overall assessment of the case:

It is the opinion of the court, having considered how the case was prepared by the

authorities, that the factual basis for the decision made by the government suffers from several significant mistakes and is also incomplete.

In light of this, Stavanger tingrett concluded that the decision to grant concession for diversion of water was invalid. Here the court relied on a well-established principle of administrative law: while the exercise of discretionary powers is usually not subject to review by court, a decision based on factual mistakes is nevertheless invalid if it can be shown that the mistakes in question were such that they could have affected the outcome.¹³⁹

Concerning the second requirement, that the factual mistakes could have affected the outcome, Stavanger tingrett found that it was clearly fulfilled in this case since the owner-led hydropower project was in fact a *better* use of the resource, even with respect to public interests. In any event, the requirement with regards to factual and procedural mistakes is only that the mistakes *could* have affected the outcome; in the presence of mistakes, the burden of proof is shifted onto the party seeking to defend the decision.

Since Stavanger tingrett held that the license to allow diversion was invalid because of factual mistakes, there was no need to consider claims regarding the legitimacy of the decision with respect to human rights law. Stavanger tingrett did conclude, however, by making a more overarching assessment of the case. Here the court states that the procedure followed in preparing the case did not have sufficient regard for owners. This, in particular, was the likely cause of the mistakes that had been made. The court also stated that the standard of assessment when considering owners' interests had to be interpreted more strictly now that hydropower development was an option available to original owners.

Jørpeland Kraft AS appealed the decision and the case then went before the court of appeal, Gulatings lagmannsrett, who found in favour of Jørpeland Kraft AS.

¹³⁹ This is not provided for explicitly in statute, but it is one of the core unwritten legal principles of administrative law. See Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014).

5.6.4 The Court of Appeal

In their argument, the court of appeal do not rely on direct assessment of the report made by NVE, nor do they mention the expert statements retrieved by the opposing parties. Instead, the court of appeal base their decision on general considerations concerning the need for efficient procedures in hydropower cases. Such reasoning provides the apparent grounds for making the following crucial observation concerning the facts:

... It was not a mistake to take Ola Måland's statement into consideration, as he was, and still is, a significant property owner. NVE's statement to the effect that granting the concession will facilitate a more effective use of the water seems appropriate, as it refers to a current hydroelectric plant that exploits a waterfall of 13.5 meters.

The court of appeal do not mention the statement made by Hjelmeland kommune, nor do they comment on the fact that alternative hydropower, as suggested by the municipality, would amount to exploiting the water over a difference in altitude of some 550 meters. In fact, the hydroelectric plant that they do mention has nothing to do with Ola Måland and the other owners, but exploits the same water further downstream. The persons affected by this were no longer parties to the dispute (since their interests were obviously quite negligible).

This waterfall was only brought up in the testimony of a representative from the NVE. When pressed on the matter, this representative claimed that the reasonable way to interpret the assessment made by the NVE was to see it as an assessment concerning the existing hydropower plant further downstream. In light of the statement provided by Hjelmeland kommune, to which the report explicitly refers, this is an ungrounded interpretation. But the regional court adopted it, without further comment.

The court of appeal seems to have assumed, quite generally, that the traditional practices adopted by the water authorities in hydropower cases still provided adequate protection for original

owners.

The court of appeal's decision was appealed by Ola Måland and the other owners. The Supreme Court decided to consider the juridical aspects of the case.¹⁴⁰

5.6.5 The Supreme Court

The Supreme Court ruled in favour of Jørpeland Kraft AS.¹⁴¹ The Court comments on the relevant facts on p 9 of the decision. There, they state that Jørpeland Kraft AS had considered the possibility that a hydroelectric scheme could be undertaken by local property owners. As I have already mentioned, a statement on this was provided to the NVE by Jørpeland Kraft AS themselves. This statement mentioned one possible project that was deemed not to be commercially viable. However, recall that in the same statement another project was also identified – in the same river, using the same water – that Jørpeland Kraft AS claimed was such a good project that it could be carried out even after the water from Brokavatn had been diverted.

The statement does not say anything about what the property owners would stand to lose when the water from Brokavatn disappeared, and the Supreme Court also remain silent on this. Nor do they mention that the statement was never handed over to the applicants, and that the details of the calculations were never handed over to, or considered by, the NVE. In fact, the full report first appeared during the hearing at Gulating lagmannsrett. This fact was not considered relevant by the Supreme Court.

Moreover, the Supreme Court remained silent on the fact that the conclusion concerning efficiency of exploitation contradicts both the NVE's own assessment, the statement made by Hjelmland Kommune, and also all subsequent assessments made both on behalf of the applicants and on behalf of Jørpeland Kraft AS. All of the above were presented to all national courts, including

¹⁴⁰ The appeal concerning the assessment of facts would not be considered. Hence, the Supreme Court would base themselves on the presentation of facts given by the court of appeal.

¹⁴¹ See *Jørpeland* (n 2).

the Supreme Court.

As to the legal questions raised by the case, the Supreme Court makes a more detailed argument than the regional court, culminating in the conclusion that established practices still provide adequate protection. Interestingly, the Supreme Court base their arguments in this regard on the premise that the case does *not* involve expropriation of waterfalls. A similar sentiment was also expressed by Gulating lagmannsrett. However, the true force of this point of view did not become apparent until the case reached the Supreme Court.

The Court first concludes that a legal basis for the concession to transfer the water is to be found in the Watercourse Regulation Act 1917 s 16. Moreover, they conclude that while this provision alone does not provide a right to expropriate the waterfall, it does give the applicant a right to divert the water away from it. While the Supreme Court notes that this amounts to an interference in property rights, they take it as an argument in favour of regarding the rules in the Watercourse Regulation Act 1917 as the primary source of guidance also in relation to procedural rules.

Hence, the provisions in the Expropriation Act 1959 are regarded as relatively unimportant compared to the rules of the Watercourse Regulation Act 1917 and established practices with respect to the provisions in this Act. Moreover, the main reason the Court give for this is that the diversion of water is *not* to be considered as an expropriation of a waterfall. As I have mentioned earlier, there is no rule in the Watercourse Regulation Act 1917 which states that the authorities are required to consider specifically the question of how the regulation affects the interests of property owners. Such a rule is only found in Expropriation Act 1959, s 2. But according to the Supreme Court, this rule does not apply at all in cases where water is being diverted away from a river.¹⁴² This is so, according to the Supreme Court, because transferral of water is not regarded as a case of expropriation of a right to the waterfall, but merely an expropriation of a right to deprive the

¹⁴² It follows, by implication, that the Court regards this rule as “in conflict with” or “unsuitable” in such cases, c.f., Expropriation Act 1959, s 31.

waterfall of water.

This is significant in two ways. First, it is important with respect to the legal status of owners who are affected by projects involving transferral of water. In Norwegian law after *Jørpeland*, it seems that established practice with respect to the assessment of such cases, focusing on environmental aspects and the positions taken by various interest groups, is beyond reproach already because such cases do not involve expropriation of waterfalls.

However, the Norwegian water authorities themselves indicate that they follow similar practices for all large-scale hydropower cases, by relying on an expropriation presumption when the automatic right to expropriate does not apply directly.¹⁴³ Hence, it remains to be seen if cases involving explicit expropriation of the waterfalls themselves will be treated differently by the courts. If so, it leads to the peculiar situation that the level of protection for owners depends on the technicalities of how the developer proposes to gain control over the water.

The difference appears arbitrary from the point of view of owners. But of course, it will soon cease to be arbitrary for developers, who must be expected to favour gutter projects, collecting water from many small rivers and diverting it, since this mode of exploitation makes it easier to acquire necessary rights. On the other hand, if the Supreme Court is to be understood as saying that traditional practices are adequate in general, the consequences of the decision seem fairly dramatic for local owners. It would then appear to be practically impossible to solicit any kind of judicial review in hydropower cases, even in circumstances when the factual basis of the licensing decision is manifestly erroneous. Moreover, the administrative branch is exempt even from the duty of informing owners of assessments made regarding them and their property interests.

To illustrate that a lack of consultation is a general problem, not confined to the particular case of *Jørpeland*, I will conclude by offering a quote from Harald Solli, director of the Section for Concessions at the Ministry of Petroleum and Energy. Solli submitted written evidence to

¹⁴³ See Flatby (n 1).

the Supreme Court regarding the practices followed in cases involving expropriation of waterfalls. Below, I give one of several exchanges that demonstrate how current practices leave local owners in a precarious position.

Q: In cases such as this, should owners affected by a loss of small-scale hydropower potential be kept informed about the factual basis on which the authorities plan to base their decision? I am thinking especially about those cases in which the authorities make an assessment regarding the potential for small-scale hydropower on affected properties.

A: Affected owners must look after their own interests. The assessments made by the NVE in their report is a public document, and it can be accessed through the homepage of the NVE.

By their reasoning in *Jørpeland*, it appears that the Supreme Court gave this dismissive attitude towards local owners a stamp of approval. In light of this, I believe the study of the law in a socio-legal setting becomes all the more relevant. For while this attitude might be a correct interpretation of current national law, as determined in the final instance by the Supreme Court, it seems pertinent to ask if it is *reasonable* law. Also, it seems that one must ask if a case can be made with respect to human rights, by arguing that the protection awarded is insufficient with regards to P1(1). This point was raised in *Jørpeland*, but did not receive any attention from the Supreme Court. In the following section, I briefly describe some further questions raised by the case.

5.6.6 A Perverse Result?

Following *Jørpeland*, I conclude that the liberalisation of the energy sector does not imply that original owners are entitled to increased protection or participation during decision-making processes regarding the use of rivers and waterfalls. This, at least, is the view held by the Norwegian judiciary. Of course, one should not overlook the possibility that the water authorities themselves

will eventually adopt new practices regarding the assessment of such cases. So far, however, it seems that they stick quite closely to the established routine.

Hence, it seems reasonable to ask about the sustainability of these practices. In fact, I believe the case of *Jørpeland* illustrates why the current system is inadequate, and how it can lead to decisions that appear ill-founded and leave the affected communities marginalised. The likelihood of factual mistakes, in particular, might increase greatly when the involvement of the local population in the decision-making process is not ensured.

More importantly, it seems that when decisions are made following the traditional procedure, it can often be hard or impossible to see any legitimate reason why the project proposed by the developer would be a better form of exploitation than allowing the local owners to carry out their own projects. In the case of *Jørpeland*, it seemed that small-scale hydropower would be a better way of harnessing the water in question, even in the sense that it would be more efficient, providing the public with more electricity at a lower cost. More generally, unless the issue of alternative exploitation in small-scale hydropower is considered during the assessment stage, one risks making decisions that are not in the public interest at all.

Additionally, this can send out the signal that expropriation of owners' rights is undertaken solely in order to benefit the commercial interests of the energy company applying for a development license. At this point, it seems appropriate to recall the concerns expressed by US Justice O'Connor in the case of *Kelo*, regarding the disproportionate influence of powerful commercial actors in takings cases.¹⁴⁴ In relation to these concerns, a major point of contention is whether or not Justice O'Connor's grim predictions about the fallout of the *Kelo* decision did indeed reflect a realistic analysis.

Surely, anyone who agrees with Justice O'Connor that the powerful will usurp the power of eminent domain to the detriment of the poor, would also agree with her conclusion that it is

¹⁴⁴ As discussed in Chapter 1.

perverse. However, whether her pessimism is warranted by empirical fact seems less clear. In this context, I believe the case of Norwegian hydropower serves a broader purpose, since it demonstrates that a loose interpretation of the public interest requirement can indeed lead to transfers of property from those with fewer resources to those with more.

However, we also need to be clear about the fact that property has a social and political function that goes beyond the financial interests of individuals. For the Norwegian case at least, it seems particularly relevant to ask if local people, by virtue of their right to property and their original attachment to the land, have a legitimate expectation *both* that their commercial interests should be protected, *and* that they should be granted a say in decision-making processes.

Protection of individual financial interests does not necessarily imply social protection, and the right to participate might be both more significant, and harder won, than the right to be compensated according to whatever the courts regard as the market value of the property in question.

5.7 Conclusion

In this Chapter, I have studied the law and practices relating to the taking of riparian rights under Norwegian law. I observed that the question of striking a balance between private and public interests is approached under the presumption that private property rights embody mainly private values, while public values are pursued through regulation that ensures public ownership and control. I tracked how this perspective shaped the law of expropriation of waterfalls, so that expropriation could only take place for narrowly defined public purposes and only to the benefit of public bodies.

I noted, however, how the increasing centralisation of the energy sector and the increasing scale of projects following the Second World War led to increased worry about the legitimacy of interference in property and the natural environment. I concluded that the ensuing conflicts

failed to make much of an impact on the law relating to hydropower, which was still organised as a public service at this time. The perceived level of political control over the sector meant that courts shunned away from adopting a strict view on legitimacy.

However, this did not mainly apply to the question of the authority to expropriate, which was hardly raised at all in the period between the reversion controversy of the early 20th century and the market-reform of the early 1990s. It applied mainly to general procedural rules. Here the Supreme Court adopted a stance whereby these rules were themselves considered largely “discretionary” in nature. Hence, it would fall under the authority of the executive to determine their scope and application in concrete cases.

I noted how this perspective has been maintained by the courts and the executive even after liberalisation. I argued that today, expropriation for hydropower development must be regarded as takings for profit, typical examples of economic development takings. I discussed how the law came to be changed on this point, with a dramatically widened expropriation authority introduced in conjunction with the Water Resources Act 2000.

I concluded with a description of the fallout from this, as expressed concretely in the case of *Jørpeland*. This case served to illustrate that administrative practices developed and sanctioned during the monopoly days are now applied uncritically in the context of competing commercial interests. As a result, expropriation has become an important tool that the powerful market players can use to gain the upper hand in competition with locally based companies or smaller companies that rely on cooperation with owners. I noted that the law as it stands is unprepared for dealing with this dynamic.

Still, in the case of *Jørpeland*, the Supreme Court explicitly denied that established practices were in need of revision. Moreover, the Court refused to reconsider the established interpretation of the scope of procedural rules in hydropower cases, rejecting arguments to the effect that these must now be understood to provide protection for waterfall owners that matches the protection

offered to other affected parties.

In the next chapter, which is the last chapter of the thesis, I consider land consolidation as an alternative to expropriation. I will argue that it has great potential for successfully addressing holdouts among local owners without giving rise to many of the problems associated with using expropriation to facilitate commercial development of hydropower. However, as demonstrated in the present chapter, Norwegian courts do not seem willing to recognise the shortcomings of the current system. Until they do, or are directed to do so by political bodies or international tribunals, it is unlikely that expropriation law will evolve much from its current fixation on the compensation issue and its unshaken belief in public-private commercial partnerships as arbiters of the common good.