On the legitimacy of economic development takings

Thesis submitted to the School of Law at Durham University for the degree of Doctor of Philosophy

by

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Autumn 2014

c. 90 000 Words

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1 Introduction and Summary of Main Themes

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

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

1.1 Property Lost; Takings and Legitimacy

Property can be an elusive concept, especially to property lawyers. Indeed, in the law of property, the word itself typically only functions as a metaphor – an imprecise shorthand that refers to a complex and diverse web of doctrines, rules, and practices, each pertaining to different "sticks" in a "bundle" of rights. Indeed, this bundle perspective dominates legal scholarship, especially in the common law world. Some even go as far as to argue that words such as "property" and "ownership" should be removed from the legal vocabulary altogether.

So is property as a unifying concept lost to the law? It certainly seems hard to pin it down. In

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

2 Abraham Bell, Private Takings, p. 583.

the words of Kevin Gray, when a close scrutiny of property law gets under way, property itself seems like it "vanishes into thin air".[3] Arguably, however, property never truly disappears. Indeed, there is empirical evidence to suggest that humans come equipped with a *primitive* concept of property, one which pre-exists any particular arrangements used to distribute it or mould it as a legal category.[4] Perhaps most notably, humans, along with a seemingly select group of other animals, appear to have an innate ability to recognise *thievery*, the taking of property (not necessarily one's own) by someone who is not entitled to do so.[5]

Taken in this light, Proudhon's famous dictum "property is theft", might be more than a seemingly contradictory comment on the origins of inequality. It might point to a deeply rooted aspect of property itself, namely its role as an anchor for the distinction between legitimate and illegitimate acts of taking.

But what is a taking, and when is it legitimate? In this thesis, I will aim to make a contribution to this question. I will study takings of a special kind, namely those that are implemented, or at least formally sanctioned, by a government. In legal language, especially in the US, such acts of government takings are often referred to as takings *simpliciter*, while talk of other kinds of "takings" require further qualification, e.g., in case of "takings" based on contract, tax or occupation.

The US terminology brings the issue of legitimacy to the forefront in an illustrative manner. We are reminded, in particular, that under the rule of law, taking is not the same as theft. Rather, the default assumption is that the takings that take place under the rule of law are legitimate. If they are not, we may call them by a different name, but not before. At the same time, it falls to the legal order to spell out in further detail what restrictions may be placed on the power to take.

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3 See Kevin Gray, 'Property in Thin Air' (1991) 50(2) The Cambridge Law Journal 252, 306-307.

4 SeeJeffrey Stake, 'The Property "Instinct"' in Semir Zeki and Oliver Goodenough (eds), *Law and the Brain* (Oxford University Press 2006).

5 See Sarah F Brosnan, 'Property in nonhuman primates' (2011) 2011(132) New Directions for Child and Adolescent Development 9, 11-13.

Indeed, restrictions appear implicit in the very notion of taking. The idea that someone might find occasion to resist an act of taking, and may or may not have good grounds for doing so, appears fundamental to our pre-legal intuitions. But how should we approach the question of legitimacy of takings from the point of view of legal reasoning, and what conceptual categories can we benefit from when doing so? This is the key question that is addressed in this thesis. I will limit attention to a special case, namely the so-called economic development takings, when government sanctions the taking of property in order to further economic development.

My primary interest lies in the legal questions that arise, not the overarching philosophical reflections that these might give rise to. However, I think it is worth reflecting for a minute on how many different, ideologically tinged, perspectives on property may come together when focus is shifted away from the thing itself towards the legitimacy of the act of taking it. This is clearly demonstrated by recent case law from the US.

The best example is the case of *Kelo v City of New London*, which brought the category of economic development takings into focus, first on the political scene, then by causing a surge of academic work by US legal scholars.[6]. The *Kelo* case concerned a house that was taken by the government in order to accommodate private enterprise, namely the construction of new research facilities for Pfizer, the multi-national pharmaceutical company.

The homeowner, Suzanne Kelo, protested the taking on the basis that it served no public use and was therefore illegitimate under thee Fifth Amendment of the US Constitution. The Supreme Court eventually rejected her arguments, but this decision created a backlash that appears to be unique in the history of US jurisprudence. In their mutual condemnation of the *Kelo* decision, commentators from very different ideological backgrounds came together in a shared scepticism towards the legitimacy of economic development takings.

Interestingly, their scepticism lacked a clear foundation in US law at the time, as the *Kelo*

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

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

In particular, the critical response to *Kelo* did not appear to have been primed by the prevailing legal order. It may have been a reflection of widely shared political sentiments, but as such it arguably also involved pre-legal notions pertaining to legitimacy. Simply stated, people from across the political spectrum simply found the outcome *unfair*.

If the law is about delivering justice to the people, this phenomenon deserves attention from legal scholars. In the US, it has received plenty of it. In the context of US law, it is now hard or impossible to deny that cases such as *Kelo* belong to a separate category of takings that raises special legal questions. Moreover, after *Kelo*, most US states have passed some sort of legislation to limit economic development takings, in a direct response to the controversy following the *Kelo* case.

In my opinion, it is appropriate to dwell for a while on the fact that this upheaval of US takings law was largely the result of a popular movement. In particular, I think this suggests the possible relevance of economic development takings as a legal category more generally, also outside of the US. There are significant differences between takings law and practice in the US compared to many other jurisdictions, e.g., in Europe. However, the backlash of *Kelo*, particularly the clear divergence between public opinion on the one hand and established case law on the other, suggests to me the transformational potential inherent in the category of economic development takings itself.

As soon as the special issues that arise in cases such as *Kelo* are brought into focus, it might be that people will have a tendency to judge the issue of fairness similarly, irrespectively of differences in the surrounding legal framework. Indeed, it seems quite natural that characterising certain kinds of takings as takings for profit can lead to a changed perception of their legitimacy.

The question becomes to what extent one may appropriately speak of economic development takings in this way. Here I believe the first important step is to acknowledge that there is at least a *risk* that takings for economic development can be improperly influenced by commercial interests. The risk of capture, moreover, is clearly higher in such cases than in cases when takings take place to benefit a concretely identified public interest, such as the building of a new school or a public road. Hence, the presence of strong commercial interests on the side of the taker in economic development cases deserves to be singled out as a relevant additional dimension along which to asses legitimacy.

This claim is by no means self-evident. For instance, it seems that many European jurisdictions implicitly reject such a perspective. This is because they fail to recognise that the category of economic development takings can be a useful category in the first place; they do not in fact use it as an anchor for reasoning about legitimacy in takings law. This brings me to the first key contribution of this thesis, which is a detailed analysis of economic development takings as a conceptual category for legal reasoning.

1.2 Economic Development Takings as a Conceptual Category

The category of economic development takings is not well established outside of the US, but the influence of the US debate is beginning to show, including in Europe.[7] It is a problem, however, that the exact meaning of the category may differ depending on who you ask. It is quite common, for instance, to speak of "private" takings, more or less as a synonym to economic development takings. But there are some differences here that I believe we should highlight and keep in mind.

First, speaking of a private taking already carries with it an implicit pointer to a lack of

[7] See, e.g., LCA Verstappen, 'Reconceptualisation of Expropriation' in H Mostert and LCA Verstappen (eds), *Rethinking Public Interest in Expropriation Law* (Forthcoming, 2014).

legitimacy, at least in jurisdictions that explicitly single out *public* interests as the only permissible justification for a taking. Speaking of an economic development taking, on the other hand, does not carry with it any such implicit critique. If economic development takings are in need of special scrutiny, the reason cannot be simply that they also involve private interests. After all, economic development itself is usually in the public interest, regardless of whether a public or private body is tasked with carrying it out.

A second difference between private takings and economic development takings is that the former notion is far easier to define. In fact, I think it is *too* easy. It is very tempting, in particular, to simply say that a private taking occurs whenever the legal person taking title to the property in question is a private company or individual. But this is too simple. It might well be, in particular, that a private organisation, for instance a tightly regulated charity, functionally mimics the quintessential "public" takers. On the other hand, it is equally easy to imagine public bodies that are functionally equivalent to private enterprises. Or consider a taking that benefits a publicly owned limited liability company. According to the simple definition of a private taking, this would not qualify, even if the interests involved are completely or predominantly of a private-law nature, directed at maximising profit, rather than providing a public service.

For economic development takings, on the other hand, we face a different problem. Here, a clear definition appears to be entirely missing in the literature. Rather, scholarship on these kinds of takings rests on an intuitive understanding of the term, firmly based on the US jurisprudence from which it first arose. At its core, however, we may safely say that the reason for paying particular attention to the cases classified as economic development takings has something to do with the strong economic, often commercial, incentives that persist on the taker side. Such incentives, more specifically, can serve to sow the seeds of doubt as to whether or not due regard has been had to the interests of owners and directly affected local communities.

In my opinion, this concern is relevant also when the economic incentives in question are of a

non-commercial nature. However, cases when the taker acts as a profit-maximiser on a competitive market are certainly likely to be of special concern. This is particularly relevant in economic systems such as those seen in the west, where the steadily increasing influence of public-private partnerships cause a generally blurring of lines between private and public sectors.

In such societies, economic development takings will almost always be characterised by a commercial incentive, meaning that a commercial interested party, often private, stands to gain a significant financial benefit from compulsorily acquiring private property. This financial motivation for the taker contrasts with the public spirited motivation of the executive or legislative body that grants permission to use compulsion; the (stated) intention of economic development takings is to promote public interests, not to bestow commercial benefits on particular parties. In my opinion, the importance of economic development as a category of takings is that it helps us flag those cases when this contrast is so strong as to suggest that we further question the legitimacy of the undertaking as a whole.

If the decision-maker fails to identify concrete public interests, but must rely on a vague notion such as economic development, this, in particular, should be cause for increased scrutiny. This, I believe, is an observation of generally validity, also outside the context of US law. At the very least, the tension between public interest and commercial gain in property interference is of general interest in any system of government that combines a market-based economy with wide state powers over the use and distribution of property. The question becomes how one should reason about this tension in a meaningful way, to analyse economic development takings in a manner that is suited to yielding legally relevant insights.

Later in this thesis, I will devote much attention to this question. First I will do so from a theoretical point of view, by first arguing that the category of economic development takings arises naturally already at the theoretical level, provided one chooses a suitable theoretical framework for reasoning about takings and property. Following up on this, I set out to distil some general

lessons from the US debate and its history. In addition, I briefly assess the status of economic development takings in Europe, where takings that benefit commercial interests are often allowed to pass without raising special questions, and where the legal relevance of the category of economic development takings may still be called into doubt.

In fact, I argue that this is a shortcoming of the narrative of property protection in Europe, and I also suggest that the concept of an economic development taking would in fact fit well with jurisprudential developments at the ECtHR, which stresses both the need for contextual assessment and attention to possible systemic imbalances in the expropriation practices of member states.

In the US, most work on economic development takings has been anchored in the so-called "public use" requirement of the Fifth Amendment. In fact, some US scholars argue that economic development takings are impermissible already because taking property for development cannot ever be said to constitute a "public use" of the property. Moreover, even scholars who reject this view tend to agree that the public use of a taking is less obvious, and should be subjected to more intense judicial scrutiny, in economic development cases.

Interestingly, requirements similar to the public use test are found in many jurisdiction, in various guises, e.g., in rules referring to the need for a *public interest* or a *public purpose* for takings. On this basis, interesting comparative work has been carried out on the basis of the idea that such a requirement is at the core of the legitimacy issue that arises for economic development takings.

In this thesis, I challenge this perspective. I do so by first reconsidering the history of the public use debate itself, as documented by case law in the US. I argue, in particular, that more attention should be paid to the fact that the state courts that originally set out to develop public use tests in the 19th century adopted a highly contextualised approach. Importantly, these courts where largely not bothered by the fact that they could not pin down any definite and consistent meaning of "public use" as a general concept.

Rather, the public use test was simply used as an expedient way of subjecting various acts of taking to a concrete fairness assessment, in the hope that local courts might help deliver corrective justice in cases when the takings power appeared to have been used in an objectionable manner. In this way, the original purpose of the public use test was tailored towards setting up a framework for judicial review that appears quite similar to how the European Court of Human Rights (ECtHR) currently choose to approach cases dealing with property.

The jurisprudence at the ECtHR typically directs focus away from the question of whether the aim of a taking is legitimate in itself towards the more contextualised question of whether or not the interference is *proportional* given the circumstances. This, I argue, is also how the public use test was also originally used by state courts in the US, before the issue of legitimacy turned federal and became subject to a more abstract form of assessment, leading eventually to a tradition for passive deference that gave rise to *Kelo*.

In fact, as soon as the issue of proportionality has been flagged as the primary question, it is not clear that the words "public use" are of much interest at all. Hence, my conceptual assessment can be summarised by the following two propositions. First, that the notion of an economic development taking, as developed in the US, is a useful addition for thinking about the legitimacy of takings, in any jurisdiction that aims to place meaningful restrictions on the takings power. Second, that the current focus on the notion of a "public use", which is supposed to provide the desired protection against transgressions, is largely misguided. At the very least, I believe alternatives should also be considered. This brings me to the second focus point of my thesis.

1.3 A Democratic Deficit in Takings Law?

I am not the first to challenge the traditional narrative that surrounds economic development takings. Indeed, some US scholars have now begun to argue forcefully that increased judicial scrutiny of the public use requirement is neither a necessary nor a sufficient response to concerns

about the legitimacy of commercially motivated takings. Instead, these authors point out that the takings procedure as such does not seem able to appropriately deal with commercial incentives on the taker side.

This has been accompanied by procedural proposals for takings law reform, most notably Professors Heller and Hills' article on Land Assembly Districts and Professor Hellavi and Lehvi's article on Special Purpose Development Companies. Both of these works propose novel institutions for collective action and self-governance, to replace (parts of) the traditional takings procedure, especially in cases where the taker has commercial incentives.

By examining these proposals in some depth, I arrive at several objections against the details of the particular institutional arrangements proposed, particularly with regards to their likely effectiveness. It seems, in particular, that both proposals fail to recognise the full extent to which prevailing regulatory frameworks concerning land use and planning would have to be reformed in order to make their proposals work.

At the same time, I argue that these novel institutional proposals are extremely useful in that they point towards a novel way to frame the issue of legitimacy in takings law. In particular, I explore the hypothesis that traditional procedural arrangements surrounding takings suffer from a democratic deficit, a particularly powerful source of discontent in economic development cases.

This idea is the second key focus point of my thesis. First, I approach it from a theoretical point of view, by exploring the notion of *participation* and its importance to the issue of legitimacy, particularly in the context of economic development. It seems, in particular, that *exclusion* could be a particular worrying consequence of certain kinds of economic development takings, namely those that lack democratic legitimacy in the local community where the direct effects of the taking are most clearly felt.

I believe this to be a promising hypothesis, and I back it up by considering the social function theory of property and the notion of human flourishing which has recently been proposed as a

normative guide for reasoning about property interests. I pay particular attention to the importance of communities that has been highlighted in recent work, as a way to bridge the gap between individualistic and collectivist ideas about fairness in relation to property.

I take this a step further, by arguing that a focus on communities naturally should bring institutions of local democracy to the forefront of our attention. The role that property plays in facilitating democracy has been emphasised before by other scholars, and I think it has considerable merit. However, I also argue that it is important to resist the temptation of viewing its role in this regard through an individualistic prism. It is especially important to take into account additional structural dimensions that may supervene on both property and democracy, such as tensions between the periphery and the centre, the privileged and the marginalised, as well as between urban and rural communities.

It is especially important, I think, to appreciate the effect takings can have on local democracy. For one, excessive taking of property from certain communities might be a symptom of failures of democracy as well as structural imbalances between different groups and interest. But even more worrying are cases when the takings themselves, brought on by a commercially motivated rationale, appears to undermine the authority of local arrangements for collective decision-making and self-governance. This dimension of legitimacy, in particular, is one that I devote special attention to throughout this thesis.

I also believe, however, that it is hard to get very far with this sub-theme through theoretical arguments alone. Hence, to explore it in more depth, I go on to assess it from an empirical angle, by offering a detailed case study of takings of Norwegian waterfalls for the purpose of hydropower development. This case study, in turn, will allow me to cast light on two further key themes, that I now introduce.

1.4 Putting The Traditional Narrative to the Test

In Norway, the traditional way of thinking about legitimacy of takings is grounded in the notion that owners are entitled to monetary compensation. The law of expropriation clearly reflects the importance attributed to this idea; the constitution itself stipulates that owners have a right to be paid in "full" for the loss they suffer as a result of giving up their property. Consequently, the right to compensation in Norway is generally regarded as stronger than in many other jurisdictions, including those that adhere to the minimal standard imposed by the ECHR.

On the other hand, the story of legitimacy more or less begins and ends with the issue of compensation. Hence, if an owner has grievances that are directed at the act of taking as such, not the amount of money they receive, takings law has very little to offer. In fact, it does not appear to have anything at all to offer, that does not already follow from general principles of administrative law. The owner can certainly argue that the decision to authorise the taking was in breach of procedural rules, or grossly unreasonably, but the chance of succeeding by making such arguments are slim, arguably no higher than in administrative cases that do not involve interference with property rights.

This narrative of legitimacy is not unique to Norway. It seems that in Europe, unlike in the US, the issue of legitimacy is often seen as predominantly concerned with the issue of compensation. In particular, the jurisprudence at the ECtHR is typically focused on compensatory issues. Moreover, while many constitutions of Europe, including the Norwegian, include public interest clauses, the courts make little or no use of these when adjudicating takings complaints. In the words of the ECtHR, the member states enjoy a "wide margin of appreciation" when it comes to determining what counts as a public interest.

Through my case study, I present a detailed analysis of how this traditional narrative actually plays out in Norway, in relation to takings for hydropower development. Such takings form an

interesting sub-class because they are clearly economic development takings, in the most interesting sense of the word. Since the early 1990s, the hydropower sector in Norway has been deregulated, so the hydropower companies, to which the government may grant permission to expropriate, are now predominantly commercial entities. Moreover, the property that they seek to takes is not merely some ancillary rights that they need to develop the country's resources. In Norway, the right to harness the power of water is a private right, under a riparian system that is otherwise quite similar to that found in the UK.

Hence, the primary right that the energy companies tend to take is the right to harness the natural resource itself, a right that is typically held jointly by groups of small-holders and local farmers. In effect, the established hydropower sector in Norway is entirely dependent on taking natural resources from local communities by use of compulsion, with the help of government, in order to exist. Since deregulation, however, not only have energy companies been reorganised as limited liability commercial companies, local owners have also begun to make use of their right to harness water power by undertaking their own hydropower projects.

As a result, local owners now regularly protest expropriation of their rights on the grounds that they wish to *participate* in economic development, by carrying out alternative development projects, or even by cooperating with the established energy companies who wish to take their water rights. Hence, while liberalisation empowers local owners to develop hydropower, it also renders taking for hydropower as takings for profit. Unsurprisingly, this has led to tensions that Norwegian courts have had to grapple with in an increasing number of cases.

In their approach to these cases, the courts rely heavily on the traditional narrative, by reconsidering how compensation is calculated when water rights are taken for hydropower. Compensation practices have already changed dramatically. However, there has also been cases when the local owners of these rights have protested the taking as such, claiming that they should be given the opportunity to develop their own resources. These protests have been entirely unsuccessful, as the

courts in Norway adopts a stance on legitimacy that is extremely deferential to the executive, provided adequate compensation is paid.

In my case study, I start by presenting the legal framework, including a short excursion into legal history, before I give a detailed assessment of a few select cases. This concrete empirical approach will allow me to explore the practical consequences of the current takings narrative, while also aiming to bring out how decision-making process surrounding hydropower work in practice. My main finding is that local owners risk being marginalised by the current regulatory framework, and that new compensation practices have proven inadequate as a means of redressing concerns that arise in this regard. My conclusion is that the case study of Norwegian waterfalls demonstrate concretely the shortcomings of the traditional narrative of legitimacy of takings.

However, I also believe that Norwegian law may offer a possible path towards a solution to this problem, one that has also been put to active use in recent years, particularly in cases when farmers themselves aim to undertake hydropower development, but wish to do so against the will of other members of the local community. This brings me to the second key theme of my case study.

1.5 A Judicial Framework for Compulsory Participation

In Norway, the distribution of property rights across the rural population is traditionally highly egalitarian. This has had many consequences for Norwegian society. For one, it meant that the farmers in Norway soon became an active political force, particularly as representative democracy started to gain ground as a form of government in the 19th century. As early as in 1837, the Norwegian parliament was so dominated by farmers that it came to be described as the "farmer's parliament".

The Norwegian farmers were often little more than small-holders, and had few privileges to protect. Hence, they became liberals of sorts (although also known for their fiscal conservatism).

The farmers as a class were responsible for pushing through important early reforms, such as the establishment of semi-autonomous, elected, municipality governments.[8]

However, the municipality governments were not the first example of local, participatory, decision-making institutions in Norway. Indeed, the highly fragmented ownership of land meant that institutions for land management are among the oldest known in Norway. One of the most important ones exists to this day, namely the *land consolidation court*. The final focus point of my thesis consists in an assessment of this institution and its potential as a possible procedural alternative to takings when compulsion appears to be needed in order to ensure economic development.

Importantly, the land consolidation procedure in Norway is a semi-judicial process that warrants the imposition of *compulsory participation* by primary stakeholders in decision-making processes to which they are deemed to owe a contribution. One typical situation when the institution will be invoked involves the management of jointly owned land, where the land consolidation procedure is used to ensure that local owners may reach a joint decision on how to regulate the use of their land, if necessary one that is imposed on them by the land consolidation judges.

However, the judges' power is limited in that they may only impose a measure if the gains are deemed to outweigh the loss for all stakeholders involved. In practice, land consolidation judges often act as mediators, to facilitate a collective decision. Moreover, one of the most common acts of a land consolidation judge is to set up owner's associations, in a manner that institutionally regulates the continued interaction and decision-making among the stakeholders even after the formal consolidation process has concluded.

I explore this framework in some depth, focusing on its potential as an alternative to expropriation. This is especially interesting since land consolidation is presently being put to use in order to organise hydropower development. Hence, my case study provides an excellent opportun-

[8] The farmers were also responsible for abolishing noble titles in Norway. Clearly, they owed no allegiance to the established aristocracy of landed nobility in Europe.

ity for comparing the land consolidation and the takings process, with respect to the overall aim of ensuring development of hydropower on equitable terms.

Here, I argue, the land consolidation route may be preferable, as it ensures legitimacy through participation. At the same time, the procedure remains effective, since participation is in fact compulsory. I discuss possible objections to the procedure in some depth, but conclude that the continued development of the land consolidation institution provides the best way forward for addressing economic development takings in Norway.

Finally, I compare the institution of land consolidation with the institutional proposals that have been made specifically in the context of the debate on economic development takings. I argue that it compares favourably, both because it comes equipped with in-built judicial safeguards, but also because it has a broader scope. I note, however, that its use as a better alternative to economic development takings is dependent on both political will and an ability to retain key feature even in the presence of new and powerful stakeholders in the consolidation process itself.

1.6 Structure of the Thesis

My thesis is divided into two parts. The first is devoted to setting up a conceptual framework and a knowledge base for analysing the legitimacy of economic development takings. I start in Chapter 2, by examining theories of property as a legal concept, particularly the so-called social function theory. This theory is distinguished by the fact that it highlights the fact that property serves as an anchor of responsibilities as well as rights, thereby helping shape and regulate social systems that are important to society, not just the owners as individuals.

The proponents of the social function theory often make strongly normative claims about property, but here I argue that it is fruitful to take a step back and examine the descriptive content of the theory separately. This, I believe, can help us locate a theoretical template that is less conceptually impoverished than many other descriptive theories of property as a legal concept.

This, in turn, can hopefully render the theory suitable as a common ground that can facilitate meaningful discussion among theorists with very different normative ideas and commitments.

Importantly, I go on to argue that the social function theory suggests that economic development takings should, already for the sake of descriptive accuracy, be treated as a separate category when reasoning about legitimacy. This insight, I note, does not arise in the same way from the two main traditional strands of theorising about property in law, based on the *dominion* concept and the *bundle of rights* metaphor. On these accounts, property is understood in individualistic terms that make it hard to justify why the purpose of the taking should be of any concern at all to the affected owner, as long as due process has been observed.

After establishing economic development takings as a category of descriptive analysis, I set out to provide a theoretical template from which to embark on normative assessment. Here I turn to the notion of *human flourishing* which has been proposed as a key concept when reasoning about the *purpose* and *values* of property. Importantly, the accompanying theory endorses value pluralism, while also flagging the importance of property to the well-being of communities. This latter theme, in particular, will be important throughout the remainder of the thesis.

In the final part of Chapter 2, I make a first pass at substantive assessment, by applying the theoretical framework I develop to provide a brief analysis of the *Kelo* case and related academic work in the US. In Chapter 3, I go on to present a much more detailed, comparative, account of how legitimacy of economic development takings are dealt with in the US compared to in Europe. I focus particularly on the history of the public use debate in the US, to argue that there are important commonalities between how the public use restriction was originally applied (at state level) and how the ECtHR current adjudicates property cases, by assessing the *proportionality* of the interference.

I follow this up by considering the role of courts as arbiters in relation to proportionality. I argue, in particular, that recent developments at the ECtHR might indicate not only increased level

of scrutiny, but also a shift of attention towards examining systemic imbalances. Moreover, I follow those who argue that courts are not well placed to actually *ensure* proportionality, and that they should not be called on to micro-manage the takings process through a myriad of rules that seek to explicate what counts as legitimate in any given scenario. Rather, I locate an institutional gap for hard cases, where the traditional takings procedures entrenched in administrative law simply appear to be inadequate.

In the final part of Chapter 3, I build on this by considering in depth some proposals for institutional reform that have emerged in the literature from the US. Here the focus is on designing mechanisms for collective action and self-governance that can replace takings in the traditional sense, in cases when there are strong economic incentives for development. This promises to ensure forms of benefit sharing with owners and their communities that are unavailable when a traditional compensatory approach is adopted. In addition, proposals for institutional reform can enhance democracy and human flourishing by giving a more prominent place to owners and local communities in those critical decision-making processes that may lead to development and reconfiguration of established property patterns. I pinpoint some shortcomings of existing proposals, raise some questions, and argue that the institutional route is the best way forward for addressing the legitimacy issue in further depth.

This preliminary conclusion leads to the second part of my thesis, where I apply the insights gained from the first half to analyse and distil lessons from the Norwegian framework for expropriation in the context of hydropower development. In Chapter 4, I begin by offering a brief introduction to the Norwegian legal system, before presenting in more detail the rules regulating the right to harness the power of water. I follow up on this by presenting empirical data on the hydropower sector, aiming to shed light on how the regulatory frameworks work in practice. I emphasise the current tension between hydropower projects controlled by local owners and their communities and competing projects controlled by large commercial, partly state-owned, compan-

ies, that rely on expropriation. I emphasise the positive effect local hydropower initiatives can have on the communities in which development takes place, and I present an early vision of the social function of such development in some depth. I conclude by a cautionary assessment of current developments in the owner-led industry itself, where commercial forces appear to be gaining ground at the expense of more rounded perspectives on the purpose of development.

In Chapter 5, I go on to specifically consider rules and practices relating to the expropriation of the right to harness water power, I give a general introduction to Norwegian expropriation law, while focusing on special rules that apply to hydropower development. I show, moreover, how the current regulatory regime is strongly influenced by the fact that the hydropower sector used to be organised as a state monopoly, under decentralised political control. This democratic and public anchor was largely removed, however, as the sector was deregulated in the early 1990s. As a result, current practices in Norway render takings for hydropower as pure takings for profit, something giving rise to an increasing number of cases where local owners challenge the legitimacy of established practices. I go on to study one such case in great depth, to bring out how the current framework can leave local owners marginalised and excluded from the key decision-making processes that eventually lead to the taking of their property by commercial companies. At the same time, I note how the compensation procedure has been reformed, offering a financial windfall to some owners individually. However, I also note how these reforms have been actively opposed by the hydropower industry which currently appears to be gaining ground in their efforts to reverse recent changes in compensation practice. I conclude by arguing that the traditional narrative of legitimacy has proven inadequate in Norway, as it unduly focuses on compensation without tackling underlying imbalances in the division of decision-making power among owners, local communities, regulators and commercial companies. In this way, my analysis of the Norwegian case culminates in the same conclusion as my theoretical work, pointing to the need for institutional reforms that can give local owners and their communities a stronger voice in decision-making processes concerning

their natural resources.

In Chapter **??**, I go on to analyse the Norwegian land consolidation courts as potential answers to this challenge. I begin by presenting the legal framework surrounding this institutional arrangement which has long traditions in Norway. Moreover, I note that it appears to be growing in importance, and that the land consolidation court is widely authorised to order collective action among property owners as well as to set up more permanent institutions for self-governance, with clearly defined rules and purposes. Hence, consolidation courts can in fact be used to order economic development and set up framework that compel owners to participate in it.

After briefly presenting the procedure itself, I focus on important property-based protections against abuse, such as the no-loss guarantee which states that no consolidation measure can be ordered unless the gains match the loss for all the properties involved. I note, in particular, how the focus here is on the affected properties as such, not on the individuals who happen to have rights to them. After presenting the land consolidation courts, I go on to study how they are used in practice in cases of hydropower development. Interestingly, while the established commercial companies continue to rely on expropriation of water rights to facilitate development, local communities that face interal disagreements about development are far more likely to turn to the land consolidation court. Hence, there is now empirical evidence available on consolidation as an alternative to expropriation in these cases. While the development projects facilitated by consolidation are still typically small-scale compared to those carried out with the help of expropriation, I still believe this material is highly interesting. In Chapter **??**, I analyse several concrete cases of consolidation for hydropower development to bring out how this works in practice. I conclude with an assessment of the consolidation alternative, proposing that it looks very promising and should be explored further. Moreover, I note the striking similarities between the consolidation framework and the institutional proposals that have emerged in the US, which I presented at the end of the first part of the thesis. I note, moreover, that the there are some key differences that

I believe speak in favour of Norwegian consolidation courts. In particular, the judicial framework, the flexible authority and scope of the procedure, the possibility of compulsion by a neutral party, as well as the built in procedural safeguards, all seem to be strengths of the Norwegian system. At the same time, however, I note some possible weaknesses, particularly the worry that the land consolidation institutions themselves risk being captured by powerful actors. In addition, worries related to the cost of the procedure, as well as its effectiveness in case of large-scale development, are addressed. Overall, however, my conclusion is that the core ideas inherent in this institutions are sound and can serve as a template for creating legitimacy enhancing institutions for compulsory economic development elsewhere. This observation concludes the material work of this thesis, and in Chapter **??** I offer my final conclusions.

Part I

Towards a Theory of Economic Development Takings

2 Property, Protection and Privilege

It's nice to own land.[1]

A human being needs only a small plot of ground on which to be happy, and even less to lie beneath.[2]

2.1 Introduction

In this chapter, I will propose a template for analysing economic development takings, based on legal theory. I will not provide an extensive presentation of concepts or theoretical approaches developed in other fields, such as political science, sociology, economy, or psychology. However, all these fields engage in interesting ways with the notion of takings and property.[3] Hence, while I focus on legal and – to some extent – philosophical theories, I will make a special note of relevant

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1 Donald Trump, as quoted in Robert Booth, 'Donald Trump opens £100m golf course' (*The Guardian*, 10th July 2012) ⟨http://www.theguardian.com/world/2012/jul/10/donald-trump-100m-golf-course⟩ accessed 16th April 2015.

2 Johan Wolfgang von Goethe, *The sorrows of young Werther and selected writings.*

3 For some examples of relevant work from economics, psychology and political science respectively, consider Thomas J Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (Cambridge University Press 2011); Janice Nadler and Shari Seidman Diamond, 'Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity' (2008) 5(4) Journal of Empirical Legal Studies 713; Claudio J Katz, 'Private Property versus Markets: Democratic and Communitarian Critiques of Capitalism' (1997) 91(2) The American Political Science Review 277; Bruce G Carruthers and Laura Ariovich, 'The Sociology of Property Rights' English (2004) 30 Annual Review of Sociology 23.

research questions that are also analysed in other academic disciplines.

The main claim made in this chapter is that the category of economic development takings is relevant to legal reasoning about certain situations when private property is taken by the state. This is not *prima facie* clear. I am prepared to face critics who will point out that the category has no legal relevance in their jurisdictions. Fortunately, the category still makes intuitive sense; it targets situations when property is, quite literally, taken for economic development. In most cases I will consider, this is even the explicitly stated aim used to justify eminent domain. Hence, the factual basis for the categorization cannot be questioned.

The juridical basis, on the other hand, cannot be taken for granted. Indeed, a superficial look at dominant legal approaches to property would seem to indicate that in many property regimes, the nature of the project benefiting from a taking is not a major issue when assessing the legitimacy of interference.[4]

Much of the work in this chapter is aimed at clarifying why the purpose and context of a taking matters, not only as a question of public policy but also with respect to property protection and the rights of owners and their communities. I believe it is important to do so thoroughly, to establish a secure conceptual basis for the rest of the thesis. From the point of view of US law, this is not strictly necessary, since economic development takings have already gained recognition as an important category of legal reasoning.[5] In Europe, however, this has not yet happened, at least not to the same extent.

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4 For instance, in Europe, the property jurisprudence at the ECtHR deals almost exclusively with other aspects of legitimacy. The Court typically stresses that interference must be in the public interest, but then leave this aspect of legitimacy behind after making clear that the member states enjoy a wide margin of appreciation in relation to the public interest requirement. See, e.g., *James and others v United Kingdom* (1986) Series A no 98; *Lindheim and others v Norway* ECHR 2012 985. Similarly, in the US in the 1980s, Merrill claimed that most observers thought of the public use clause in the fifth amendment of the US constitution as nothing more than a "dead letter", see Thomas W Merrill, 'The Economics of Public Use' (1986) 72 Cornell Law Review 61, 61.

5 See generally Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183; Robin Paul Malloy (ed), *Private Property, Community Development and Eminent Domain* (Ashgate 2008).

The reason for this difference is not that US law contains special rules that directly point to distinguishing features of economic development takings.[6] Rather, the difference is largely due to the fact that economic development takings have resulted in great political controversy in the US, a controversy that has influenced both the law and legal scholars.[7] Hence, in the absence of a similar political climate in Europe, a conceptual investigation into the very idea of an economic development taking is warranted.

As I argue in this chapter, providing an adequate account of this forces us to broaden our theoretical outlook compared to traditional strands of legal reasoning about property. Interestingly, I find considerable support for the necessary conceptual reconfiguration when I consider recent trends in property theory, particularly those that focus on the *social function* of property.[8] Indeed, the crux of the main argument presented in this chapter is that the social function view compels us to pay attention to the special dynamics of power that tend to manifest in cases when private property is taken by the state for someone else's profit.

To motivate the theoretical work, I will begin in Section 2.2 by considering the Balmedie controversy, pertaining to Donald Trump's plans for a golf resort in Balmedie, a village on the east coast of Scotland. I use this concrete example to argue that we need new conceptual categories when reasoning about property protection in the context of economic development, to adequately

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6 In fact, many state laws now *do* contain such rules, following the backlash of the controversial decision in *Kelo v City of New London* 545 US 469 (2005). However, such rules were introduced only after the category of economic development takings first came to prominence in legal discourse. See generally Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust Journal 799; Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100; Harvey M Jacobs and Ellen M Bassett, 'All Sound, No Fury? The Impacts of State-Based Kelo Laws' (2011) 63(2) Planning & Environmental Law 3.

7 See, e.g., Ilya Somin, 'The Politics of Economic Development Takings' (2008) 58 Case Western Reserve University Law Review 1185, 1190-1192.

8 See generally Gregory S Alexander and others, 'A Statement of Progressive Property' (2009) 94(4) Cornell Law Review 743; Sheila R Foster and Daniel Bonilla, 'The Social Function of Property: A Comparative Perspective' (2011) 80 Fordham Law Review 1003; Jospeh William Singer, *Entitlement: The paradoxes of property* (Yale University Press 2000); Laura S Underkuffler, *The Idea of Property: Its meaning and power* (Oxford University Press 2010); Gregory S Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press 2006); Gregory S Alexander and Eduardo Peñalver, *Community and Property* (Oxford University Press 2010); Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press 2011).

address tensions between property's different functions in this context. Then, in Section 2.3, I go on to discuss theories of property, in the hope of locating a suitable starting point for further analysis. I argue that neither of the two dominant property theories of the last century, the bundle theory and the dominion theory respectively, provide such a starting point. In Section 2.4, I move on to consider the social function theory of property, to arrive at more useful theoretical template. Moreover, I argue that the descriptive content of this theory can provide a valuable conceptual tool even if one does not agree with the normative assertions that are typically associated with it.

Importantly, the social function theory will allow me to argue that economic development takings are in fact an interesting special case, which raises distinct questions that require special treatment. This realisation does not rely on any overtly normative assertions; the descriptive core of the social function theory will suffice. However, in Section 2.5, I go on to consider normative aspects, by presenting the human flourishing account of the purpose of property. I argue that while the social function theory allows us to formulate important issues that may otherwise be ignored, the human flourishing theory provides us with a possible path towards answers to the normative questions that arise. In Section 2.6, I make the discussion more concrete, first by applying the social function theory to explain and justify economic development takings as a conceptual category, then by drawing on the human flourishing theory to set out some overriding normative constraints that will guide the concrete policy assessments I offer in this thesis. In Section 2.7, I offer a conclusion.

2.2 Donald Trump in Scotland

On the 10th of July 2010, the property magnate Donald Trump opened his first golf-course in Scotland, proudly announcing that it would be the "best golf-course in the world".[9] Impressed with the unspoilt and dramatic seaside landscape of Scotland's east coast, the New Yorker, who

[9] See Joe Passow, 'Trump Scotland is on its way to being one of the best courses in the world' (*Golf Magazine*, 13th July 2012) ⟨http://www.golf.com/courses-and-travel/donald-trump-scotland-golf-course-lives-hype⟩ accessed 16th April 2015.

made his fortune as a real estate entrepreneur, had decided he wanted to develop a golf course in the village of Balmedie, close to Aberdeen.

To realise his plans, Trump purchased the Menie estate in 2006, with the intention of turning it into a large resort with a five-star hotel, 950 timeshare flats, and two 18-hole golf-courses. The local authorities were divided on issue of planning permission, which was initially denied by Aberdeenshire Council.[10] Critical attention was directed at the fact that the proposed site for the development had previously been declared to be of special scientific interest under conservation legislation.[11] The frailty and richness of the sand dune ecosystem, many argued, suggested that the land should be left unspoilt for future generations.

Trump was not deterred, and in the end he was able to convince Scottish ministers that he should be given the go-ahead on the prospect of boosting the economy by creating some 6000 new jobs.[12] Activists continued to fight the development, launching the "Tripping up Trump" campaign to back up local residents who refused to sell their properties.[13] One of these, the farmer and quarry worker Michael Forbes, expressed his opposition in particularly clear terms, declaring at one point that Trump could "shove his money up his arse".[14] Trump, on his part, had described Forbes as a "village idiot" that lived in a "slum".[15] Moreover, he had suggested that Forbes was keeping his

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[10] See, e.g., 'Trump's £1bn golf plan rejected' *BBC News* (London, 29th November 2007) ⟨http://news.bbc.co.uk/2/hi/uk_news/scotland/north_east/7118105.stm⟩ accessed 18th April 2015.

[11] See 'Trump's golf submission swings in' *BBC News* (London, 30th March 2007) ⟨http://news.bbc.co.uk/2/hi/uk_news/scotland/north_east/6506923.stm⟩ accessed 18th April 2015.

[12] See Severin Carrell, ''World's best golf course' approved - complete with 23-acre eyesore' *The Guardian* (London, 4th November 2008) ⟨http://www.theguardian.com/world/2008/nov/04/donald-trump-scottish-golf-course⟩ accessed 16th April 2015. Trump's plans attracted significant public attention, and his interaction with Scottish decision-makers came under critical scrutiny by commentators, see, e.g., Simon Jenkins, 'Scotland's gullible politicians are the victims of a colossal Trump try-on' (*The Guardian*, 13th June 2008) ⟨http://www.theguardian.com/commentisfree/2008/jun/13/donaldtrump.scotland⟩ accessed 16th April 2015. For a more general assessment from the point of view of conservation interests in the UK, see Arts Koen and Gina Maffrey, 'Trump's golf course – Society's nature. The death and resurrection of nature conservation' (2013) 34(1) ECOS 49.

[13] See 'Tripping up Trump' ⟨http://www.trippinguptrump.co.uk⟩ accessed 16th April 2015.

[14] See 'Donald Trump's plea to homeowners on the Menie Estate' *The Scotsman* (Edinburgh, 12th November 2010) ⟨http://www.scotsman.com/news/donald-trump-s-plea-to-homeowners-on-the-menie-estate-1-1370270⟩ accessed 16th April 2015.

[15] See 'Trump may pursue housing laws over golf 'slum'' *BBC News* (London, 1st June 2010) ⟨http://www.bbc.com/

property in a state of disrepair on purpose, to coerce Trump to pay more for the land, to remove the blight.[16] Forbes was offended. He proudly declared that he would never consider selling, as the issue had become personal.[17]

At the height of the tensions, Trump asked the local council to consider issuing compulsory purchase orders (CPOs) that would allow him to take property from Forbes and other recalcitrant locals against their will.[18] These plans were met with widespread outrage. The media coverage was wide, mostly negative, and an award-winning documentary was made which painted Trump's activities in Balmedie in a highly negative light.[19] The controversy also found its way into UK property scholarship. Kevin Gray, in particular, a leading expert in property law, expressed his opposition by making clear that he thought the proposed taking would be an act of "predation".[20]

In fact, the case prompted Gray to formulate a number of key features that could be used to identify situations where compulsory purchase would be more likely to represent an abuse of power. He noted, moreover, that Trump's proposed takings would fall in line with a general tendency in the UK towards using compulsory purchase to benefit private enterprise, even in the absence of

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news/10205781⟩ accessed 16th April 2015.

16 See 'Fisherman bunkers Trump golf plan' *CNN* (Atlanta, Georgia, 10th October 2007) ⟨http://edition.cnn.com/2007/WORLD/europe/10/10/trump.golf/⟩ accessed 16th April 2015.

17 See Brian Ferguson, 'Farmer who took on Trump triumphs in Spirit awards' *The Scotsman* (Edinburgh, 29th November 2012) ⟨http://www.scotsman.com/news/scotland/top-stories/farmer-who-took-on-trump-triumphs-in-spirit-awards-1-2668649⟩ accessed 16th April 2015.

18 See Mark Macaskill, 'Donald Trump accused of new clearance' *The Sunday Times* (London, 6th September 2009) ⟨http://www.thesundaytimes.co.uk/sto/news/uk_news/article184090.ece⟩ accessed 16th April 2015. It would not have been the first time Donald Trump benefited from eminent domain. In the 1990s, he famously succeeded in convincing Atlantic City to allow him to take the home of Vera Coking, to facilitate further development of his casino facilities. But in this instance, Trump has been unsuccessful. Indeed, the taking of Vera's home was eventually struck down by the New Jersey Superior Court, an influential result that was hailed as a milestone in the fight against "eminent domain abuse" in the US. See Stephen J Jones, 'Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment' (2000) 50 Syracuse Law Review 285, 297-301. See also Nick Gillespie, 'Litigating for Liberty' *Reason* (Los Angeles) ⟨http://reason.com/archives/2008/03/03/litigating-for-liberty/4⟩ accessed 16th April 2015. For the decision itself, consult *Casino Reinvestment DevAuth v Banin* 727 A2d 102 (NJ Super Ct Law Div 1998).

19 See Anthony Baxter, 'You've been Trumped' (3rd May 2011) ⟨http://www.youvebeentrumped.com/youvebeentrumped.com/THE_MOVIE.html⟩ accessed 16th April 2015.

20 Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011).

a clear and direct benefit to the public. Hence, it seemed realistic that CPOs could indeed come to be used in Balmedie, as existing statutory authorities were broad enough to justify takings of this kind.[21] It would not be hard to argue that the public would benefit indirectly in terms of job-creation and increased tax revenues. Moreover, Scottish ministers had already gone far in expressing their support for the plans.

But then, in a surprise move, Trump announced he would not seek CPOs, claiming also, to the consternation of local residents, that it had never been his intention to do so.[22] Instead, Trump decided to pursue a different strategy, namely that of containment. He erected large fences, planted trees and created artificial sand dunes, all serving to prevent the properties he did not control from becoming a nuisance to his golfing guests. One local owner, Susan Monroe, was fenced in by a wall of sand some 8 meters high. "I used to be able to see all the way to the other side of Aberdeen", she said, "but now I just look into that mound of sand".[23] She also lamented the lack of support from the Scottish government, expressing surprise that nothing could be done to stop Trump.

There was little left to do. As soon as the decision was made to build around them, the neighbouring property owners found themselves marginalized. Trump, on his part, was declared a valuable job-creator whose activities would boost the economy in the region. He even received an honorary doctorate at Robert Gordon University, a move that prompted the previous vice-chancellor, Dr David Kennedy, to hand his own honorific back in protest.[24]

In the end, it was not by taking the land of others that Trump triumphed in Scotland. Rather,

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[21] In particular, the Town and Country Planning (Scotland) Act 1997 contains a wide authority in s. 189, stating that local authorities has a general power to acquire land compulsorily in order to "secure the carrying out of development, redevelopment or improvement".

[22] See 'Scepticism as Donald Trump claims no evictions over Menie' *The Scotsman* (Edinburgh, 31st January 2011) ⟨http://www.scotsman.com/news/scepticism-as-donald-trump-claims-no-evictions-over-menie-1-1499167⟩ accessed 17th April 2015.

[23] See Booth (n 1).

[24] See 'Degree returned over Donald Trump's RGU award' *BBC News* (London, 28th September 2010) ⟨http://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-11421376⟩ accessed 17th April 2015.

he succeeded by exercising "despotic dominion" over his own.[25] This proved highly effective. After he fenced them in, his neighbours were hard to see and hard to hear. The Balmedie controversy went quiet, the golfers came, Trump got his way. As he declared during the grand opening: "Nothing will ever be built around this course because I own all the land around it. [...] It's nice to own land."[26]

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The tale of Trump coming to Scotland serves to illustrate the kind of scenario that I will be looking at in this thesis. In addition, it puts my work into perspective. The story shows that what it means to protect property against undue interference depends on the circumstances and, in particular, on our normative assessment of those circumstances. For a while, it looked like Balmedie was about to become a canonical case of an economic development taking. But in the end, it became an illustration of something more subtle, namely that what it means to protect property depends on value judgements regarding opposing kinds of property interests. In particular, while Trump achieved his ends in Scotland by relying on his own property rights, he did so by undermining the property rights of others, even if he did not formally condemn those rights.

This was made possible by an exercise of regulatory and financial power. Hence, we are reminded that the function of property as such is deeply shaped by social, political and economic structures. For the powerful owner, property can be used offensively. For the marginalised, it might well be the last line of defence. Indeed, Donald Trump's ownership of the Menie estate has a vastly different meaning than does Michael Forbes' ownership of his small farm. To many observers, the former kind of ownership will represent some combination of power, privilege and profit, while the latter will be regarded as imbued with a mix of defiance, community and sustenance. Very different values

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[25] To quote William Blackstone, William Blackstone, *Commentaries on the Laws of England, Volume 2: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press 1979) 2.

[26] See Booth (n 1).

are inherent in these two forms of ownership, and after Trump came to Balmedie, they clashed in a way that required the legal order to prioritise between them.

In Trump's narrative, upholding the sanctity of property in Balmedie entails allowing him to protect his golf resort plans from what he regards as backwards locals who attempt to fight progress. If this is one's starting point, property protection might even come to involve the use of compulsory purchase of rights that are seen as a hindrance to the full enjoyment of property by a more resourceful owner.

For Michael Forbes and the other local owners, protecting property has a completely different meaning. To them, it was paramount to protect the local community against what they saw as a disruptive and damaging plan, one that threatened to turn them and their properties into mere golfing props. Again, adequate protection might require an interference in property, to prevent Trump from using his land according to his own wishes, because this causes damage to his neighbours.

Regardless of who we support, in the case of Balmedie, we are forced to recognise that protection implies interference and vice versa.

This shows the conceptual inadequacy of the idea that property protection is all about weighing private and public interests against each other, to strike a balance between the state's power to do good and owners' right to do as they please. In reality, matters can be more subtle, involving a number of additional dimensions. Importantly, how we assess concrete situations where property is under threat depends crucially on what we perceive as the "normal" state of property, the alignment of rights and responsibilities that we deem worthy of protection. Our stance in this regard clearly depends on our values. But values themselves are in turn influenced by the context of assessment within which they arise. An additional challenge is that our assessments are often influenced by our *perception* of the relevant context, rather than by facts.

For example, property activists in the US tend to regard the value of autonomy as a fundamental

aspect of property. But this must be understood in light of the idea that US society is founded on an egalitarian distribution of property, where ownership is meant to empower ordinary people by facilitating self-sufficiency and self-governance.[27] Hence, the autonomy inherent in property ownership is not thought of as being bestowed on the few, but on the many. Protecting autonomy of owners against state interference is not about protecting the privileges of the rich and powerful, but is embraced as a way to protect *against* abuse by the privileged classes.[28]

This, however, is only an *idea* of property protection. It might not correspond to the reality surrounding the rules that have been moulded in its image. Indeed, it has been noted that despite the great pathos of the egalitarian property idea, egalitarianism has actually played a marginal role to the development of US property law.[29] More worryingly still, research indicates that land ownership in the US, which are hard to track due to the idiosyncrasies of the land registration system, is not actually all that egalitarian.[30] In this way, we are confronted with the danger of a dissociation of values, reality and the law.

In Scotland, a similar story unfolds. Here, the traditional concern is that land rights are mainly held by the elites.[31] As a result, Scottish property activists tend to focus on values such as equality and fairness, calling also on the state to regulate and implement measures to achieve more egalitarian control over the land. Indeed, reforms have been passed that sanction interference in established property rights on behalf of local communities.[32] At the same time, cases like Balmedie

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27 See, e.g., James W Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press 2007) 173.

28 This narrative is enthusiastically embraced by US activists who fight economic development takings, see, e.g., 'Castle Coalition' ⟨http://castlecoalition.org/⟩ accessed 18th April 2015.

29 Joan Williams, 'The Rhetoric of Property' (1998) 83 Iowa Law Review 277, 361 ("Why does the egalitarian strain of republicanism have such a substantial presence in American property rhetoric outside the law but so little influence within it?")

30 Harvey M Jacobs, *Who Owns America?: Social Conflict over Property Rights* (University of Wisconsin Press 1998) 246-247.

31 See generally Andy Wightman, *Who owns Scotland?* (Canongate 1996); Andy Wightman, *The Poor Had No Lawyers: Who Owns Scotland and How They Got It* (Birlinn 2013).

32 See generally John A Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89(4)

illustrate that the Scottish government, now with enhanced powers of land administration, may well choose to align themselves with the large landowners. Moreover, research indicates that recent reforms in Scottish planning law, which serve to enhance the power of the central government, have the effect of undermining local communities and their capacity for self-governance.[33] Again, the danger of a disconnect between influential property narratives and reality is brought into focus.

On the other hand, it seems that grass roots property activists in the US and Scotland may well be closer in spirit than they seem. Although their perception of the role of the state is very different, they appear to share many of the same concerns and aspirations. Arguably, differences arise mainly from the fact that they operate in different contexts and engage with different discourses of property. The challenge is to find categories of understanding that allow us to make sense of both their commonalities and their differences.

I think the example of Balmedie suggests a possible first step. It illustrates, in particular, the need for a framework that will allow us to recognise that opposing the use of compulsory purchase for economic development is perfectly consistent with supporting strict property regulation to prevent the establishment of golf resorts in fragile coastal communities. Both of these positions, moreover, should be viewed as efforts to protect property. To the classical debate about the limits of the state's authority over property, such a dual position can be hard to make sense of. But in my opinion, this only points to the vacuity of the conventional narrative.

In general, I think it is hard to make sense of many contemporary disputes over property if we do not have the conceptual acumen to distinguish between (1) egalitarian property held under a stewardship obligation by members of a local community, and (2) "feudal" property held by large

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Nebraska Law Review 739; Matthew Hoffman, 'Why community ownership? Understanding land reform in Scotland' (2013) 31 Land Use Policy 289.

[33] See generally Michael Pacione, 'Private profit, public interest and land use planning – A conflict interpretation of residential development pressure in Glasgow's rural–urban fringe' (2013) 32 Land Use Policy 61; Michael Pacione, 'The power of public participation in local planning in Scotland: The case of conflict over residential development in the metropolitan green belt' (2014) 79(1) GeoJournal 31.

enterprises for investment. Moreover, there is no contradiction between promoting the value of autonomy for one of these, while emphasising the need for state control and redistribution when it comes to the other. The broader theme is the contextual nature of property and its implications for protection of property rights. In the coming sections, I will propose a theoretical basis that integrates this viewpoint into legal reasoning about interference in property rights.

2.3 Theories of Property

What is property? In common law jurisdictions, the standard answer is that property is a collection of individual rights, or more abstractly, *entitlements*.[34] Being an owner, it is often said, amounts to being entitled to one or more among a bundle of "sticks", streams of protected benefits associated with, and thereby serving to legally define, the property in question.[35] This point of view was first developed by legal realists in response to the natural law tradition, which conceptualised property in terms of the owner's dominion over the owned thing, particularly his right to exclude others from accessing it.[36] In civil law jurisdictions, rooted in Roman law, a dominion perspective is still often taken as the theoretical foundation of property, although it is of course recognised that the owner's dominion is never absolute in practice.[37]

In modern society, the extent to which an owner may freely enjoy his property is highly sensitive to government's willingness to protect, as well as its desire to regulate. To dominion theorists, this

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[34] The term "entitlement" was used to great effect in the seminal article Guido Calabresi and ADouglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) Harvard Law Review 1089.

[35] See Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111(2) Yale Law Journal 357, 357-358. The "classical" references on the bundle of rights theory in the US and the UK respectively are Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710; Anthony M Honorè, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (1961).

[36] Daniel B Klein and John Robinson, 'Property: A Bundle of Rights? Prologue to the Property Symposium' (2011) 8(3) Econ Journal Watch 193, 193-195.

[37] For a comparison between civil and common law understanding of property, see generally YC Chang and HE Smih, 'An Economic Analysis of Civil versus Common Law Property' (2012) 88(1) Notre Dame Law Review 1.

sensitivity is typically thought of as giving rise to various restrictions on property, but for bundle theorists it is rather thought of as *constitutive* of property itself.[38]

The bundle of rights theory has long historical roots in common law. Arguably, it was distilled from the traditional estates system for real property, which was turned into a theoretical foundation for thinking about property in the abstract.[39]

However, during the 18th and 19th century, natural law and dominion theorising was also influential in common law. This is evidenced, for instance, by the works of William Blackstone and James Kent.[40] Towards the end of the 19th century, it became increasingly hard to reconcile such an approach to property with the reality of increasing state regulation. Hence, the bundle metaphor that gained prominence in the early 1900s can be seen as a return to a more modest perspective.[41]

On the bundle account, property rights are thought to be directed primarily towards other people, not things.[42] This underscores an important point about property in the real world, namely that the content of rights in property are necessarily relative to a social context as well as the totality of the legal order. For instance, when relying on a bundle metaphor it becomes easy to explain that a farmer's property rights protects him against trespassing tourists, but not against the neighbour who has an established right of way.[43]

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38 Chang and Smih (n 37) 7.

39 See Chang and Smih (n 37) 7 ("The "bundle of rights" is in a sense the theory implicit in the common law system taken to its extreme, with its inherently analytical tendency, in contrast to the dogged holism of the civil law.").

40 See generally Blackstone, *Commentaries on the Laws of England, Volume 2: A Facsimile of the First Edition of 1765–1769* (n 25); James Kent, *Commentaries on American law* (1st edn, Commentaries on American Law, vol 2, O Halsted 1827).

41 See Klein and Robinson (n 36) 195.

42 See Merrill and Smith, 'What Happened to Property in Law and Economics?' (n 35) 357-358 ("By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a "thing".").

43 It has been argued that this way of thinking about property, as a web of (legal and social) normative relations between persons, does not entail the bundle of sticks idea, see Avihay Dorfman, 'Private Ownership' (2010) 16(1) Legal Theory 1, 23-25. I agree, and I also believe that endorsing the property-as-relations perspective is largely appropriate, even if one does not otherwise agree with the bundle perspective. Historically, however, the two ideas

By contrast, the dominion theory suggests viewing such situations as exceptions to the general rule of ownership, which implies a right to exclusion at its core. In the case of property, exceptions no doubt make up the norm. But in civil law jurisdictions one lives happily with this. It takes the grandeur away from the dominion concept, but it retains a nice and simple structure to property law. In the civil law world, it is common to say that what the owner holds is the *remainder*, namely what is left after deducting all positive rights that restrict his dominion.[44] Moreover, while there may be many limitations and additional benefits attached to property, they are all in principle carved out of one initial right, namely that of the owner. In this way, the system becomes more easily navigable.

An interested party may ask, "who owns this land?" Then, under the dominion theory, a clear answer is expected and will usually be adequate, even if it does not give a complete picture of all relevant property rights. Under the bundle theory, on the other hand, one might be inclined to respond, "to which stick are you referring?" Clearly, this narrative is more complex, perhaps unduly so.

Some common law scholars have recently elaborated on this to develop a critique of the bundle theory, by suggesting that it should at least be complemented by a firm theory of *in rem* rights in property. This, they argue, would allow the law to operate more effectively, by relying on a simple and clear rule that, although defeasible, will generally suffice to inform people about their relevant rights and duties in relation to property.[45]

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have in fact been closely associated with one another, so presenting them together seems appropriate. Moreover, I will not actively enter into the theoretical debate on this point, since I believe that the *social function* account of property, discussed in more detail in Section 2.4, takes us further than both bundle and dominion perspectives. However, as will hopefully become clear, the social function theory itself may be seen as a continuation of the property-as-relations idea, catering also to a more holistic perspective on social structures (although it otherwise manages to remain largely neutral on the bundle v dominion issue).

44 Chang and Smih (n 37) 25.

45 Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101(4) Columbia Law Review 773, 793 ("The unique advantage of in rem rights – the strategy of exclusion – is that they conserve on information costs relative to in personam rights in situations where the number of potential claimants to resources is large, and the resource in question can be defined at relatively low cost."); Merrill and Smith, 'What Happened to Property in Law

There are also other, less pragmatic, reasons why a dominion approach might be preferable, even if the bundle metaphor might be more descriptively accurate. In particular, some scholars point out that the bundle theory does not adequately reflect the sense in which property is a right to a *thing*, serving to create an attachment that is not easily reducible to a set of interpersonal legal relationships.[46] In the US, where the bundle theory has traditionally been dominant, critique like this seems to be gaining ground.[47]

In this thesis, the efficiency and clarity of different property concepts will not be a primary concern, nor will personal attachments to things in themselves play a particularly important role.[48] Hence, I will remain largely agnostic about this aspect of the debate between dominion and bundle theorists. In particular, the differences between civil and common law traditions in this regard do not cause special problems for my analysis of economic development takings. In this regard, it is more important how different ways of looking at property can influence how we assess when interference is legitimate under constitutional and human rights law. Hence, I now turn to the question of whether or not there are any significant differences between dominion and bundle theories in this regard.

Intuitively, one might think that bundle theorists are likely to endorse greater room for state interference in property rights. Indeed, thinking about property as sticks in a bundle may lead one

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and Economics?' (n 35) 389 ("The right to exclude allows the owner to control, plan, and invest, and permits this to happen with a minimum of information costs to others."). See also RC Ellickson, 'Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith' (2011) 8(3) 215 (arguing that Merrill and Smith's analysis nicely complements and improves upon the bundle theory).

46 Thomas W Merrill and Henry E Smith, 'The morality of property' (2007) 48(5) William and Mary Law Review 1849, 1862. For a slightly different take on attachment, highlighting how the 'thingness' of property marks its conditional nature and transferability, see JE Penner, 'The "bundle of rights" picture of property' 43(3) UCLA Law Review 711, 799-818.

47 See generally Nigel Foster and Satish Sule, *German legal system and laws* (Oxford University Press 2010).

48 I mention, however, that the personhood aspects of property that are sometimes highlighted in this regard will also be relevant to my analysis of economic development takings. However, this is not something that I think warrants extensive engagement with the bundle v dominion debate. I note, for instance, that in the work of Margaret Jane Radin, one of the main proponents of personhood accounts, the bundle theory is not challenged as much as it is readjusted, although in places it also seems to be the object of some implicit criticism, see, e.g., Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press 1993) 127-130.

to think that property rights are intrinsically limited, so that subsequent changes to their content – carried out by a competent body – are mere reflections of their nature, not a cause for complaint. In particular, the theory conveys the impression that property is highly malleable. For the theorists that developed the bundle of sticks metaphor in the late 19th and early 20th century, this aspect was undoubtedly very important. By providing a highly flexible concept of property, they helped the state gain conceptual authority to control and regulate. Indeed, this was the clear intention of many early proponents of the bundle theory – the "progressives" of their day.[49] The early bundle theorists not only developed a theory to fit the law as they saw it, they also contributed to change.

In relation to takings law, the progressives succeeded in gaining acceptance for the use of eminent domain to benefit a wider range of public purposes than had so far been considered legitimate.[50] For instance, they argued successfully that the public use restriction in takings law, which had previously been enforced quite strictly, especially by state courts, should be greatly relaxed. This change was important in creating the situation which led to economic development takings becoming a contentious issue in the US, and so provides important background to the main topic of my thesis. I return to the public use debate in the US in much more depth later, in Chapter 3, Section 3.6. Here I would like to stress that I think there can be little doubt that the increased scope given to eminent domain in the early 20th century was mutually conducive to the conceptual reorientation that took place during the same time.

In relation to the different, but related, issue of so-called regulatory takings, the bundle theory became even more directly implicated. A regulatory taking occurs when governmental control over the use of property becomes so severe that it must be classified as a taking in relation to the law of eminent domain. Particularly in the US, the question of when regulation amounts to a regulatory

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49 Klein and Robinson (n 36) 195.

50 See generally Anonymous, 'The Public Use Limitation on Eminent Domain: An Advance Requiem' English (1949) 58(4) Yale Law Journal 599.

taking is highly controversial. The stakes are high because takings have to be compensated in accordance with the Fifth Amendment of the US constitution. At the same time, the law is unclear; a lack of statutory rules means that regulatory takings cases are often adjudicated directly against constitutional property clauses (often the relevant state constitution, in the first instance).

If property is thought of as a malleable bundle of entitlements that exists only because it is recognised by the law, it becomes more natural to argue that when government regulates the use of property, it does not deprive anyone of property rights, but merely restructures the bundle. In the case of *Andrus v Allard*, the Supreme Court adopted such an argument when it declared that "where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety".[51]

Historically, therefore, it seems that bundle theorists have been largely aligned with those that favour a less restrictive approach to eminent domain. But I think it is wrong to conclude that the bundle theory *necessarily* implies such a stance on takings. Indeed, some prominent scholars have argued for an almost entirely opposite view. Professor Epstein, in particular, goes far in suggesting that as every stick in the property bundle represents a property right, government should not be permitted to remove any of them without paying compensation.[52] Moreover, Epstein does not believe that the bundle theory is responsible for the fact that his view of property has not been widely endorsed by US courts. Instead, he thinks the main (negative) impact of "progressive" thinkers stems from their tendency to adopt a "top-down" approach to property. That is, Epstein directs attention towards their tendency to view property rights as vested in, and arising from, the power of the state, not the possessions of individuals.[53]

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51 *Andrus v Allard* 444 US 51, 65–66 (1979).

52 RA Epstein, 'Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property' (2011) 8(3) 223, 232-233.

53 Epstein, 'Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property' (n 52) 227-228 ("In my view, the nub of the difficulty with modern property law does not stem from the bundle-of-rights conception, but from the top-down view of property that treats all property as being granted by the state and therefore subject

In my opinion, Epstein's argument shows that adoption of the bundle theory can hardly be considered a determinate factor for the kind of protection private property enjoys in a given legal system. Moreover, Epstein successfully demonstrates that as a rhetorical device, the theory may well be turned on its head. Unsurprisingly, the substance of the law, in the end, turns primarily on the values one adheres to, not the theoretical constructions one relies on when expressing those values.[54]

In the civil law world, the relationship between property theorising and property values is similarly hard to pin down at the conceptual level. To illustrate, I will again point to the question of regulatory takings. In some countries, like Germany and the Netherlands, the right to compensation is quite strong, but in other civil law countries, such as France and Greece, it is very weak.[55] In particular, the exclusive dominion understanding of property does not commit us to any particular kind of policy on this point. Indeed, the theory appears to cater comfortably to a range of different politically determined solutions to the problem of striking a balance between the interests of owners and the interests of the state.

On the one hand, the undeniable fact of modern society is that property rights are enforced, and limited, by the power of government. Hanging on to the idea of dominion, then, necessarily forces us to embrace also the idea that dominion is not enjoyed absolutely and that government may interfere in property rights. In this way, the theory may serve as a conceptual basis for arguing in favour of a relaxed approach to protection of property rights. These rights are not absolute anyway, so why worry about interfering in them for the common good? But this story too may be turned

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to whatever terms and conditions the state wishes to impose on its grantees").

54 To further underscore this point, it may be mentioned that while US courts do in fact recognise that a regulation can amount to a taking, this is practically unheard of in several other common law jurisdictions, including England and Australia, which nevertheless paint property in a similar conceptual light. Moreover, while the issue of regulatory takings is considered central to constitutional property law in the US, it is considered a fairly marginal issue in England, see Michael Purdue, 'United Kingdom' in R Alterman (ed), *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (Amercian Bar Association 2010).

55 See generally R Alterman (ed), *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (Amercian Bar Association 2010).

on its head: A libertarian may well use the same image to tell a tale of property being ripped apart at its seams. Hence, such a person may argue, unless we want to completely lose our grasp of what property is, we had better enhance the level of protection offered to property owners.

To me, the upshot is that the differences between common law and civil law theorising about property are not significant enough to make them crucial to the questions studied in this thesis. In particular, the differences between the bundle theory and the dominion idea do not appear to speak decisively in favour of any particular approach to economic development takings, nor does it provide any clear justification for regarding such takings as special in the first place. Property enjoys constitutional protection and is a recognised human right across the divide, but what this means in practice is hard to deduce from either account.

In terms of descriptive content, both theories appear oversimplified. They provide a manner of speech, but they do little to enhance our understanding of the reality of property rights in modern society. In particular, they do not provide a functional account of what role property plays in relation to the social, economic and political structures within which it resides. In terms of normative content, on the other hand, they appear too bland and imprecise. They simply do not offer much clear guidance as to what norms and values the institution of property is meant to promote. They give neat explanations of what property is, but do not tell us *why* it should be protected.

In the following, I will address both these shortcomings by considering property theories with a wider scope. There are many candidates that could be considered. In a recent book on property theory, Alexander and Peñalver present five key theoretical branches:

- *Utilitarian* theories, focusing on property's role in helping to maximize utility or welfare with respect to individual preferences and desires.[56]

[56] Alexander and Peñalver, *Community and Property* (n 8) Chapter 1.

- *Libertarian* theories, focusing on property's role in furthering individual autonomy and liberty, as well as the importance of protecting property against state interference, particularly attempts at redistribution.[57]

- *Hegelian* theories, focusing on the importance of property to the development of personhood and self-realisation, particularly the expression and embodiment of free will through control and attachment to one's possessions.[58]

- *Kantian* theories, focusing on how property arises to protect freedom and autonomy in a coordinated fashion so that *everyone* may potentially enjoy it, through the development of the state.[59]

- *Human flourishing* theories, focusing on property's role in facilitating participation in a community, particularly as a template allowing the individual to develop as a moral agent in a world of normative plurality.[60]

It it beyond the scope of this thesis to give a detailed presentation and assessment of all these theoretical branches and the various ideas that have been discussed within each of them. However, in Section 2.5 below, I will present the human flourishing theory in more detail. This is because I believe that if it is adopted, it suggests making a range of new policy recommendations regarding how the law *should* approach the question of economic development takings.

First, however, I note that all the theories mentioned above are highly normative. They are used to argue for particular values associated with property. By contrast, one of my main aims in this thesis is to study economic development takings descriptively, by giving a case study of

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57 Alexander and Peñalver, *Community and Property* (n 8) Chapter 2.

58 Alexander and Peñalver, *Community and Property* (n 8) Chapter 3.

59 Alexander and Peñalver, *Community and Property* (n 8) Chapter 4.

60 Alexander and Peñalver, *Community and Property* (n 8) Chapter 5.

Norwegian waterfalls and discussing its significance in terms of comparative and human rights law. Hence, before I move on to consider other aspects, I first need a theoretical framework that allows me to meaningfully discuss those aspects that make economic development takings unique. I would like to do so, moreover, without thereby committing myself to any particular stance on how to normatively assess those aspects.

To arrive at such a foundation, I will rely on the descriptive parts of the so-called *social function theory* of property.[61] While this theory is often implicated in normative theories, including the human flourishing theory, I argue that it has a descriptive core which is also of great significance. Its importance to my work in this thesis is underscored by the fact that I will draw on the social function theory to answer the pressing problem of what makes economic development takings a relevant category of legal reasoning.

Let me first reiterate that it is not *prima facie* clear that the category makes any legal sense at all, since many jurisdictions lack rules that explicitly make the purpose of interference a relevant measuring stick for assessing legitimacy. To respond successfully to this potential objection, I believe it is necessary to look at property's social functions. In fact, property scholars are becoming increasingly aware of the need to do this in general, as they note that existing theories are overly focused on a narrative that revolves around individual entitlements. Many still reject the idea that this necessitates conceptual reconfiguration, but the social function perspective appears to be gaining ground, also as an important aid in making sense of how the law actually works. In particular, it allows us to make sense of economic development takings as a special issue in property law, a claim I will argue for in more depth in Section 2.6.

Before making my specific point about takings, I will present the social function theory of

[61] See generally Foster and Bonilla (n 8); MC Mirow, 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22 Floridal Journal of International Law 191; Alexander and others (n 8). Be aware that some authors, particularly in the US, also speak of the *social obligation* theory, using it more or less as a synonym for the social function theory.

property in some further detail. I will focus on showing that it captures aspects that are already highly relevant – behind the scenes – to how property rules are understood and applied in concrete situations. It seems, in particular, that socio-legal arguments play an important, yet often unacknowledged, role when courts interpret fundamental rules that are meant to protect private property. Bringing those aspects into the open is in itself a worthwhile project, irrespective of any further normative stances that the social function theory might give the theorist occasion to adopt.

2.4 The Social Function of Property

There is a growing feeling among property scholars that the notion of property has been drawn too narrowly by many of the traditionally dominant theories of property. Some have even gone as far as to challenge the idea that property is a meaningful and well-defined concept at all. These scholars point out that what counts as property in a given legal system, and what property entails in that system, depends largely on its social and political context, tradition, and even chance.[62] In the US, a utilitarian law-and-economics approach, which tends to take the social and political underpinnings of property for granted, has long been regarded as standard, but the tide is turning. In particular, many are beginning to turn away from assessing property rules narrowly against their effectiveness in maximising individual utility and social welfare. Instead, these scholars adopt a holistic approach, which allows property's social function to come into focus. One of the main proponents of this conceptual shift is Gregory S. Alexander, professor at Cornell University. In a recent article, he writes:

> Welfarism is no longer the only game in the town of property theory. In the last several years a number of property scholars have begun developing various versions of a general vision of property and ownership that, although consistent with welfarism in some

[62] For a particularly inspiring exposition of property's elusive nature, see Kevin Gray, 'Property in Thin Air' (1991) 50(2) The Cambridge Law Journal 252.

> respects, purports to provide an alternative to the still-dominant welfarist account.[...] These scholars emphasize the social obligations that are inherent in ownership, and they seek to develop a non-welfarist theory grounding those inherent social obligations.[63]

To scholars coming from political science, sociology or human geography, this trend will not raise many eyebrows, except perhaps for the fact that it is a recent one. After all, in fields such as these, property has never been understood merely as a set of individual entitlements that are meant to result in increased welfare. Rather, property is seen as a crucial part of the fabric of society, one that entrenches privileges and bestows power.[64] Even scholars who believe that the institution of property is a force for good recognise that being an owner carries with it political capital, social responsibility, and membership in a community. Those aspects, moreover, are often regarded as more important than entitlements explicitly recognised in positive legal terms. Crucially, they are important not only to the individual owners but also to society as a whole. How property rights are distributed among the population, for instance, has obvious political and economic implications, serving as a source of power and prosperity to some groups, while marginalising others.[65]

But what is the relevance of this to property law? Usually, jurists approach property in isolation from such concerns, and often they do so because of practical necessity. The political question of what the law should be depends on assessments of the purpose and social context of property, but in the day-to-day workings of the law, the story goes, such considerations play a lesser role, with the importance of clear and simple rules outweighing the possible benefit that would result from contextual and holistic assessment. Classical theories of property can be accused of taking such a pragmatic view too far, by failing to recognise that many social functions are *intrinsic* to property,

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63 Gregory S Alexander, 'Pluralism and Property' (2011) 80 Fordham Law Review 1017, 1017.

64 See generally Carruthers and Ariovich (n 3).

65 See, e.g., Carruthers and Ariovich (n 3) 23. ("The right to control, govern, and exploit things entails the power to influence, govern, and exploit people").

so that they may become directly relevant when the law is applied to resolve concrete disputes.

The same accusation can be raised against both bundle and dominion theorists. They both tend to leave little room for considering property as a social phenomena. It is recognised, of course, that rights in property – bundled or otherwise – serve to regulate social relations. But this effect is typically regarded as belonging to the periphery of property as a legal category, more relevant to sociologists than to property scholars. In addition, it is uncommon to observe that the causal relation between property rights and society is bidirectional, since the meaning and content of property itself is partly determined by the very same social structures that property helps establish and sustain. When this aspect of property is not recognised, the risk is that subtle dependencies between property and the political order are not brought into focus, even when they play an important role in practice.

This is particularly clear when it comes to socially defined obligations attached to property. Hardly anyone would protest that in practical life, what an owner will do with his property is as much constrained by the expectations of others as it is by law. But in addition to influencing the owner subjectively, expectations can take on an objective character by being embedded strongly in the social fabric. This, in turn, can give rise to a norm, or even a custom, which may be legally relevant, either because the law gives direct effect to it, or because it influences how we interpret rules relating to the use of property.[66]

This seems hard to dispute, but traditional property theorists have surprisingly little regard for such mechanisms. According to Alexander, the classical theories of property convey the impression that "property owners are rights-holders first and foremost; obligations are, with some few exceptions, assigned to non-owners".[67] The social function theorists attempt to redress this imbal-

66 See generally Eduardo M Peñalver, 'Land Virtues' (2009) 94(4) Cornell Law Review 821; Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) Cornell Law Review 745.

67 Alexander, 'Pluralism and Property' (n 63) 1023.

ance by developing theories that can naturally accommodate an account of social obligations that attaches greater weight to them as objects of property. As Alexander explains, "social obligation theorists do not reverse this equation so much as they balance it. Of course property owners are rights-holders, but they are also duty-holders, and often more than minimally so."[68]

It should be noted that while it lay dormant for some time, particularly in the US, this idea is by no means new. Its first modern expression is often attributed to León Duguit, a French jurist active early in the 20th century. In a series of lectures he gave in Buenos Aires in 1911, Duguit challenged the classic liberal idea of property rights by pointing to their context dependence, adopting a line of argument strikingly similar to how recent scholars have criticized the law-and-economics discourse about property.[69] In particular, Duguit also pointed to the notion of obligation, stressing the fact that individual autonomy only makes sense in a social context, wherein people are also dependent on each other and related through membership in communities. Hence, depending on the social circumstances of the owner, his property could entail as many obligations as it would entail entitlements and dominion. This, according to Duguit, was not only the reality of property ownership in life, it was also a normatively sound arrangement that should inspire the law, more so than the unrealistic visions of property evoked by the liberal tradition.[70]

Similar thoughts have been influential in Europe, particularly during the rebuilding period after the Second World War. For instance, as I discuss further in Chapter 3, Section **??**, the constitution of Germany – her *Basic Law* – contains a property clause that explicitly includes a provision

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68 Alexander, 'Pluralism and Property' (n 63) 1023.

69 See Foster and Bonilla (n 8) 1004-1008. For more details about Duguit's work and the contemporaries that inspired him, see generally Mirow, 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (n 61).

70 See Foster and Bonilla (n 8) 1005 ("The idea of the social function of property is based on a description of social reality that recognizes solidarity as one of its primary foundations", discussing Duguit's work). It should also be noted that Duguit was particularly concerned with owners' obligations to make productive use of their property, to benefit society as a whole. This raises the question of who exactly should be granted the power to determine what counts as "productive use". In this way, Duguit's work also serves to underscore one of the main challenges of regulatory frameworks that seek to incorporate and draw on property's social dimension. How should decisions be made in such regimes?

stating that property entails obligations as well as rights. As argued by Alexander, this has had a significant effect on German property jurisprudence, creating a clear and interesting contrast with US law.[71]

A social perspective on property was also influential during the debate among the European states that first drafted the property clause in the First Protocol to the European Convention of Human Rights.[72] Later, however, the liberal conception of property gained ground in Europe, causing jurisprudential developments that have been particularly clear in the case law from the European Court of Human Rights.[73] Even so, property theorising in Europe is still influenced by a social function view on property, more so than in the US. The European Court of Human Rights, for instance, stresses the importance of *proportionality* and *fairness* when adjudicating property cases, suggesting the importance of a contextual approach to the balancing of the many private and public interests involved.[74]

I will return to possible normative implications of the social function theory later. Here I would like to stress that in the first instance it merely asks us to recognise an empirical truth: Property does not arise in a vacuum, but from within a society. As a philosophical proposition, this is obvious and hardly anyone denies it. But the social function theory asks us to consider something more, namely that property *law* continues to influence, and be influenced by, surrounding social and political structures.

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71 See Gregory S Alexander, 'Property as a Fundamental Constitutional Right? The German Example' (2003) 88 Cornell Law Review 733, 338 ("The German Constitutional Court has adopted an approach that is both purposive and contextual, while the U.S. Supreme Court has not").

72 See Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (2010) 59(04) International & Comparative Law Quarterly 1055, 1063-1065.

73 See generally Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (n 72).

74 See generally Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005) Chapter 5.

Perhaps most importantly, property both reflects and shapes relations of power among members of a society.[75] Moreover, it does not act uniformly in this way – the effect of property on power depends on the circumstances. An indebted farmer who is prevented by state regulation from making profitable use of his land might come to find that his property has become a burden rather than a privilege. As a consequence, someone who has already amassed power and wealth elsewhere might be able to purchase the land from the farmer cheaply. Indeed, this might provide an excellent opportunity for the outsider to consolidate their position. They can ensure that their privileges become further entrenched, both socially, politically and economically. By acquiring a farm and transforming it to recreational property, the outsider will symbolically and practically assert their dominance and power, while also reaping a potential financial benefit resulting from their investments in a more modern function of property.

In some cases, this dynamic can become endemic in an area, resulting in a complete reshaping of the social fabric surrounding property. The story might go like this: First, impoverished farmers and other locals sell homes to holiday dwellers. Then house prices soar. As a result, local people with agrarian-related incomes cannot afford local homes, causing even more people to sell their land to the urban middle class. In this way, a causal cycle is established, the social consequences of which can be vicious, particularly to the low-income people who are displaced.[76] My theoretical contention is the following: Setting out to protect property in a situation like this – when property rights pull in different directions depending on your vantage point – requires taking some stance on whose property, and which of property's functions, one is aiming to protect. Should the law

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75 This aspect of property's social function was stressed in a recent "statement of purpose" made by leading property scholars in support of the social function theory, see Alexander and others (n 8).

76 The general mechanism is well-documented and known as *gentrification* in human geography (often qualified as rural gentrification when it happens outside urban areas). See generally Jan van Weesep, 'Gentrification as a research frontier' (1994) 18(1) Progress in Human Geography 74; Martin Phillips, 'Rural gentrification and the processes of class colonisation' (1993) 9(2) Journal of Rural Studies 123; Tom Slater, 'The Eviction of Critical Perspectives from Gentrification Research' (2006) 30(4) International Journal of Urban and Regional Research 737. For a case study demonstrating the role that state regulation can play (perhaps inadvertently) in causing rural gentrification, see Eliza Darling, 'The city in the country: Wilderness gentrification and the rent gap' (2005) 37(6) Environment and Planning A 1015, 1027-1030.

protect the property rights of local people who face displacement, or should it protect the property rights of outsiders wishing to invest in holiday homes?

Some may shy away from this way of posing the question, by arguing that it would be better to rely on simpler rules that can deliver justice to owners without contextualising the level of protection. However, the prospect of coming up with such "socially neutral" rules seems illusory when both sides of a conflict are in a position to adopt a property narrative to argue for their opposing interests. For a concrete example of such a situation, it is enough to remind of how Donald Trump acted in Scotland, as discussed in Section 2.2.

As long as Trump threatened to use compulsory purchase, the local people could adopt a traditional "pro-property" stance against Trump. But as soon as Trump decided to fence them in by relying on his own property rights, they had to adopt a seemingly contradictory view, *against* property, on the basis that Trump's rights should be limited out of concern for the community. So how do we classify the anti-Trump stance with regard to property? The answer is unclear under classical theories, but under the social function stance, it becomes easy to resolve. The locals sought to protect property, but not just any property. The property they wanted to protect was the property which served the social function of sustaining the existing community. The property they wanted to protect was the property that *meant* something to them.

Undoubtedly, this was also the sentiment of Trump and his supporters, who could also make a case based on property. Hence, in conflicts such as these the law will invariably have to take a stand regarding which social functions it wishes to promote. In all likelihood, such a stand must also sometimes be taken by whoever *interprets* the law, since it is exceedingly unlikely that the legislature will ever be able to provide deterministic rules for resolving all conflicts of this kind. Lastly and most controversially, the courts may find occasion to curtail the power of government – perhaps even the legislature – if such power is usurped by powerful actors wishing to undermine property's proper functions to further their own interests. This, in particular, becomes the question

of constitutional and human rights limits to interference in property, relative to those functions that are to be protected.

Property shapes and reflects societies, but it also shapes and reflects social commitments and dependencies within those societies.[77] Again, this function of property is highly dependent on context. A small business owner, by virtue of being a member of the local community, is discouraged from becoming a nuisance to his neighbours. Everything from erecting bright neon signs to proposing condemnation of neighbouring properties are actions that he will be socially deterred from taking. If the local shop owner does not conform to social expectations, he will pay a social price. Indeed, most likely even an economic price, especially if his customer-base is local. At the same time, the local connection would serve to make the business owner positively invested in the well-being of the community. This would encourage everything from sponsoring local events to hiring local youths as part-time helpers.

But at the same time, the local business owner might be discouraged from changing his business model to become more competitive, if this is perceived as a threat to other members of the community. Economic rationality might suggest that he should expand, say, by physically acquiring more space and targeting new groups of customers, but social rationality might make this an untenable proposal. This, however, might render the business economically unsustainable, particularly if it is facing fierce competition from businesses that are not similarly constrained by community ties. Moreover, even if the business is in fact viable as long as the community remains in place to support it, the perception that it is not fulfilling its commercial potential can increase external pressures both on the business and the community. Importantly, in the age of regulation for commercial facilitation, the state itself might exert pressure of this kind, by acting in a way that makes it hard to sustain local businesses that are regarded as 'ùnderperforming'.

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77 See generally Alexander, 'The Social-Obligation Norm in American Property Law' (n 66).

Then, if our local shop owner goes out of business, for whatever reason, the new owner might not become integrated in the community in the same way, with obvious consequences for the property's function in that community. Indeed, if we imagine that the new owner is a large commercial actor who is hoping to raze the community in order to build a new shopping center, we are at once reminded of the stark contrasts that can arise between various social functions of property. The property rights of a shop owner can be the lifeblood of a community, while the exact same rights in the hands of someone else can spell destruction. While this is an undeniable empirical fact of property ownership, it is far from clear what its legal ramifications are. Here it is tempting to embrace a normative stance, and argue for particular social values that the law *should* promote. However, I will hold on to the descriptive mode of analysis a little further. For it is clear that regardless of whose interests win out in the end, assessments of the social function of property will have played an important role in bringing about that outcome.

This is true not only when the law explicitly requires that this function is taken into account, such as in relation to the property clause of the basic law of Germany. It also commonly becomes true as soon as courts begin their search for information to guide them in their interpretation and application of statutory rules that are seemingly not concerned with social aspects of property. The classical example from the US is the case of *State v Shack*.[78] The case concerned the right of a farmer to deny others access to his land, a basic exercise of the right to exclusion. The controversy arose after the two defendants, who worked for organizations that provided health-care and legal services to migrant farmworkers, entered the land of a farmer without permission. They were there to provide services to the farmer's employees, and when the farmer asked them to leave, they refused.

In the first instance, they were convicted of trespassing in keeping with New Jersey state law, but on appeal the Supreme Court of New Jersey overturned the verdict. The court held that the

[78] *State v Shack* 58 NJ 297 (1971).

dominion of the land owner did not extend to dominion over people who were rightfully on his land. Hence, as long as the defendants were there at the request of the workers, the owner had to tolerate this. Importantly, the court argued for this result – which was not based on any natural reading of the New Jersey trespass statute – by pointing also to the fact that the community of migrant workers was particularly fragile and in need of protection. Their right to receive visitors on the land where they work and live, therefore, had to be recognised, in spite of this limiting the farmer's exclusion right.

The lesson to take from this is that the social function of property can play a role even when this does not explicitly follow from any property rules. In so far as the property rules we rely on explicitly directs us to take the social aspect of property into account when applying the law, it might be permissible for the practically minded jurist to conclude that there is little need for theorising about property's social dimension. This dimension, in so far as it is relevant, is quantified inside the law itself, not by theories that encompass it. However, cases like *State v Shack* show that the social dimension can be relevant even when it is not mentioned in any authority, even in relation to clear rules that would otherwise appear to leave little room for statutory interpretation. It arises as relevant, in such cases, because the social dimension is intrinsic to property itself.

This might still be a radical claim, but it is primarily a descriptive one. Indeed, even if the case of *State v Shack* had gone the other way, the same conceptual conclusion might well have been appropriate. If the owner's right to exclusion had received priority over the workers' right to receive guests and the owner's obligation to respect this right, that too would be an outcome that would underscore the social function of property.

To illustrate this, I will briefly discuss an article written by Eric Claeys, where he is critical both of the social function theory in general and *State v Shack* in particular.[79] In light of the basis for that decision, Claeys is led to argue by pointing to those aspects of the social context that

[79] Eric R Claeys, 'Virtues and Rights in American Property Law' (2009) 94(4) Cornell Law Review 889.

speak in favour of the farmer.[80] Indeed, since he aims to engage with the social function theorists, he cannot simply declare that the trespass rules were clear and that the social circumstances were given too much weight.

Instead, he argues that by considering the social circumstances in *more* depth, a different outcome suggests itself.[81] But if this is true, it is no argument against the descriptive content of the social function theory. Rather, it becomes a further affirmation of the descriptive adequacy of such an account of property. Moreover, it becomes an argument against those who think that particular values need to be endorsed by those who rely on it. In this regard, it is not hard to agree with Claeys that normative fundamentalism is wrong. Indeed, he might even have a point in criticising some social function theorists for normative naivety.[82]

However, I do not follow Claeys when he takes this to be an argument against the form of legal reasoning that social function theories promote and which he himself skilfully engages in.[83] In *State v Shack*, for instance, such reasoning was clearly in order. To engage in it was far *less* naive than to dismiss it on the basis that it would be irrelevant to the case. Indeed, if the social function view had been dismissed, the entitlement-based idea of property would in effect do *unacknowledged* normative work, by declaring some property obligations as irrelevant.

However, I agree with Claeys that prudence is in order. Moreover, it seems clear that adopting the social function theory is likely to have normative consequences. This is so simply because the theory provides a new way of talking about property and analysing conflicts, which will in turn

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80 Claeys, 'Virtues and Rights in American Property Law' (n 79) 941-942.

81 Claeys, 'Virtues and Rights in American Property Law' (n 79) 941 ("there are good reasons for suspecting that there was more blame to go around in Shack than comes across in the case's statement of facts").

82 Claeys, 'Virtues and Rights in American Property Law' (n 79) 945 ("Judges might think they are doing what is equitable and prudent. In reality, however, maybe they are appealing to a perfectionist theory of politics to restructure the law, to redistribute property, and ultimately to dispense justice in a manner encouraging all parties to become dependent on them.")

83 In particular, I do not follow the leap Claeys makes when he suggests that it is beneficial to keep "discretely submerged" what he describes as "culture war overtones" in legal reasoning.Claeys, 'Virtues and Rights in American Property Law' (n 79) 947.

influence our normative assessments. This is also illustrated by *State v Shack*. Despite Claeys skilled advocacy, many would no doubt fail to be convinced of the social merit of recognising a right to exclusion in this case. But the crucial aspect of the social function narrative is that it makes such aspects clear, not that it commits us to, or promises to deliver, any morally superior stance on property that can deliver "correct" outcomes in cases such as this.

This challenges an assumption that is also common among supporters of the social function theory, who often argue that the theory commits us to a particular form of normative assessment in pursuit of the "good". Some even argue that property law should be studied from the point of view of virtue ethics.[84] Unsurprisingly, critics such as Claeys use this to launch attacks on the social function theory, by arguing that it represents a way of thinking that will invariably lead to lessened constitutional property protection and greater risk of abusive state interference.[85] Indeed, increasing the room for state interference is often seen as the aim of conceptual reconfiguration; the social function view of property tends to be associated with social democratic and/or redistributive political projects, by which the notion of property is recast to justify greater interference in established rights.[86]

It is important to note, however, that while social democratic policies may be easier to justify by emphasising the social function of property, the mere recognition that property has an important social dimension does not in itself justify such policies. For one, policy reasons must always be tied to the prevailing social and economic circumstances. In addition, it seems that the most crucial

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84 See generally Peñalver (n 66).

85 See Claeys, 'Virtues and Rights in American Property Law' (n 79) ("The more "virtue" is a dominant theme in property regulation, the less effective "property" is in politics, as a liberal metaphor steering religious, ethnic, or ideological extremism out of the public square").

86 Despite his commitment to "value-pluralism", this motivation is also clearly felt in the work of Gregory Alexander. He argues, for instance, that the social obligations inherent in property imply that the "state should be empowered and may even be obligated to compel the wealthy to share their surplus with the poor", see Alexander, 'The Social-Obligation Norm in American Property Law' (n 66) 746. For an assessment linking similar views on property in Europe to the increasing influence of social democratic thought after the Second World War, see Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (n 72).

premises used in arguments for greater state control and state-led redistribution projects concern the nature of the state, not the functions of property.

Why should anyone believe that the state is the ultimate social institution to which property *should* answer? Is it not desirable that property should continue to answer to informal social structures, such as those that it is embedded in by virtue of owners' membership in local communities? If one takes this view, one might well want to limit the state's role to that of ensuring fair play among individuals and communities.

Indeed, from the point of view of social function theories, the appropriateness of direct state control seems to depend on evidence that more low-level social structures fail to function properly and, crucially, that state control is a *better* alternative. This requires argument anchored in specific social and political property contexts. Hence, to move uncritically between talk of the "community" and talk of the state, as writers like Peñalver and Alexander sometimes appear to do, is inappropriate.

I conclude that the social function view of property tells us little about how widely the state should intervene in property in a given society. It allows us to recognize the *possibility* that the state may have to intervene on behalf of certain property values, say those that aim to protect communities. But this is no argument in favour of any general position on state interference. Importantly, the theory still serves a crucial purpose in that it allows us to reason more clearly about *when* it is appropriate for the state to intervene.

More generally, it does not follow from the recognition that property structures are social in nature that *any* institution should actively seek to change or protect those structures. The Humean position, namely that the existing distribution of property rights represents a socially emergent equilibrium, remains plausible. Moreover, the normative stance that this equilibrium is a *good* one (or at least as good as it gets) remains as contentious as ever. For this reason, I believe it is appropriate to approach the social function theory as a descriptive theory in the first instance.

It is worth emphasising that in taking this view I depart from the stance taken by many contemporary scholars who advocate on behalf of social function theories, including some that reject social democratic ideals. Hanoch Dagan, for instance, is a self-confessed liberal who argues for a social function understanding on the basis that it is morally superior. "A theory of property that excludes social responsibility is unjust", he writes, and goes on to argue that "erasing the social responsibility of ownership would undermine both the freedom-enhancing pluralism and the individuality-enhancing multiplicity that is crucial to the liberal ideal of justice".[87]

If this is true, then it is certainly a persuasive argument for those who believe in a "liberal idea of justice". But for those who do not, or believe that property law is – or should be – largely neutral on this point, a normative argument along these lines can only discourage them from adopting a social function approach. Such a reader would be understandably suspicious that the *content* of the social function theory – as Dagan understands it – is biased towards a liberal world view. The reader might agree that property continuously interacts with social structures, but reject the theory on the basis that it seems to carry with it a normative commitment to promote liberalism.

Dagan is not alone in proposing highly normative social function theories. Indeed, most contemporary scholars endorsing a social function view on property base themselves on highly value-laden assessments of property institutions.[88] These scholars provide interesting insights into the nature of property, but they might overstate the desirable normative implications of adopting a social function view. In addition, they appear to believe we should embrace certain values and reject others. Hence, one is sometimes left with the impression that the social function theory has little to offer beyond the values with which it is imbued, which can in turn push the law in the direction

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87 Hanoch Dagan, 'The Social Responsibility of Ownership' (2007) 92 Cornell Law Review 1255, 1259.

88 See, e.g. Alexander, 'The Social-Obligation Norm in American Property Law' (n 66); Colin Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80(3) Fordham Law Review 1089; Nestor M Davidson, 'Sketches for a Hamilton Vernacular as a Social Function of Property' (2011) 80(3) Fordham Law Review 1053; Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94(4) Cornell Law Review 1009; Peñalver (n 66).

that these writers deem desirable.

However, this is not how I aim to use the social function theory in this thesis.

The normative assertions that have been made in relation to it are not necessarily wrong, but that they need not be accepted in order to conclude that the social function of property should be given a more prominent place in property theory. Importantly, I think the focus on normative reasons threatens to overshadow the most straightforward reason for looking to social structures, namely that they are almost always crucially important behind the scenes, even if they go unacknowledged. The social function theory, rather than being "good, period", as Danach suggests, is nothing more nor less than accurate, irrespective of one's ethical or political inclinations. As such, it provides the foundation for a debate where different values and norms can be presented in a way that is conducive to meaningful debate, on the basis of a minimal number of hidden assumptions and implied commitments. Thus, the first reason to accept the social function theory is epistemic, not deontic.

That is not to say that normative theories should not be formulated on the basis of the social function theory. I maintain only that it is useful to maintain a distinction between the descriptive and normative aspects of such theorising. I return to normative aspects in the next section, arguing that the commitment to "human flourishing" endorsed by Professor Alexander is a particularly well-argued norm that arises from value-based assessment of the social function of property. This, I believe, is in large part also due to the value-pluralism inherent in this idea, suggesting as a positive normative claim that our notions of property *should* allow for a divergence of opinions and values to influence the law and its application in this area.

Moreover, I believe the history of the social function theory lends support to my claim that it is useful to emphasise that the theory gives us important descriptive insights that carry few normative commitments. Theories can hardly be entirely value-neutral, nor is this a goal in itself. But in my opinion, a good theory is one that can at least serve as a common ground for further

discussion based on disagreement about values and priorities. According to Kevin Gray, "the stuff of modern property theory involves a consonance of entitlement, obligation and mutual respect".[89] It is important, I think, that the same measured perspective is reflexively applied towards theory itself, to diminish the worry that a broader theoretical outlook is the first step towards unchecked state power and rule by "judicial philosopher-kings", as Claeys puts it.[90]

In the next subsection, I will argue in some more detail why such a cautious perspective is warranted, by considering how the Italian fascists appropriated the social function theory in 1930s. Building on the work of di Robilant, I will also briefly track how non-fascist property scholars opposed this development by focusing on value-pluralism, local self-governance and freedom.[91] Importantly, these scholars embraced the social function theory as a common ground from which to launch a meaningful attack on more radical ideas, without alienating those with divergent views. Instead of clinging to the old-style liberal discourse that the fascists had either rejected or subverted, many Italian non-fascists were willing to engage in a discourse revolving around property's social function, by spelling out a more measured set of ideas based on this premise.

Crucially, this set the stage for a form of intellectual resistance that did not reject those aspects of fascism that had appeal to the public and which arguably reflected true insight into the unfairness and lack of sustainability of the established legal order.

2.4.1 Rooting out Fascism: The Tree of Property

While the social function theory makes intuitive sense, it is also highly abstract. Therefore, its exact content has been notoriously hard to pin down. This is recognised by contemporary scholars endorsing a normative view, who attempt to address this by proposing lists of values that should be

89 Gray, 'Recreational Property' (n 20) 37.

90 Claeys, 'Virtues and Rights in American Property Law' (n 79) 944.

91 Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?' (2013) 66(3) Vanderbilt Law Review 869.

taken into account while giving examples of how they should be used to inform the law in concrete areas or cases.[92] Unsurprisingly, however, views soon diverge regarding the concrete import of a social function view on legal reasoning. Even so, the contemporary debate appears to be based on a common ground that is quite stable, also with respect to the overall notion of what good the theory can do. However, as history shows, this state of affairs is by no means guaranteed.

In a recent article, Anna di Robilant illustrates this point by tracking the history of social function theorising in Italy during the fascist era. The fascist property scholars, she notes, were happy to embrace the social function theory, since it provided them with a conceptual starting point from which to develop their idea that rights and obligations in property should be made to answer to one core value: the interests of the state.[93] This stance was as effective as it was oversimplified. As di Robilant notes, "earlier writers had been hopelessly evasive about the meaning and content of the social element of property".[94] Hence, the fascist approach filled a need for clarity about the implications of the main idea, which was by now attracting increasing support both from the public and the academic community. Established property doctrine, it was widely felt, was both ineffective and unfair to ordinary people. Rather than securing productivity and a livelihood for all, property was used mainly as an instrument for maintaining the privileged position of the elites. By promising to change this state of affairs, the fascists attracted many to their cause.

As di Robilant notes, supporters of the fascist idea of property made clear that "social function meant the productive needs of the Fascist nation".[95] But at the same time, they cleverly denied that there was a "contradiction between subordinating individual property rights to the larger

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92 See, e.g., Gregory S Alexander, 'Property's Ends: The Publicness of Private Law Values' (2014) 99(3) Iowa Law Review 1257; Alexander, 'Pluralism and Property' (n 63); Dagan, 'The Social Responsibility of Ownership' (n 87).

93 See Robilant (n 91) 908-909 ("Fascist property scholars had also appropriated the social function formula. For the Fascists, the social function of property meant the superior interest of the Fascist state.").

94 Robilant (n 91) 909.

95 Robilant (n 91) 909.

interest of the Fascist state and the liberal language of autonomy, personhood, and labor".[96] In this way, fascist scholars could claim that fascist liberalism was true liberalism, thereby subverting the conceptual basis for the traditional idea of liberal justice.[97] In this situation, there was reason to suspect that clinging to liberal dogma would be a largely ineffective response. Moreover, it seemed undeniable that fascism's appeal was rooted in real concerns about the fairness and effectiveness of the liberal legal order.

Hence, many non-fascists shunned away from uncritical defence of traditional liberalism. Instead, they agreed that property's social function should come into focus, but emphasised the plurality of values that could potentially inform this function, which could be different from the interests of the state. In addition, they also noted that property rights were invariably associated with *control* over resources, and that the social functions of property depended on the resources in question. To own property, they argued, provides individuals with a highly valued source of privacy, power and freedom that is worthy of protection.

To summarise their insights, Italian scholars adopted the metaphor of a "tree", by describing the core social function of property as the trunk, while referring to the various resource-specific values attached to property as branches.[98] As di Robilant notes regarding these theorists:

> The rise of Fascism, they realized, was the consequence of the crisis of liberalism. It was the consequence of liberals' insensibility to new ideas about the proper balance between individual rights and the interest of the collectivity.[99]

In light of this, the tree-theorists concluded that continued insistence on the protection of the autonomy of owners was not a viable response. Instead, they adopted a theory that "acknowledges

96 Robilant (n 91) 900.

97 Robilant (n 91) 900.

98 Robilant (n 91) 894-916.

99 Robilant (n 91) 907.

and foregrounds the social dimension of property", but without committing themselves to fascist ideas about the supreme moral authority of the state.[100] The value of autonomy was in turn recast in terms of property's social function. Arguably, this served to make the case far more compelling. Protecting autonomy could be seen as an aspect of protecting property's freedom-enhancing function, both at the individual level and as a way of ensuring a right to self-governance and sustenance for families and local communities. This, moreover, could not easily be derided as tantamount to protecting unfair privilege and entitlement. Rather, property became elevated from an individual liberal right to a crucial building block of participatory democracy.

The story of fascist appropriation of the social function theory demonstrates why it is sensible to maintain a descriptive perspective on its core features. Indeed, the readiness with which the fascists embraced social function theorising serves as a reminder that we cannot easily predict what normative values may come to be promoted on its basis. At the same time, we are reminded of the danger of attaching too much normative prestige to a theory that is abstract and open to various interpretations.

In particular, it seems that a failure to recognise the descriptive nature of the core idea can lead to unrealistic expectations of what the social function theory provides. In addition, it will make it harder for the theory to gain acceptance as a conceptual common ground from which to depart when engaging in debate. Indeed, if no division is recognised between normative and descriptive aspects, the historical record would allow detractors to make a *prima facie* plausible attack on the social function theory by arguing that it is fascism in disguise, or that fascism, rather than liberal justice, is where we end up in practice should we choose to adopt it.[101]

In response, one might retort that this is cherry picking the historical facts, or that the fascists

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[100] Robilant (n 91) 907.

[101] This would echo the claim already made by Claeys, that the theory (when coupled with virtue ethics) might become a slippery slope towards the kind of extremism and revolt against oppression that gave rise to the Rwanda genocide in the early 1990s Claeys, 'Virtues and Rights in American Property Law' (n 79) 926-927.

misunderstood or perverted the theory. That is certainly plausible, but this kind of debate is in itself rather unhelpful. Unless the social function theory is rendered neutral enough to be acceptable as the conceptual premise of debate, it is likely going to fail as a template for negotiating conflicts about property. Those who oppose the norms associated with the theory will oppose also the core descriptive content, if they feel that the latter commits them to the former. This, in turn, suggests that those advocating on behalf of the social function theory should take care to avoid rhetorical hubris. The main point to convey is that the theory is more accurate, in a purely epistemic sense, than other conceptualisations of property.

The story of the fascist appropriation of the social function theory also points to a danger often attached to abstract theories, namely that they allow us to opportunistically recast whatever values we wish to promote by providing qualifications for them in abstract terms that are hard to refute. The fascists did this, and the non-fascists responded. Hence, in the end one could do little more than hope that the fascists' vision of their state as an "ethical state" that "every man holds in his heart" would eventually prove less attractive then the promise of self-governing communities characterised by diversity in life and character.

2.4.2 Towards a Normative Stance

The social function theory can facilitate a new kind of normative reasoning, arising from how the theory allows us to recognise more subtle distinctions between different kinds of property and different kinds of circumstances. For instance, a staunch entitlements-based approach to autonomy will leave us with little room to differentiate between the protection of investment property and the protection of a home, unless such a distinction is explicitly provided for in the law. But a social function approach compels us to notice the difference and to acknowledge that it might be legally, as well as ethically, relevant. Hence, if we seek to argue for protection of investment property, we must in principle be prepared to face counter-arguments that revolve around particulars of the

investor's role in society and their relationship to the community of people that are affected by how they manage their property. Similarly, if someone argues against protecting home ownership, we can respond by drawing on additional arguments based on the importance of the home both to the owner, their family and friends, and their community. Under the social function theory, it becomes relevant to address how a home creates a sense of belonging and provides a basis for membership in social structures.

I believe normative assessments should aim to be as concrete as possible. That said, I think it is worthwhile to provide more abstract forms of expression for core values, to clarify the ethical premises that provide the basis for concrete value-based conclusions. Therefore, normative theories should aim to be meta-ethical, not just ethical. They should provide a vocabulary and a conceptual framework tailored to advancing one's values. However, they should recognise that the ultimate expression of those values is provided only in relation to concrete facts. This, I believe, is prudent in light of how abstract ethical assertions are necessarily imprecise and run the risk of being distorted or exaggerated.

Invariably, the most accurate information regarding the values I rely on when assessing cases will be conveyed by my assessment of the cases, not by my theorising. On a deeper level, I am inclined to believe that value-systems are more or less unique to individuals, so that ethical theories are helpful primarily in that they provide an introduction to keywords and important lines of argument that will recur in different forms. As such, they enhance understanding, making it easier to communicate ideas and opinions in such a way that potential respondents are likely to enjoy a more accurate impression of what they are responding to.

In short, I believe that ethics make moral judgements communicable, allowing new ideas to be created in the minds of individuals. I believe in ethical men and women, but not in "ethical Man" or – God forbid – the "ethical State". Luckily, I find some support for this view in recent theories that have been proposed as normative extensions of the social function theory of property. These

are the subject of my next section.

2.5 Human Flourishing

Taking the social function theory seriously forces us to recognise that a person's relation to property can be partly constitutive of that person's social and personal identity, including both its political and economic components. Hence, property influences people's preferences, as well as what paths lie open to them when they consider their life choices.[102] This effect is not limited to the owner, it comes into play for anyone who is socially or economically connected to property in some way. The life-significance of property is often clearly felt also by a large group of non-owners.[103] The importance of property is obviously reduced if we move away from it in terms of social or economic distance. Hence, in many cases, property will be most important to its owner, simply because they are closest to it. This is not always the case, however, especially not if property rights are unevenly distributed, or in the possession of disinterested or negligent owners. Moreover, as mathematically oriented sociologists like pointing out, social connections are ubiquitous and the world is often smaller than it seems.[104]

Hence, there is great potential for making wide-reaching socio-normative claims on the basis of the social function perspective on the meaning and content of property. But which such claims *should* we be making? According to some, we should adjust our moral compass by looking to the overriding norm of *human flourishing* as a guiding principle of property law. Colin Crawford, for example, explicitly argues that the social function theory of property should "secure the goal of

[102] See generally Alexander, 'The Social-Obligation Norm in American Property Law' (n 66).

[103] Gregory S Alexander and Eduardo M Peñnalver, 'Properties of Community' (2009) 10 Theoretical Inquiries in Law 127, 128-129.

[104] See generally Sebastian Schnettler, 'A structured overview of 50 years of small-world research' (2009) 31(3) Social Networks 165.

human flourishing for all citizens within any state".[105] In a recent article, Alexander goes even further, by declaring that human flourishing is the "moral foundation of private property".[106]

As I have already explained, I believe – in contrast to both Crawford and Alexander – that it is useful to decouple such normative claims from the descriptive core of the social function theory.[107] I therefore refer to the more distinctly normative aspects of their work as human flourishing theorising.

Human flourishing has a good ring to it, but what does it mean? According to Alexander, several values are implicated, both public and private.[108] Importantly, Alexander stresses that human flourishing is *value pluralistic*.[109] There is not one core value that always guarantees a rewarding life. To flourish means to negotiate a range of different impulses, both internal and external. Importantly, these all act in a social context which influences their meaning and impact.[110]

For the family of a homeowner, the value of the ownership tends to be great; a home is a home for any non-owner living there, just as much as it is a home for the owner. This, in turn, creates both commitments and opportunities for the owner, which may or may not find recognition in the law and our legal reasoning. Regardless of this, it certainly carries significant importance both to

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105 Crawford (n 88) 1089.

106 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1261.

107 Crawford comments that the social function theory on its own "is not self-defining and invites many interpretations", see Crawford (n 88) 1089. The normative theory he proposes is clearly aimed at filling this perceived gap, by pinning down normative commitments that Crawford believes are intrinsic to the theory. However, as I have already argued, I reject this approach, since it unwisely downplays the fact that the social function theory can serve as a common ground among commentators with widely divergent normative views. Indeed, Crawford himself refers unfavourably to a writer who addresses the social function theory, but who, according to Crawford, proposes that "property's social function is best served by focusing on overall economic production and efficiency in a given society, allowing the market's invisible hand to work its magic", see Crawford (n 88) 1089. Against Crawford, I would argue that it is better to counter such a claim by arguing why it is normatively wrong rather than by suggesting that people with such values should be discouraged from attempting to argue for them on the basis of a social function understanding of property. Rather, by encouraging such an argument it should become easier to make the case why the values promoted are ultimately undesirable. This, at least, should follow if Crawford is otherwise largely correct (as I think he might be).

108 See generally Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92); Alexander, 'Pluralism and Property' (n 63).

109 Alexander, 'The Social-Obligation Norm in American Property Law' (n 66) 750-751.

110 Alexander, 'Pluralism and Property' (n 63) 1035-1052.

the owner's life and the lives of those that depend on her. If property is rented out as a home to someone else, the importance of the property might be *greater* to a non-owner. Moreover, assuming a society where tenancy is a well-functioning social institution, the continuation of the established property pattern might well be of greater importance to the tenant than it is to the owner.

The effect on non-owners can also be restrictive in socially desirable ways. If an apartment has an owner, it discourages squatters, for instance. Moreover, this effect clearly depends also on *who* the owner is and the choices they make in managing their property. If the owner lives in the apartment, squatting is less likely to be an issue. But even the owner of an unoccupied apartment can discourage squatting by managing their property well. However, if owners mismanage their properties, for instance because they seek to obtain demolition licenses, squatters can take opportunity of this. The risk, of course, increases if housing cannot be afforded by a large number of a society's members. In this case, it is natural to argue that something is amiss with the prevailing property structures.

Now the social function theory of property becomes important, since it allows us to attach significance to this also when discussing the property rights of individual owners. In particular, the theory allows us to recognise that possible failures of property as a social institution might be relevant when considering rights and responsibilities of private ownership.

Squatting, for instance, clearly affect the owner, influencing both the meaning and the value of their property, both to them, potential buyers, the local government, the state, and other interested parties. Even the mere *risk* of squatting can play such a role. But a property theory which does not recognise the social function of property might not allow us to take this into due regard. As long as the standard expectation of an owner is to be able to enjoy their apartment free of squatters, an entitlements-based view on property could easily force us into denial regarding actual (risk of) squatters.

In particular, we would be led to consider squatting as an interference with the owner's rights which the state cannot, on pain of disrespecting property, recognise as a legitimate response to

mismanagement and imbalances in the property structure. The normative significance of real life – where squatting often happens due to badly managed property – is discounted because our conceptual glasses block it out. Then, the unavoidable consequence is that the state also recognises a *positive* obligation to forbid squatting, and to forcibly remove squatters on behalf of owners. Under a narrow entitlements-based conception, this is the natural outcome, which must be classified as an act of protecting private property. Hence, under classical liberal values, it also becomes *good*.

Here, however, the social function theory permits us to take a highly divergent view, to carry forward different value-judgments. If squatting is recognised as creating new interests and obligations attaching to the property, it may now be argued that it is the use of state power to evict that is the most severe act of interference. Moreover, this might be more than merely an interference in whatever housing rights the squatters might have, if any. It can also be seen as an interference in *property*, in need of further justification.

In the Netherlands, the Supreme Court adopted a line of reasoning reflecting a similar insight when it held that the right not to be disturbed in one's home life also applied to squatters. Hence, the property owner could not forcibly evict people who had taken up residence in their property.[111]

In South Africa, a somewhat similar line of reasoning was adopted in the recent case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd*, analysed in depth by Alexander and Penñalver.[112] The case dealt with squatting on a massive scale: Some 400 people had taken up residence on land owned by Modderklip Farm, apparently under the belief that it belonged to the city of Johannesburg. The owner attempted to have them evicted and obtained an eviction order,

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111 See NJ 1971/38. The court held that the lower court had erred in taking it proven that the "house in the original charge was 'in use' by the owner of this house", as required by the statute under which the squatters were tried. Instead, the Supreme Court held that "art.138, in so far as it mentions houses, is specifically aimed at protecting home rights, in connection with which the words 'in use' (differently than the court judged) can only be understood as 'actually in use as a house', as in accordance with ordinary use of language". The upshot was that it was the squatters, not the owner, who enjoyed protection under the statute. In terms of the bundle theory, a right thought to be in the owner's bundle was deemed to actually belong to the bundle of the squatters, as this corresponded better to the circumstances of the case and the purposes meant to be served by the statute in question.

112 Alexander, 'Pluralism and Property' (n 63) 154-160.

but the local authorities refused to implement it. Eventually, the settlement grew to 40 000 people and Modderklip Farm complained that its constitutional property rights had not been respected.

The Supreme Court of Appeal concluded that Modderklip's property rights had indeed been violated, but noted that so had the rights of the squatters, since the state had failed to provide them with adequate housing.[113] However, they upheld the eviction order and granted Modderklip Farm compensation for the state's failure to implement it. The Constitutional Court, on the other hand, while agreeing that the eviction order was valid, concluded that as long as the state failed in its obligations towards the squatters, the order should not be implemented.[114] The eviction of the squatters was made contingent upon an adequate plan for relocation. In the meantime, Modderklip would receive monetary compensation from the state rather than the squatters. In this way, the Court recognised the social function of property; they refused to give full effect to Modderklip's property rights as long as that meant putting other rights in jeopardy. The fact that the squatters had no place to go was allowed to influence the content of Modderklip's right, making it impermissible to implement a standing eviction order.

It is possible to cast this outcome as an interference in property rights that was regarded as acceptable in the public interest. However, the reconceptualisation in terms of property itself having a social function appears highly attractive. Moreover, it is also consistent with the South African constitution, which also focuses on property's social dimension.[115] Thinking about cases like *Modderklip* in terms of property's social function allows us to remove the state as an intermediary between the owner and the other interested parties, in this case the squatters. As argued by Alexander and Peñalver, it becomes possible to think of the Court as adjudging based on Modderklip's own responsibility, as an owner, towards other members of the community that have an interest in

[113] See *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (2004) 8 BCLR 821 (SCA).

[114] *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* (2005) 5 SA 3 (CC).

[115] See section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996.

the property.[116]

On this basis, it becomes easier to conclude that it is permissible for courts to take the social context into account even in the absence of any specific state action or legislation to indicate that this should be done or that the public interest is at stake. Indeed, one of the problems in *Modderklip* was that the state had failed also in its responsibility towards the squatters. Moreover, while the local sheriff had refused to implement it, an eviction order had in fact been granted. Hence, thinking of the case as property interference in the public interest becomes difficult.

More importantly, by taking into account the social function of property, it becomes possible to argue for the outcome in Modderklip positively on the basis of property values. In this way, property is no longer seen to stand in the way of justice in cases such as this. We need not "interfere" with rights to secure an appropriate outcome, we only need to apply property law. As Alexander puts it in another recent article:

> The values that are part of property's public dimension in many instances are necessary to support, facilitate, and enable property's private ends. Hence, any account of public and private values that depicts them as categorically separate is grossly misleading. One important consequence of this insight is that many legal disputes that appear to pose a conflict between the private and public spheres or that seemingly require the involvement of public law can and should, in fact, be resolved on the basis of private law – the law of property alone.[117]

Protection of property, when property is understood in this way, becomes a potential source of justice, also for squatters. The basic values attached to property – freedom, liberty, autonomy – have not really changed, but are applied in a new way. In particular, they no longer only apply to

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116 Alexander, 'Pluralism and Property' (n 63) 157 ("The courts' unwillingness to ratify Modderklip's desire to remove the squatters from its land illustrates the courts' willingness to take seriously the obligations of owners, not only as they concern owners' direct relationship with the state but also in relation to the needs of other citizens").

117 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1295-1296.

the owner's interest in property, but also to that of other individuals closely connected to it. This normative turn, I argue, will potentially strengthen the institution of property itself, while also serving to loosen the compulsiveness of the idea that the ultimate expression of the public interest is found in the actions taken by the state. It suggests rather the view that the public interest manifests wherever the public may reside, including in property.

This conclusion requires taking a normative stance, but a minimal one; we merely extend the scope of values traditionally attached to property.[118]

That said, in the case of *Modderklip* the court was clearly faced with a value conflict that it is hard to resolve by looking to traditional liberal values. If these apply equally to the squatters, we are left with deadlock rather than resolution. Indeed, this was also reflected in the outcome of the case, which did not resolve the matter, but merely concluded that the state had failed in its obligations towards both of the parties. What should the solution be in the end? Should the squatters be allowed to stay, following condemnation of Modderklip's land, or should alternative housing be provided so that the eviction order can be carried out? The answer depends on how we resolve a normative conflict, and how to do so might not be obvious. Moreover, value pluralism suggests that we must be prepared to engage with multiple ways of looking at the matter. In the interest of stability of property as an institution, allowing the squatters to succeed in establishing lasting title to the land might be considered unwise. Against this pragmatic and largely technical value, one would have to consider the values of community and belonging that now attach the squatters to their new homes. These two values are largely incommensurable, and it is not clear how to choose between them.

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[118] Arguably, cases such as *Modderklip* might be taken to suggest that the social function theory, as soon as it is applied for the purposes of normative assessment, will systematically guide us to conclude that owners are not entitled to as many benefits as would otherwise follow from their property rights. It is fortunate, therefore, that the entire remainder of the thesis will focus on economic development takings, where it will typically appear more natural to conclude the opposite. In these cases, on a common- sense understanding of justice, applying the social function theory will allow us to recognise a sense in which owners should receive *increased* protection and more benefits, as a consequence of how such interferences can prove particularly damaging, both to the owner and to the social fabric of democracy.

Still, Alexander maintains that human flourishing provides an "objective" standard on which to approach dilemmas such as these. Moreover, he "rejects the view that what is good or valuable for a person is determined entirely by that person's own evaluation of the matter".[119] Some things are good for people, Alexander argues, irrespective of whether or not people know so themselves. Hence, it may perhaps be argued that what is truly good for Modderklip is to come to an arrangement with the squatters and the state, to resolve the problem amicably. Moreover, failure to do so might entitle the state to take action that would otherwise seem to undermine the stability of property. This, then, would be partly due to this being conducive also to the flourishing of the people behind Modderklip, not only the squatters.

This might be derided as an overly intrusive and moralistic way to approach property law. More generally, as Alexander notes, the exact content of goodness is "necessarily contestable". It consists of a list of different values which are all open to dispute, both as to their relevance and their precise meaning.[120] Alexander goes on to list some key values that he believes are central, but the list is not meant to be exhaustive.[121]

Among the key values that Alexander discusses, we find many core private values that are commonly seen as important goals for the institution of property. This includes values such as autonomy and self-determination, both of which will feature heavily later in this thesis. However, Alexander also considers several public values, such as equality, inclusiveness and community. These too will be important later, as I will draw on them in my own normative analysis of economic development takings. I will be particularly concerned with the value of *participation*, understood, following Alexander, in terms of its broad social function.[122]

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119 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1263.

120 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1263.

121 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1764-1776.

122 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1275-1276.

In my view, this value is closely related to the value of democracy. Participation in local decision-making processes is the root which enables democracy to come to fruition at the regional and national level. Moreover, participation is a value that will give me occasion to make particular policy suggestions regarding the correct way to approach economic development takings. Devoting some time to discussing this value in the abstract will therefore be helpful.

Alexander traces the value of participation back to Aristotle and the republican tradition. He notes, however, that this tradition involves a notion of participation that is somewhat narrowly drawn. For thinkers in the republican tradition, participation tends to mean public participation, meaning people's engagement with the formal affairs of the polity.[123] For Alexander, participation has a broader meaning, involving also the value of being included in a community. He writes:

> We can understand participation more broadly as an aspect of inclusion. In this sense participation means belonging or membership, in a robust respect. Whether or not one actively participates in the formal affairs of the polity, one nevertheless participates in the life of the community if one experiences a sense of belonging as a member of that community.[124]

Importantly, participation in a community can have a crucial influence also on people's preferences and desires. In this way, it is also invariably relevant – behind the scenes – to any assessment of property that focuses on welfare, utility or public participation in the classical sense. As Alexander and Peñalver put it, drawing on the work of Amartya Sen and Martha Nussbaum:[125]

> The communities in which we find ourselves play crucial roles in the formation of our

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123 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1275.

124 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 92) 1275.

125 Amartya Sen, *Resources, Values and Development* (Harvard University Press 1984); Amartya Sen, *Commodities and Capabilities* (North-Holland 1985); Amartya Sen, *Development as freedom* (1st edn, Oxford University Press 1999); Martha C Nussbaum, *Women and human development: the capabilities approach* (Cambridge University Press 2000); Martha Nussbaum, 'Capabilities and Social Justice' (2002) 4(2) International Studies Review 123.

> preferences, the extent of our expectations and the scope of our aspirations.[126]

Therefore, for anyone adhering to welfarism, rational choice theory, utilitarianism or the like, neglecting the importance of community is not only normatively undesirable, it is also unjustified in an epistemic sense. In particular, it should be recognised as a descriptive fact that community is highly relevant to *any* normative theory that attempts to take into account the preferences and desires of individuals.[127] But Alexander and Peñalver go further, by arguing that participation in a community should also be seen as an independent, irreducibly social, value, not merely as a determinant of individual preferences and a precondition for rational choice. They write:

> Beyond nurturing the individual capabilities necessary for flourishing, communities of all varieties serve another, equally important function. Community is necessary to create and foster a certain sort of society, one that is characterized above all by just social relations within it. By "just social relations", we mean a society in which individuals can interact with each other in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy. Communities foster just relations with societies by shaping social norms, not simply individual interests.[128]

This, I think, is a crucial aspect of participation. Moreover, it is one that it is hard, if at all possible, to incorporate in theories that take preferences and other attributes of individuals as the basis upon which to reason about property. For instance, if people in a community come under pressure to sell their homes to a large commercial company that wishes to construct a shopping mall, it may be appropriate to consider this as an unjustifiable attack on their property rights. Importantly, this may be so *irrespective* of what the individual owners themselves think they should

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126 Alexander, 'The Social-Obligation Norm in American Property Law' (n 66) 140.

127 Again, I think Alexander and other theorists attempting to incorporate such ideas in property law could benefit from making this descriptive point separately, so as to enable it to be considered in isolation from the more contentious normative arguments they construct on its basis.

128 Alexander, 'The Social-Obligation Norm in American Property Law' (n 66) 140.

do. If they are offered generous financial compensations for their homes, or if they are threatened by eminent domain, economic incentives might trump the value of social inclusion and participation for all or a majority of these owners. As a consequence, the community might decide to sell.

Even so, in light of the value of community, it would be in order for planning authorities, maybe even the judiciary, to view such an agreement as an *attack on their property*. It is clear that by the sale of the land, the "just social relations" inhering in the community will be destroyed. The members of the community – including all the non-owners – will lose their ability to participate in those relations. The property rights that once contributed to sustaining "just relations" will now be transformed into property rights that serve different purposes. This includes aiding the concentration of power and wealth in the hands of commercially powerful actors. Such a change in the social function of property might have to be regarded – objectively speaking – as a threat to participation, community and democracy. Hence, on the human flourishing theory, it is also a threat to property. Our property institutions, therefore, should protect against it.

There is a subtle issue that arises on the basis of this kind of normative reasoning about individual rights. Is it appropriate to still think of such reasoning – and the obligations it gives rise to – as an aspect of protecting individuals? Is it not more accurate to say that this is an *interference* with individual rights, undertaken to further the public interest? Indeed, when the individual himself does not want his property or privacy to be "protected", is it not somewhat perverse to insists that this is what is happening?

I am inclined to answer in the negative. In my opinion, we are still talking about protecting individual rights, even when this means imposing protections on people that they themselves do not want. Undoubtedly, this is *also* an interference in their rights, but just as different rights of different people can sometimes come into conflict, I am inclined to think that the same right, for the same person, can sometimes come into conflict with itself. This happens, in particular, when it is not possible to simultaneously protect all those functions that this right seeks to promote.

For instance, if someone protests a taking on environmental grounds and also rejects financial compensation as immoral, the courts should still award just compensation for the land, if they find that the taking is valid. If the owner wishes, they can purge themselves by making a donation to charity. Similarly, if someone attempts to commit suicide, the health services are still obliged to help, even against the patient's wishes. This remains the case, moreover, even though suicide is no longer considered a criminal offence.

If the justification for an act of interference is a vague proclamation of the "public interest", the individual is marginalised from the start. A balancing act might be required, but this renders the individual relevant only to one side of the equation. On the other hand, if the act of interference is simultaneously rendered as protection, enforcement of an obligation, or a measure to enable participation, the individual occupies center stage. In so far as the public interests triumph, it is not because the individual loses, but because the public is deemed to know best how to secure the goal of human flourishing, both for the individual and other members of the social structure.

For instance, external interests of both a private and a public nature can dictate that owners should avoid becoming a nuisance to their neighbours. But under a human flourishing theory, we are also able to portray this as a case of protecting the membership of individuals in their community. The public does not "side with the neighbours", but undertakes measures to protect the relationship between owners and their fellows. In my opinion, a conceptual approach to property law that makes this portrayal *prima facie* plausible is highly desirable, for analytic as well as normative reasons.

For a second example, consider situations when environmental concerns suggest imposing restrictions on what an owner is permitted to do with his land. This too can be rendered as an act of protecting property. But doing so requires the regulatory body to relate the interference positively to the individual's interests and obligations, to ensure that they avoid adopting a narrative where the regulation is rendered as an act of enforcing the will of unnamed others against the will of specific owners. In this way, public values and the public interest can be given considerable

weight, but will have to be rendered less abstract. The public interests must be related concretely to the social functions of the rights protecting the individuals interfered with. The baseline for assessment remains actual persons and their well-being, not some abstract ideal of "goodness". Moreover, implementation of the collective will becomes a guide towards human flourishing for a society of individuals, not a goal in itself.

The upshot is that on the human flourishing account, if property interference is unavoidable, it is still important to interfere in a way that constructively targets the individual, aiming to protect them by enabling them – and compelling them – to protect others and partake in social and political life. This can then become interference aimed at bringing the individual into the fold, making them play their part, by raising them to fruitful citizenship. Such a paternal (or maternal) state is one that cares, but one that may also be overprotective, unfair, or plain stupid. Hence, it becomes natural to resist and to revolt, but not without also carrying forward care and affection for the social, political and legal structures within which this agency is (hopefully) permitted to take place.

To conceptualise an act of restriction as a means to empower the persons restricted is something they might well find offensive, but it also renders interference more meaningful. It provides both a reason to take a more active role in relation to the interfering power, and a possible cause for constructive resistance. Importantly, it does not force the conclusion that the public resides behind closed doors, disinterested in what the affected individual have to offer. Instead, it is an approach that encourages a response, by focusing always on the persons interfered with, whenever interference is deemed necessary. This is the vision of a bottom-up, rather than a top-down, approach to imposing the collective will on individuals. I believe it has merit, and I will return to it in the final chapter of this thesis, when I discuss the Norwegian institution of land consolidation as an alternative to eminent domain in economic development situations.

In the next section, I zoom in on economic development takings. First, I will introduce such

takings by considering the seminal case of *Kelo v City of New London*[129], which brought this category to prominence in the US discourse on property law. Then I will assess the unique aspects of such takings against the social function theory, to provide an argument that the category has significance for legal reasoning in takings law, as well as with respect to property as a constitutionally protected human right. Finally, I will provide an abstract presentation of the values that I believe are important when normatively assessing the law in this area. In doing so, I will draw on the human flourishing theory, setting out the main values that will inform the concrete policy assessments I provide later.

2.6 Economic Development Takings

Constitutional property rules in many jurisdictions indicate, with varying degrees of clarity, that eminent domain should only be used to take property either for "public use", in the "public interest", or for a "public purpose". Such a restriction can be regarded as an unwritten rule of constitutional law, as in the UK, or it can be explicitly stated, as in the basic law of Germany.[130] In some jurisdictions, for instance in the US and in Norway, explicit property clauses exist, but do not provide much information about the intended scope of protection.[131]

Both the Norwegian and the US property clauses appear to refer to public use only as a precondition for the duty to pay compensation. However, this is universally understood as expressing the *presupposition* that the power of eminent domain is only to be used in the public interest.[132] Indeed, in cases when one might say that private property is "taken" for a non-public use without compensation, for instance in a divorce settlement, it is not commonly regarded as an exercise of

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[129] *Kelo* (n 6).

[130] See Chapter 3. Section 3.3 below.

[131] See Chapter 3, Section 3.5 and Chapter 5, Section 5.2.

[132] In the literature, it is rare to even note that a different interpretation is linguistically possible. But see Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1978) 57 Oregon Law Review 203, 205.

eminent domain. Rather, it is justified by reference to a different category of rules, meant to ensure enforcement of obligations that arise between private parties independently of the state's power to single out and compulsorily acquire specific properties.

The exact boundary between eminent domain and other forms of state interference in property is not always clear, but I will not worry too much about it in this thesis. I note, moreover, that most legal scholars seem to agree that the power of eminent domain is meant to be exercised in the public interest. However, differences of opinion emerge when we turn to the question of whether the presupposed public use or public interest serves also to restrict the power to take. In the US, most scholars agree that some restriction is intended, but there is great disagreement about its extent.[133] In Norway, on the other hand, a consensus has developed whereby the notion of public use is interpreted so widely that it hardly amounts to a restriction at all.[134] Moreover, the courts defer almost completely to the assessments made by the executive branch regarding the purposes that may be used to justify a taking.[135]

Some US scholars adopt a similar stance, but others argue that the public use presupposition should be read as a strict requirement, forbidding the use of eminent domain unless the public will make actual use of the property that is taken.[136] Most scholars fall in between these two extremes. They regard the public use restriction as an important limitation, but they also emphasise that courts should normally defer to the legislature's assessment of what counts as a public use.[137]

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133 Berger (n 132) 205.

134 See, e.g., Eirik Holmøyvik and Jørgen Aall, 'Grunnlovsfesting av menneskerettane' (2010) 123(2) Tidsskrift for eiendomsrett 327, 368.

135 Holmøyvik and Aall (n 134) 368.

136 Compare Abraham Bell and Gideon Parchomovsky, 'The Uselessness of Public Use' (2006) 106(6) Columbia Law Review 1412; Abraham Bell, 'Private Takings' English (2009) 76(2) The University of Chicago Law Review 517; Eric R Claeys, 'Public-use limitations and natural property rights' (2004) 2004(4) Michigan State Law Review 877; Timothy Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (2006) 10 Chapman Law Review 1.

137 See, e.g., Merrill (n 4); Gregory S Alexander, 'Eminent Domain and Secondary Rent-Seeking' (2005) 1(3) New York University Journal of Law & Liberty 958. The fact that US jurists usually stress deference to the legislature, not the executive branch, should be noted as a further contrast with Norway.

As I discuss in more depth in Chapter 3, Section 3.6, the debate in the US has its roots in case law developed by state courts – the federal property clause was for a long time not applied to state takings. This has changed, and today the Supreme Court has a leading role in this area of US law. It has developed a largely deferential doctrine, resembling the understanding of the public use limitation under Norwegian law.[138] The difference is that in the US, cases raising the issue still regularly arise and prove controversial. The most important such case in recent times was *Kelo*, decided by the Supreme Court in 2005.[139] This case saw the public use question reach new heights of controversy in the US.[140]

Kelo centred on the legitimacy of taking property to implement a redevelopment plan that involved construction of research facilities for the drug company Pfizer. The home of Suzanne Kelo stood in the way of this plan and the city decided to use the power of eminent domain to condemn it. Kelo protested, arguing that making room for a private research facility was not a permissible "public use". She was represented by the libertarian legal firm *Institute for Justice*, which had previously succeeded in overturning similar instances of eminent domain at the state level.[141] Kelo lost the case before the state courts, but the Supreme Court decided to hear it and assessed its merits in great detail.

The precedent set by earlier federal cases was clear: As long as the decision to condemn was "rationally related to a conceivable public purpose", it was to be regarded as consistent with the public use restriction.[142] Moreover, the role of the judiciary in determining whether a taking was for a public purpose was regarded as "extremely narrow".[143] It had even been held that deference

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138 See *Berman v Parker* 348 US 26; *Hawaii Housing Authority v Midkiff* 467 US 229 (1984); *Kelo* (n 6).

139 *Kelo* (n 6).

140 See, e.g., Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 6).

141 See https://www.ij.org/cases/privateproperty.

142 *Midkiff* (n 138) 241.

143 *Berman v Parker* (n 138) 32.

to the legislature's public use determination was required "unless the use be palpably without reasonable foundation" or involved an "impossibility".[144]

This understanding was also reflected in the outcome of related cases. In *Hawaii*, the Supreme Court had upheld a taking that would benefit private parties, with no direct benefit to the public.[145] In *Berman*, it had upheld a taking for economic redevelopment of a blighted area, even though the property taken was not itself blighted.[146] But in the case of *Kelo*, the court hesitated.

Part of the reason was no doubt that takings similar to *Kelo* had been heavily criticised at state level, with an impression taking hold across the US that eminent domain "abuse" was becoming a real problem.[147] A symbolic case that had contributed to this worry was the infamous *Poletown Neighborhood Council v City of Detroit Poletown Neighborhood Council v City of Detroit*.[148] In this case, General Motors had been allowed to raze a town to build a car factory, a decision that provoked outrage across the political spectrum.[149] The case was similar to *Kelo* in that the taker was a powerful commercial actor who wanted to take homes. This, in particular, served to set the case apart from *Hawaii*, which involved a taking in favour of tenants, and to some extent also *Berman*, which involved a taking of businesses (and homes) in the interest of removing blight. Moreover, the Michigan Supreme Court had recently decided to overturn *Poletown* in the case of *Wayne County v Hatchcock Wayne County v Hatchcock*.[150] Hence, it seemed that the time had come for the Supreme Court to reexamine the public use questions.[151]

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144 See *Old Dominion Land Co v US* 269 US 55, 66 (1925); *US v Gettysburg Electric R Co* 160 US 668, 680 (1896).

145 *Midkiff* (n 138). For a more detailed discussion, see Chapter 3, Section 3.6 below.

146 *Berman v Parker* (n 138). For a more detailed discussion, see Chapter 3, Section 3.6.

147 See, e.g., Timothy Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (2005) 28(2) Harvard Journal of Law and Public Policy 651, 667-669.

148 *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (1981).

149 See generally Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 147).

150 *Wayne County v Hatchcock* 684 NW2d 765 (Michigan Supreme Court 2004).

151 See, e.g., Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 147); Claeys, 'Public-use limitations and natural property rights' (n 136).

Eventually, in a 5-4 vote, the court decided to apply existing precedent and held against Suzanne Kelo. The majority also made clear that economic development takings were indeed permitted under the public use restriction, also when the public benefit was indirect and a private company would benefit commercially.[152] The backlash of this decision was severe. According to Ilya Somin, the case ranks among the most disliked decision that the Court has ever made.[153] Some 80 - 90 % of the US public expressed great disapproval, with critical voices coming from across the political spectrum.[154] Why did the case prove so controversial? No doubt, the discontent with the decision was fuelled in large part by the fact that it was seen as a case of the government siding with the rich and powerful, against ordinary people.[155] Indeed, the party that appeared to benefit the most from the taking was Pfizer – a multi-billion dollar company – while Suzanne Kelo, who stood to lose, was a middle class homeowner. In this context, the taking of Kelo's home seemed morally suspect, an act of favouritism showing disregard for less influential members of society.[156]

In addition, it is worth noting that many commentators conceptualised the *Kelo* case by thinking of it as belonging to a special category, by describing it as an economic development taking, a *taking for profit*, or, more bluntly, a case of *Robin Hood in reverse.*[157] Categories such as these had no clear basis in the property discourse before *Kelo*. Indeed, in terms of established legal doctrine, it would be more appropriate to say that the case revolved entirely around the notion of "public use".

However, when considering the most common reasons given for condemning the outcome in

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152 *Kelo* (n 6) 469-470.

153 Ilya Somin, 'The judicial reaction to Kelo' (2011) 4(1) Albany Government Law Review 1, 2.

154 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 6) 2108-2110.

155 Jane B Baron, 'Winding toward the heart of the takings muddle: *K*elo, Lingle, and public discourse about private property' (2007) 34 Fordham Urban Law Journal 613, 630-634

156 See, e.g., Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377.

157 Ilya Somin, *Robin Hood in Reverse: The Case against Taking Private Property for Economic Development* (Policy Analysis NO 535, Cato Institute 2005).

Kelo, it becomes clear that many critics felt it was natural to classify the case along additional dimensions. A survey of the literature shows that many made use of a combination of substantive and procedural arguments to paint a bleak picture of the *context* surrounding the decision to take Kelo's home. Important aspects of this include the imbalance of power between the commercial company and the owner, the incommensurable nature of the opposing interests, the lack of regard for the owner displayed by the decision makers, the close relationship between the company and the government, and the feeling that the public benefit – while perhaps not insignificant – was made conditional on, and rendered subservient to, the commercial benefit that would be bestowed on a commercial beneficiary.[158] This dynamic, in which public bodies no longer seem to be leading and pushing the process forward, but are rather being led and being pushed, is regarded as particularly suspicious. This, in turn, is typically derided as a perversion of legitimate decision-making, used to argue that economic development takings such as *Kelo* suffer from what I will refer to here as a *democratic deficit*.

From a theoretical point of view, I take all of this to suggest that many critics of *Kelo* effectively adopted a social function view on property, by paying close attention to the wider social and political context of the taking.[159] Importantly, if we now turn to the social function theory of property, we are placed in a position to engage more actively with this form of reasoning, as an integrated part of our assessment of the law. This may then in turn give us cues as to how we should reason to justify a departure from the course laid down by previous cases on the "public use" requirement, where such a perspective was not adopted. Indeed, it seems to me that this is exactly what the minority of the Supreme Court did, particularly Justice O'Connor, who formulated a

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158 See, for instance, Underkuffler, 'Kelo's moral failure' (n 156); Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 5); Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (n 136); Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 5); Daniel S Hafetz, 'Ferreting out favoritism: Bringing pretext claims after Kelo' (2009) 77(6) Fordham Law Review 3095; Zachary D Hudson, 'Eminent domain due process' (2010) 119(6) Yale Law Journal 1280.

159 For a particularly clear example of this, see Underkuffler, 'Kelo's moral failure' (n 156).

strongly worded dissent.[160] She concluded as follows:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[161]

It seems to me that the values Justice O'Connor rely on in her assessment are closely related to the idea of human flourishing presented by Alexander and others, particularly those pertaining to the political function of property as an anchor for community and democracy. Importantly, cases like *Kelo* not only appear to threaten individual entitlements of owners. They also appear to threaten equality in civic society, as the economic rationality used to justify interference results in an implicit political statement to the effect that the property of the rich and powerful is better protected, and valued higher by the state, than property owned by regular citizens, who reside in ordinary communities.

The effect of a traditional economic development taking is that property rights are transferred from the many to the few, taken from ordinary people and given to the powerful. Hence, these cases represent a possibly pernicious redistribution of property, particularly in terms of property's social function. The structural imbalances of the condemnation process itself find permanent expression in the new distribution of property. The social structures of a living community are dismantled in favour of a social structure that revolves around the commercial interest of designated companies

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160 *Kelo* (n 6) 494-505. Justice O'Connor was joined by the four other dissenters, but Justice Thomas also formulated his own dissent, taking a more narrow view and arguing for the revival of a strict reading of the public use requirement, see *Kelo* (n 6) 505-523.

161 *Kelo* (n 6) 505.

that enjoy the support of government. The political and social power of the community is diminished, perhaps lost in its entirety, while the political and social power of designated companies increase.

It seems clear that to Justice O'Connor, this too had to be recognised as a negative consequence of the taking in *Kelo*. Again, I stress that recognising such effects appear to require a social function approach to property. There is no clearly quantifiable individual loss – no particular "stick" in the property bundle that is not compensated. Rather, it is the community itself that is lost, a community that was not directly implicated in any formal "entitlement", but which played a crucial role in providing meaning to the totality of the bundle of rights and obligations enjoyed by the owners.

Even if we extend our perspective to account for indirect individual losses, we are not doing justice to such losses. The owner might relocate, acquire new property with a similar meaning in a new community somewhere else. But that does not make up for the fact that *this* community is lost forever, as *this* property takes on new meanings and functions. The loss to Suzanne Kelo, therefore, might even be a significant loss to the City of New London, whose democracy suffers as a result of the taking.

Of course, the economic and social gains of development might outweigh such negative effects. In any event, it seems that the balancing of interests required in this regard should be carried out by an institution that sufficiently recognises the owners' right to participation and self-governance. The presence of a highly active commercial third party, in particular, means that public participation in the standard sense might be insufficient. In economic development takings, the commercial company typically appears alongside the government, as a more or less integrated part of the institutional structure making the decision to condemn. The owners, however, do not enjoy a corresponding level of participation.

Specifically, their interests are only negatively defined. They are adversely effected and may

object, but under standard administrative regimes they play no constructive role in the process. For instance, they are not called on to take part in the development itself, or to assess its merits more broadly than by being asked to respond based on their own individual entitlements. This might be one of the main problems with economic development takings, resulting in a democratic deficit. I will argue for this in more depth later, but I remark here that an important reason to focus on this aspect is that it involves precisely those values that economic development takings are most likely to threaten. Moreover, if the loss of community outweighs the positive effect of economic development, this is unlikely to be recognised following a process that relies primarily on the contribution of the developer and the expert planners.[162]

The objections made by owners may not only be given too little weight. It is also possible that owners themselves unduly focus only on the individual loss. They might not even consider those issues that are most important for property's social function. To address this concern, I do not think it is sufficient to theoretically proclaim that social function aspects need to be considered. Such aspects are likely to already form part of the package of interests that expert planners are supposed to take into account. However, to address the democratic deficit of economic development takings, it seems that institutional reforms might be in order, to give owners and their community a more significant voice in the decision-making process. This is a call for greater involvement by the local community (including, perhaps, even non-owners) in the decision-making process relating to development. It is not sufficient to merely "consult" local communities by asking if they have objections. It is also necessary to include communities in a constructive way, perhaps even be compelled to assume an active role in relation to the proposed project.

This is a proposal that envisages owners engaging directly with both government and potential developers, by considering alternative schemes, and making their own proposals. In short, this asks for a system where owners and communities are co-authors of the government's plans for their

[162] A similar point is made in Underkuffler, 'Kelo's moral failure' (n 156).

land. According to the human flourishing theory as I understand it, acting as such a co-author is not only an owners' right, but also their obligation.

This perspective gives a plausible basis on which to strike down certain kinds of economic development takings. Moreover, it allows us to do so without giving up the value of judicial deference, since it focuses on the democratic deficit rather than the exact meaning given to the notion of "public use". In addition, it is a call for institutional reform, to search for new governance frameworks that will empower owners and their communities.

It seems to me that Justice O'Connor's argument reflects some of the ideas I have sketched here. Indeed, O'Connor seems to believe that the taking of Kelo's home would be a particularly harmful interference in "just social structures", to quote Alexander. Importantly, a piece-by-piece entitlement-based approach to *Kelo* could hardly justify the degree of disapproval seen in Justice O'Connor's opinion. After all, Kelo had been offered generous compensation, there had been no clear breach of concrete procedural rules, and the claim that the taking was *only* a pretext to bestow a benefit on Pfizer did not seem supported by the facts.[163] Rather, it was the overall character of the taking that could be used to argue that it was illegitimate. In this argument, moreover, the perceived lack of a clearly identifiable and direct public benefit was only one of several key points.

In addition, the institutional, social and political aspects of the case was considered in depth. By contrast, the economic implications appear to have been less important to Justice O'Connor. Even the importance of home ownership to personhood does not receive the same attention as structural aspects pertaining to good governance. The problem which overshadows everything else is the concern that economic development takings represent a form of governmental interference in property that might systematically favour the rich and powerful to the detriment of the less resourceful. Hence, such takings may help establish and sustain patterns of inequality. Hardly anyone would openly regard this as desirable. It is not hard to agree that if Justice O'Connor's

[163] See Bell and Parchomovsky, 'The Uselessness of Public Use' (n 136).

predictions about the fallout of *Kelo* are correct, then it is indeed "perverse".

The question, of course, is whether her predictions are warranted. This is a call for empirical and contextual assessment of economic development takings, to help us gain a better understanding of how they actual affect political, social and bureaucratic processes. In addition, it raises the question of how to *avoid* negative effects, that is, how to design rules and procedures that can reduce the democratic deficit of economic development takings. As I now move away from theory towards concrete assessment of economic development takings, both these questions will be in focus.

2.7 Conclusion

In this chapter, I have presented the core notion of my thesis, namely that of an economic development taking. I started by noting that while the notion is straightforward to define factually, it is far from obvious what implications it has for legal reasoning. I illustrated the subtleties involved by considering a concrete example of a commercial scheme that looked like it might well result in compulsory acquisition of land, namely Donald Trump's controversial plans to develop a golf course on a site of special scientific interest close to Aberdeen, Scotland. In the end, the plans did *not* require takings, as Trump was able to make creative use of property rights he acquired voluntarily, against the complaints of recalcitrant neighbours.

This turn of events made the example even more relevant to the points I have been trying to make in this chapter. It served to highlight, in particular, that the question studied in this thesis is not a black-and-white balancing act between property privileges on one side and the good will of the regulatory state on the other. Rather, the example of Trump's golf course allowed me to emphasise the importance of context when assessing both the nature of property rights and the meaning of protecting them. In particular, to protect the property rights of those opposing Trump's golf course was not about protecting just any property, it was about protecting the property of members in a local community that felt it would be detrimental to this community, and to their lives, if Trump

was allowed to redefine it. In particular, after Trump decided not to pursue compulsory purchase, protecting the property of these members of the community became a question of *restricting* the degree of dominion that Trump could exercise over his own property. Hence, under a conventional and overly simplistic way of looking at these matters, protecting property then became tantamount to restricting its use, a seeming paradox.

To resolve this paradox, and to arrive at a better conceptual understanding of economic development takings, I looked to various theories of property. I noted that there are differences between civil law and common law theorising about property, but I concluded that these differences are not particularly relevant to the questions studied in this thesis. In particular, I observed that neither the bundle theory, dominant in the common law world, nor the dominion theory, taught to many civil law jurists, helped me clarify economic development takings as a category of legal thought.

I then went on to consider more sophisticated accounts of property, noting that a range of different *normative* theories have been proposed. These differ with respect to the values that they think the institution of property should promote, and as such they are also relevant to the question of assessing economic development takings. However, they do not allow us to zoom in on such takings in a more value-neutral way, to argue that regardless of one's normative persuasions, one should acknowledge that they deserve special attention.

I argued that in order to do justice to this latter point, the traditional entitlements-based perspective on property has to be abandoned. Instead, I looked to the social function theory of property, which encourages us to take a more contextual perspective on rights and obligations inherent in property. In particular, I noted that the social function theory compels us to recognise the importance of property in regulating social and political relations. Hence, economic development takings are special because they redefine the meaning of the property that is taken. They cause a lasting disturbance to the established economic, social and political relationships that exist between owners, communities, state bodies, and commercial actors.

The social function theory asks us to acknowledge that property rules are hardly ever neutral with regards to such effects. I identified this as the key observation that allowed me to make sense of economic development takings as a category of legal reasoning.

After concluding in this way, I went on to argue that in the first instance, the social function theory should be understood as giving us *descriptive* insights into the workings of property and its role in the legal order. In this regard, I advanced a different stance than many property scholars, by arguing that it would be better to decouple the more normative aspects of the theory, to allow the social function theory to serve as a common ground for further value-based debate.

I then went on to clarify my own starting point for engaging in such debate, by expressing support for the human flourishing theory proposed by Alexander and Peñalver. I noted that this theory focuses on how property enables communities and individuals to participate in social and political processes. I argued that protecting this function of property was good and that this value should be considered fundamental in property law. Moreover, I noted that the human flourishing theory also contains a further important insight, concerning the scope of the state's power to protect. In particular, the theory asks us to recognise that protecting property against interference that is harmful to human flourishing is a responsibility that the state has even in cases when the individual owners themselves neglect to defend their property, for instance as a result of financial incentives to remain idle. In other words, some functions of property are such that owners have an obligation to preserve them, while the state has a duty to protect them, potentially even against the will of the owners.

After this, I went on to consider economic development takings specifically, by drawing on the theoretical insights collected from preceding sections. To make the discussion concrete, I considered the case of *Kelo*, which propelled the notion of an economic development taking to the front of the takings debate in the US. I focused particularly on the dissenting opinion of Justice O'Connor, and I argued that she approached the issue in a way that is consistent with the theoretical basis

proposed in this chapter.

I will now go on to make my analysis of economic development takings more concrete, by considering how such takings are dealt with in Europe and the US respectively. I note that the category has yet to receive much attention in Europe, so the discussion focuses on the US. Here this issue has received a staggering level of attention after *Kelo*. To get a broader basis upon which to assess all the various arguments that have been presented, I consider the historical background to the issue as it is discussed in the US. This involves giving a detailed presentation of the public use restriction, as it was developed in case law from the states during in the 19th and early 20th century. I then connect this discussion with recent proposals to deal with economic development takings, responding to the backlash of *Kelo* by aiming to address the democratic deficit of such takings.

Later, when I begin to consider the law relating to Norwegian hydropower, I will look back at the theoretical basis provided in the present chapter to guide the analysis. In particular, I focus on certain decision-making mechanisms that have developed on the ground in Norway, as a practical response to the increased tendency for local owners to engage in hydropower development. I will argue that this shows the conceptual strength of the idea that property is irreducibly embedded in community, continuously evolving alongside institutions of participatory decision-making.

3 Taking Property for Profit

3.1 Introduction

In the previous chapter, I argued that economic development takings should be considered a separate category of interference in private property. I also placed it in the theoretical landscape, by relating it to the social function theory of property. In particular, I argued that economic development takings raise questions that require us to depart from the individualistic, entitlements-based narrative that otherwise dominates in property law.

So far, I have argued for a certain way of reasoning about economic development takings, but I have not addressed in depth what the law has to say about them. In this chapter, I consider this question, by giving an overview of how economic development cases are dealt with in some representative jurisdictions. In addition, I consider some recent proposals for reform.

First, in Section 3.2, I will comment briefly on the importance of economic development takings on the global stage. I note that the core issues I address are relevant also in the context of developing economies, even when property rights as such remain a less stable basis on which to reason about the rights and obligations of individuals and communities. This argument rests on the social function approach to property, which suggests that formal recognition of title is not a necessary precondition for legally recognising community interests inhering in the institution of property.

In Section 3.3, I move on to contrast the English and the German approach to the legitimacy of takings, particularly in the context of economic development. This serves to introduce the topic of

my thesis from the point of view of European law, where the issue of economic development takings has attracted far less attention than in the US. It appears to be gaining importance, however, as the increasing influence of public-private partnerships means that takings for development are increasingly becoming takings for profit also in Europe.

In Section 3.4, I elaborate on a practically significant pan-European property clause, namely Article 1 of Protocol 1 (P1(1)) of the European Convention of Human Rights (ECHR). I argue that this clause provides an interesting perspective on the legitimacy issue, asking us to focus on the proportionality of the interference, judged relatively to its social and political context. I also consider some possible objections against the human rights approach, including the worry that the court in Strasbourg is not well-placed to be the arbiter of social and individual justice throughout Europe. At the same time, I point to some recent decisions at the Court that I believe signal hope that the case law on property is moving away from ill-conceived "micro-management", towards a more open-ended jurisprudence that seeks to force member states to address systemic problems that they might otherwise be reluctant or incapable of raising to the national agenda. Here the involvement of a (hopefully) politically neutral institution like the ECtHR can serve an important purpose, particularly if it manages to tailor its own case law in such a way as to leave room for local institutions of the member states to work out for themselves how to concretely resolve human rights issues flagged by the Court in Strasbourg.

In Section 3.5, I return to the US setting, by presenting in detail how the perspective on economic development takings, mediated through case law on the public use restriction, has evolved since the 19th century until today. I structure the presentation as a story in two parts, describing the situation before and after the *Kelo* case. For the pre-*Kelo* presentation, I begin by pointing out that the case law on the public use restriction was initially developed by state courts, who would adjudicate legitimacy cases against the respective state constitutions (which typically also involve some sort of public use restriction on the takings power).

I go on to observe how the Supreme Court adopted deference to state *courts* initially, before changing their perspective by adopting a policy of deference directed rather at the state *legislature* (in practice also the administrative branch).[1]

I go on to argue that this shift in case law at the federal level had the effect of destabilizing the established state approach to economic development takings, resulting in increased tension and controversy, paving the way to *Kelo*. In essence, my argument is that the Supreme Court was right in taking a deferential stance with respect to local institutions, but wrong in stripping the public use restriction of content, a move that would undermine the authority of state courts. In effect, the federal takings jurisprudence weakened the legal authority of a very sensible *local* judicial constraint on executive power, a constraint that was also important to the proper division of power at the state level.

In Section 3.7, I follow this up by a discussion of developments after *Kelo*, which has seen a resurgence in state court scrutiny of the public use requirement, often backed up by state legislation that explicitly seeks to limit the scope of takings for economic development. According to some, such state reforms have been largely ineffective. Ilya Somin, one of the most prolific writers on economic development takings in the US, has argued that this is partly due to so-called "rational ignorance" of political decision-makers and voters regarding the subtleties of the public use issue. The idea is that the distance between policy makers and communities affected by economic development takings is too great, so that policy makers have no incentive to consider the finer details of the takings equation. In principle, the US public is almost unanimously on the side of the local communities in cases like *Kelo*, but in practice, the great distance between political cause and effect means that effective reform policies are hard to formulate, since they tend to rely on oversimplified narratives tailored to centralised processes of decision-making.

[1] I argue that this shift in Supreme Court jurisprudence can be pin-pointed rather precisely to the case of *Berman*, see *Berman v Parker* 348 US 26.

In Section 3.8, I go on to consider a few recent suggestions that I regard as possible answers to this concern. These suggestions, in particular, focus on the need for new frameworks for collective action, institutions that can replace the top-down dynamics of eminent domain in cases of economic development. The idea here is to ensure a greater level of self-governance for the communities directly affected by the development, the individual members of which have a rational incentive to invest time and effort in reaching sophisticated compromises that can replace the use of black-white solutions (be it in the form of an economic development taking or a politically sanctioned top-down *ban* on such takings).

I argue that this idea embodies both a natural and necessary counterpart to increased judicial scrutiny of the public use restriction. In particular, I argue that the two ideas are mutually conducive to each other, properly conceived. This argument will set the stage for the case study in the second part of the thesis, where I explore the tension between takings and self-governance in the context of hydropower development in Norway. In Section 3.9, I offer a conclusion.

3.2 The "Underscrutinised" Language of Economic Development

Public-private partnerships are becoming increasingly important to the world economic order.[2] To some, they are the illegitimate children of privatisation and deregulation, while others see them as efforts to make the public sector more efficient and accountable. Either way, their numbers are growing, and they appear to be here to stay.[3] In this situation, it is inevitable that when eminent domain is used to acquire property for economic development, those who directly benefit will often

[2] See generally Stéphane Saussier, 'Public–private partnerships' (2013) 89 Journal of Economic Behavior & Organization 143.

[3] Although their potentially pernicious effects on stability and accountability has also been noted. See, e.g., CRichard Baker, 'Investigating Enron as a public private partnership' (2003) 16(3) Accounting, Auditing & Accountability Journal 446 (arguing that "the Enron scandal can be better understood as an American form of public private partnership rather than just another example of capitalism run amok").

be commercial companies rather than public bodies. In the previous chapter, I pointed out how indirect public benefits are typically used to justify such takings. Standard legitimizing reasons include the prospect of new jobs, increased tax revenues, and various other economic and social ripple effects. However, as I have indicated, economic development takings have a tendency to result in controversy.

In the US after *Kelo*, they have also been at the forefront of the constitutional property debate. In the rest of the world, a similar shift in academic outlook has yet to take place, but expropriation-for-profit situations are increasingly coming into focus also on the global stage.[4] If we lift our perspective slightly, to consider commercially motivated interference in property more generally, it even seems appropriate to speak of a crisis of confidence in property law, particularly in relation to land rights. This is most clearly felt in the developing world, where egalitarian systems of property use and ownership are coming under increasing pressure. It has been noted, in particular, that large-scale commercial actors are assuming control over an increasing share of the world's land rights, a phenomenon known as *land grabbing*.[5]

So far, most research on land grabbing has looked at how commercial interests, often cooperating with nation states, exploit weaknesses of local property institutions, to acquire land voluntarily, or from those who lack formal title. However, the danger of *Kelo*-type reasoning has also been recognised. In particular, it has been noted how the purported public interest in economic development can be used to justify land grabs that would otherwise appear unjustifiable. In a recent article, Smita Narula cites *Kelo* directly and warns that procedural safeguards alone might not provide sufficient protection against abuse. She writes:

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4 See, e.g., Kevin Gray, 'Recreational Property' in Susan Bright (ed), *Modern studies in property law: Volume 6* (Hart Publishing 2011); Emma JL Waring, 'The prevalence of private takings' in Nicholas Hopkins (ed), *Modern studies in property law: Volume 7* (Hart Publishing 2013); LCA Verstappen, 'Reconceptualisation of Expropriation' in H Mostert and LCA Verstappen (eds), *Rethinking Public Interest in Expropriation Law* (Forthcoming, 2014).

5 See generally Saturnino M Borras and others, 'Towards a better understanding of global land grabbing: an editorial introduction' (2011) 38(2) Journal of Peasant Studies 209.

> Procedural safeguards, however, can all too easily be co-opted by a state because its claims about what constitutes a public purpose may not be easy to contest. Particularly within the context of land investments, states could use the very general and under-scrutinized language of "economic development" to justify takings in the public interest.[6]

This underscores the broader relevance of the study of economic development takings. In addition, it reminds us that the question of what can be justified in the name of "economic development" is a general one, not confined to particular systems for organizing property rights. To address this, and to restore confidence in the institution of property more generally, many turn towards *human rights*. These scholars argue that a human right to land should be recognised on the international stage, a right that would apply even when those most affected by a land grab lack formal title.[7] If successful, this approach promises to deliver basic protection against interference in established patterns of property use independently of how particular jurisdictions approach property.

In Europe, a human rights perspective is already of great practical significance due to the European Convention of Human Rights (ECHR) and the court in Strasbourg (ECtHR). But, of course, in the context of land grabbing, protecting land rights is not primarily a question of protecting the civil law ideal of individual dominion. Rather, it is a question of providing protection against large-scale transactions that destabilise or destroy established patterns of land use, to the detriment of local communities. Nevertheless, the questions raised by the public interest narrative – and the notion of "economic development" in particular – should arise in much the same way as in cases when formal title is acquired following a state-authorised taking.

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6 Smita Narula, 'The Global Land Rush: Markets, Rights, and the Politics of Food' [2013] (1) Stanford Journal of International Law 140, 157.

7 See generally Olivier De Schutter, 'The Emerging Human Right to Land' 12(3) International Community Law Review; Olivier De Schutter, 'The Green Rush: the Global Race for Farmland and the Rights of Land Users' (2011) 52(2) Harvard International Law Journal 503; Rolf K'unnemann and Sofía Monsalve Suárez, 'International Human Rights and Governing Land Grabbing: A View from Global Civil Society' (2013) 10(1) Globalizations 123.

Hence, it is somewhat surprising that the special category of for-profit takings has not received more attention from the point of view of human rights law. In human rights discourse, the focus tends to be rather on fairness and proportionality as broad benchmarks, in addition to specific values related to food and water security as well as the protection of basic livelihoods, issues that arise with particular urgency in the context of third-world land grabs. However, to achieve effective protection we need firm categories and enforcible legal principles to back up our broad benchmarks and good intentions. In this regard, I think Narula is right to stress that the lack of a convincing approach to the notion of "economic development" is a crucial challenge.

On the one hand, economic development is no doubt a sound overreaching goal, particularly for poor nations. But at the same time, the risk of abuse is obvious when such a vague term is used to justify dramatic interferences in property. After all, interferences in property can cause severe disturbances in people's life. This, moreover, is true for middle-class US homeowner in much the same way as it is true for members of self-sustaining agrarian communities in Africa, although the stakes might be very different.

As illustrated by *Kelo*, deep conflicts can arise in this regard also in developed democracies with long established and relatively stable systems of private property. In the following, I will attempt to shed further light on the issue as it arises in such legal systems, without considering the additional complications that arise when property itself is a more fragile concept. I note, however, that according to the social function view of property, there is no need to view formally recognised property rights as completely distinct from rights arising from property use that is not based on formal title. The two are intertwined and the difference between them is at most a matter of degree.[8]

At the same time, my case study will look to Norway, a prosperous European country with a

[8] Moreover, if the human flourishing account of property values is successfully developed, there should even be hope that a unified normative treatment can be given at some point.

long and relatively stable tradition of an egalitarian distribution of land rights among the rural population. Hence, it is prudent to narrow down the discussion here by focusing on jurisdictions where property as such is a similarly stable institution.[9] I will do so now, beginning with a brief look at English and German law, to illustrate that there are significant variances in how different European jurisdictions think about property in general and takings in particular. Then I turn my attention to the ECHR and the proportionality test that is now at the core of property adjudication at the ECtHR.

Following this, I move on to consider the US in greater depth, both the historical debate that led to *Kelo* and the suggestions for reform that have emerged following its backlash. A closer look is necessary because of the sheer magnitude of writing on this issue in the US. Moreover, while much of it is repetitive and coloured by the tense political climate, I believe some historical points, as well as some recent suggestions for reform, are highly relevant also to the international setting. To single out and analyse those aspects is the main aim of this part of the chapter. Indeed, the current debating climate in the US might be an indication of what is to come also in Europe, if concerns about the legitimacy of economic development takings are not taken seriously.

In response to that worry, this chapter aims to bring into focus the key question of how to ensure meaningful participation for owners and their local communities in decision-making pertaining to economic development on their land. The tentative answers provided in Section 3.8 will set the stage for the remainder of the thesis, where these answers will be assessed in depth against the case study of Norwegian hydropower.

9 The relation with third-world land grabbing is a highly interesting question for future work.

3.3 A European Contrast

Economic development takings have not become as controversial in Europe as they are in the US, but there have been cases where the issue has come up, in several different jurisdictions.[10] The P1(1) of the ECHR protects property, but the legitimacy of economic development takings has not yet been discussed in case law from the European Court of Human Rights (ECtHR). However, it is interesting to analyse cases like *Kelo* against P1(1), particularly since the ECtHR has developed a doctrine that focuses on "proportionality" and "fairness" rather than the purpose of interference.[11]

In this section, I address economic development takings from the point of view of European sources. I first contrast English and German law, to show that there are significant differences between European jurisdictions in this regard. I then go on to give a more detailed presentation of the unifying property clause in P1(1). The case law from the ECtHR is presented and analysed in some depth, in an effort to assess how the ECtHR would be likely to approach an economic development case such as *Kelo*. In particular, I argue that the proportionality doctrine offers an interesting approach to such cases. Importantly, the doctrine stipulates that a "fair balance" must be struck between the interests of the property owner and the public.[12] I argue that such a perspective could make it easier to get to the heart of why economic development takings are often seen as problematic, without getting lost in theoretical discussions about the meaning of terms like "public use" or "public purpose". However, I also raise the concern that the ECtHR is not the appropriate institution for applying the proportionality test. Indeed, its remoteness to most of

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10 For instance, in the UK, Ireland and Germany, as well as in Norway and Sweden. See AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011) 466-483; Geir Stenseth, 'Noen internasjonale utviklingstrekk i ekspropriasjonsretten' (2010) 123(04-05) Tidsskrift for Rettsvitenskap 774.

11 See generally, Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005) Chapter 5. This approach may become even more significant as a source of property protection in the future, as the ECtHR have indicated that there are "jurisprudential developments in the direction of a stronger protection under Article 1 of Protocol No. 1", see *Lindheim and others v Norway* ECHR 2012 985, para 135.

12 Allen, *Property and the Human Rights Act 1998* (n 11) Chapter 5.

Europe suggests that we should look for more locally grounded legitimacy-enhancing institutions. Such institutions will likely be better able to assess the fairness of interference in context.

I go on to discuss whether existing government institutions can serve this purpose, arguing that local courts may well be the best candidates. However, I also note that active application of the proportionality test in property cases might not be found at the local level. In this regard, the ECtHR could play a crucial role, by focusing on the systemic question of what issues local courts need to consider when assessing legitimacy of property interference.

However, quite apart from this, there is reason to worry that judicial bodies are not ideally suited to carry out the kind of assessment that is required. Hence, new institutional proposals might be in order. I conclude by arguing that once the need for local grounding is recognised and met, the ECtHR has the potential to play an important and constructive role in providing oversight and developing basic principles, also with respect to new institutions that aim to deliver increased legitimacy at the local level.

3.3.1 England

In England, the principle of parliamentary supremacy and the lack of a written constitutional property clause has led to expropriation being discussed mostly as a matter of administrative law and property law, not as a constitutional issue.[13] Moreover, the use of compulsory purchase – the term most often used to denote takings in the UK – has not been restricted to particular purposes as a matter of principle. The uses that can warrant compulsory alienation of property are those that parliament regard as worthy of such consideration. However, as private property itself has long been recognised as a fundamental right, the power of compulsory purchase has typically been exercised with caution.

[13] Michael Taggart, 'Expropriation, Public Purpose and the Constitution: Essays on public law in honour of Sir William Wade' in *The Golden Metwand and the Crooked Cord* (Oxford University Press 1998).

In his *Commentaries on English Law*, William Blackstone famously described property as the "third absolute right" that was "inherent in every Englishman".[14] Moreover, Blackstone expressed a very restrictive view on the possibility of expropriation, arguing that it was only the legislature that could legitimately interfere with property rights. He warned against the dangers of allowing private individuals, or even public tribunals, to be the judge of whether or not the "common good" could justify takings. Blackstone went as far as to say that the public good was "in nothing more invested" than the protection of private property.[15]

Historically, Blackstone's description conveys a largely accurate impression of takings practice in England. Indeed, Parliament itself would usually be the granting authority in expropriation cases, through so-called *private Acts*. Hence, compulsory purchase would not take place unless it had been discussed at the highest level of government. Moreover, the procedure followed by parliament in such cases strongly resembled a judicial procedure; the interested parties were given an opportunity to present their case to parliament committees that would then decide whether or not compulsion was warranted.[16]

On the one hand, the direct involvement of parliament in the decision-making process reflected a fundamental respect for property rights. But at the same time, parliamentary supremacy also meant that the question of legitimacy was rendered mute as soon as compulsory purchase powers had been granted. The courts were not in a position to scrutinize takings at all, much less second-guess parliament as to whether or not a taking was for a legitimate purpose.

Eventually, an overworked parliament developed procedures for dealing more expeditiously with

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14 William Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press 1979) 134-135.

15 Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (n 14) 134-135.

16 See Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 13-16. While this procedure reflected a protective attitude towards private property, recent scholarship has also pointed out that expropriation was in fact used very actively in Britain, particularly following the glorious revolution, see Julian Hoppit, 'Compulsion, Compensation and Property Rights in Britain, 1688–1833' (2011) 210(1) Past & Present 93.

takings cases. Moreover, during the 19th Century, as an industrial economy developed, private Acts granting compulsory purchase powers to commercial companies grew massively in scope and importance.[17] Private railway companies, in particular, regularly benefited from such Acts.[18] During this time, the expanding scope of private-to-private transfers for economic development led to high-level political debate and controversy. Usually, it would attract particular opposition from the House of Lords. Interestingly, this opposition was not only based on a desire to protect individual property owners. It also often reflected concerns about the cultural and social consequences of changed patterns of land use.[19]

Hence, the early debate on economic development takings in the UK shows some reflection of a contextual approach to property protection. At the same time, as society changed following increasing industrialisation, an expansive approach to compulsory purchase would eventually emerge as the norm. The idea that economic development could justify takings gradually became less controversial.

Today, the law on compulsory purchase in England is regulated in statute and the role of courts is to a large extent limited to the application and interpretation of statutory rules. Some common law rules still play an important role, such as the *Pointe Gourde* rule, which stipulates that changes in value due to the compensation scheme itself should be disregarded when calculating compensation to the owner.[20] With respect to the question of legitimacy, however, the starting

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17 See Allen, *The Right to Property in Commonwealth Constitutions* (n 16) 204.

18 Allen, *The Right to Property in Commonwealth Constitutions* (n 16) 204. See generally RW Kostal, *Law and English Railway Capitalism* (Clarendon Press 1997).

19 Allen, *The Right to Property in Commonwealth Constitutions* (n 16) 204.

20 The rule takes it name the case of *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* [1947] UKPC 71. The underlying principle, including also statutory regulations with a similar effect, is referred to as the "no scheme" principle, see Compulsory Purchase and Compensation: Disregarding the Scheme (Discussion Paper, Law Commission 2001). The principle is found in many jurisdictions, see Jacques Sluysmans, Stijn Verbist and Regien de Graaff, 'Compensation for Expropriation: How Compensation Reflects a Vision on Property.' (2014) 2014(1) European Property Law Journal 3. The principle is often quite contentious, and notoriously hard to apply in practice. For a recent attempt at clarifying the principle, see *Waters and other v Welsh National Assembly* [2004] UKHL 19. I note that a strict interpretation of the no-scheme principle effectively precludes benefit sharing between takers and owners, a phenomenon that is of particularly relevance in the context

point for English courts is that this is a matter of ordinary administrative law.

More recently, the Human Rights Act 1998 adds to this picture, since it incorporates the property clause in P1(1) into English law. Even so, the usual approach in England is to judge objections against compulsory purchase orders on the basis of the statutes that warrant them, rather than constitutional principles or human rights provisions that protect property.[21] It is typical for statutory authorities to include standard reservations to the effect that some public benefit must be identified in order to justify a compulsory purchase order, but the scope of what constitutes a legitimate purpose can be very wide. For instance, to warrant a taking under the Town and Country Planning Act 1990, it is enough that it "facilitates the carrying out of development, redevelopment and improvement on or in relation to the land".[22]

While various governmental bodies are authorised to issue compulsory purchase orders (CPOs), a CPO typically has to be confirmed by a government minister. The affected owners are given a chance to comment, and if there are objections, a public inquiry is typically held. The inspector responsible for the inquiry then reports to the relevant government minister, who makes the final decision about whether or not it should be granted, and on what terms. The CPO may then be challenged in court, but will usually only be scrutinized on the basis of whether or not it lies within the scope of the statute authorising it. Hence, the discussion and evaluation performed by the court is firmly grounded in statutory rules.

That said, the idea that property may only be compulsorily acquired when the public stands

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of economic development takings. I will not address this particular issue in any depth here – I choose instead to focus on legitimacy of takings in a broader, non-compensatory sense. However, the compensation aspect of economic development takings is also very interesting (and challenging). For further details, I refer to 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).

21 The important statutes are the Acquisition of Land Act 1981, the Land Compensation Act 1961, the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004. Acquisition of Land Act 1981, the Land Compensation Act 1961, the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004.

22 Town and Country Planning Act 1990 s 226.

to benefit permeates the system. Indeed, this has also been regarded as a constitutional principle, for instance by Lord Denning in *Prest v Secretary of State for Wales*.[23] He said:

> It is clear that no minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomsoever it is made – should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands. If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen.[24]

Lord Denning also supported the doctrine of necessity, as expressed by Forbes J in *Brown v Secretary for the Environment*:[25]

> It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary, in order to exercise the powers for the purposes of the Act under which the compulsory purchase order is made, that the acquiring authority should have authorisation to acquire the land in question.[26]

In practice, these principles are mostly implicit in legal reasoning, as a factor that influences the courts when they interpret statutory rules and carry out judicial review of administrative decisions. As Watkins LJ stated in *Prest*:

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[23] *Prest v Secretary of State for Wales* (1982) 81 LGR 193.

[24] *Prest v Secretary of State for Wales* (n 23) 198.

[25] *Brown v Secretary for the Environment* (1978) 40 P & CR 285.

[26] *Brown v Secretary for the Environment* (n 25) 291.

> The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.[27]

In *R v Secretary of State for Transport, ex p de Rothschild*, Slade LJ referred to *Prest* and made clear that he did not regard it as expressing a rule concerning the burden of proof in compulsory purchase cases. Rather, he took it as more general observation on the severity of property interference and the importance of vigilance in such cases.[28] He pointed to "a warning that, in cases where a compulsory purchase order is under challenge, the draconian nature of the order will itself render it more vulnerable to successful challenge".[29]

A nice example of how these sentiments influence the assessment of legitimacy of takings, showing how it is applied in economic development cases, can be found in the recent case of *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*.[30] Here a CPO was granted to allow the company Tesco to acquire land from its competitor Sainsbury, in a situation when they were both competing for licenses to undertake commercial development on the same land, owned partly by both. The decisive factor that had led the local authorities to grant the CPO was that Tesco had offered to develop a different property in the same local area, which was currently in need of regeneration.

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27 *Prest v Secretary of State for Wales* (n 23) 211-212.

28 *R v Secretary of State for Transport, ex p de Rothschild* (1989) 1 All ER 933 (CA).

29 *R v Secretary of State for Transport, ex p de Rothschild* (n 28) 938.

30 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, (2010) 1 AC 437.

Sainsbury protested, arguing that the local council could not strike such a deal on the use of its compulsory purchase power. It was argued, moreover, that taking the land for incidental benefits resulting from development in a different part of town was not legitimate under the Town and Country Planning Act 1990. The UK Supreme Court agreed 4-3, with Lord Walker in particular emphasising the need for heightened judicial scrutiny in cases of private-to-private takings for economic development.[31] Lord Walker even cited *Kelo*, to further substantiate the need for a stricter standard in such cases.[32]

However, the main line of reasoning adopted by the majority was based on an interpretation of the Town and Country Planning Act itself. In particular, the majority held that it was improper for the local council to take into consideration the development that Tesco had committed itself to carry out on a different site.[33] This, in particular, was not "improvement on or in relation to the land", as required by the Act.[34] In addition, Lord Collins, who led the majority, said that "the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision maker".[35] Hence, the general importance of the decision for economic development cases is unclear.

Still, it is interesting to see how the purpose of the interference featured in the Supreme Court's interpretation and application of the statutory rules. The opinion of Lord Walker is particularly interesting, since he stresses that "The land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential."[36] He goes on to state that "economic regeneration brought about by urban redevel-

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31 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 80-84.

32 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 81.

33 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 73-79.

34 Town and Country Planning Act 1990, s 336.

35 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 70.

36 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 81.

opment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive."[37]

Lord Walker then makes clear that he does not think it is impermissible, as such, for the local council to take into account positive effects on the local area, even when these do not directly result from the planned use of the land that is being acquired. Instead, he relies explicitly on the for-profit character of the taking, by arguing that "the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for."[38]

Lord Walker's opinion might indicate that the narrative of economic development takings is about to find its way into English case law. Moreover, a more critical approach might be adopted in the future, when compulsory purchase powers are made available to commercial companies wishing to undertake for-profit schemes. However, for schemes where the commercial aspect appears less dominant, English courts still appear very reluctant to quash CPOs, also when the purpose is economic development. This is so even in situations when the owners have requested a stricter standard of review on the basis of human rights law.

For instance, in the case of *Smith & Others v Secretary of State for Trade and Industry*, a caravan site was compulsorily acquired for development in connection with the London Olympic Games.[39] Some of the owners protested, including Romany Gypsies who used the caravans as their primary residence. A public inquiry was held, after which the inspector recommended that the CPO

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37 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 81.

38 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 30) 84.

39 *Smith and Others v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), (2008) 1 WLR 394.

should not be confirmed until adequate relocation sites had been identified. However, due to the "urgency, timing and importance" of the project, the Secretary of State decided to go ahead before a relocation scheme was put in place (although he expressed commitment to ensuring satisfactory relocation).[40] The owners argued that without satisfactory relocation plans, the interference in the property rights was not proportional and had to be struck down on the basis of human rights law, in particular Article 8 in the ECHR regarding respect for the home and private life.[41]

The Court of Appeal considered the matter in great depth, applying the doctrine of proportionality developed at the ECtHR. Importantly, this doctrine was understood to go beyond the standard form of judicial review required under English law. However, the Court still concluded that the taking was proportional. This was largely based on the finding that "the issue of proportionality has to be judged against the background that everyone accepts that an overwhelming case has been made out for compulsory acquisition of the sites for the stated objectives and that compulsory purchase is justified."[42]

Justice Williams arrived at this conclusion after noting that the owners' *only* substantial objection against the CPO was that it was confirmed before adequate relocation measures had been agreed on.[43] Hence, the question, as he saw it, did not concern the validity of using compulsory purchase powers, but merely the timing with which it had been ordered. On this basis, he framed the question of legitimacy as one relating to the "necessity" standard, according to which an infringement of Convention rights is only permissible when the public interest cannot be served in some other way.[44] A strict reading of this standard holds that an interference must be the *least*

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40 *Smith and Others v Secretary of State for Trade and Industry* (n 39) 10.

41 *Smith and Others v Secretary of State for Trade and Industry* (n 39) 27-51.

42 *Smith and Others v Secretary of State for Trade and Industry* (n 39) 42.

43 *Smith and Others v Secretary of State for Trade and Industry* (n 39) 42.

44 *Smith and Others v Secretary of State for Trade and Industry* (n 39) 43.

intrusive means of achieving the stated aim.[45]

Justice Williams argued against such a strict reading, subscribing instead to a view expressed as an *obiter* in the case of *Pascoe v The First Secretary of State*. According to this view, an interference need not be the least intrusive means. Rather, it is sufficient that the measure is "reasonably necessary" to achieve that aim.[46] However, while noting his agreement with this approach, Justice Williams went on to also apply the stronger necessity test, and found that even if this was applied the CPO in question would still be a proportional interference.[47]

It seems clear that while the taking in question was for economic and recreational development purposes, the case was marked by a preliminary finding to the effect that the legitimacy of the aim of interference – to facilitate the London Olympics – was beyond reproach. Hence, there was no need for, or even room for, more detailed purposive reasoning of the kind that would later be applied by Lord Walker in *Sainsbury*. The fact that the taking was for economic development and recreation, not for a pressing public need, was not considered relevant. Moreover, since the case was construed to be solely about the extent to which the CPO was "necessary" to further its stated aim, the proportionality test that was carried out, despite being detailed, was very narrow in scope. It concerned only proportionality of the means, not of the aim itself. The question of how to weigh the public interest in a multi-billion dollar sporting event against the security of someone's home was not considered.

In later cases, a dismissive attitude towards substantive review has been adopted even in situations when the owners have argued against takings by explicitly questioning the proportionality of the interference against the importance of the aim. In the case of *Alliance Spring Co Ltd v The*

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45 Such a standard has been adopted in some Convention cases, for instance in *Samaroo v Secretary Of State For Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150.

46 See *Pascoe v The First Secretary of State* [2006] EWHC 2356, [2007] 1 EWHC 885, 74-75 (quoting *Clays Lane Housing Co-Operative Ltd, R (on the application of) v Housing Corporation* [2004] EWCA Civ 1658, (2005) 1 WLR 2229, 25).

47 *Smith and Others v Secretary of State for Trade and Industry* (n 39) 41-50.

First Secretary of State, a large number of properties were expropriated to build a new football stadium for the football club Arsenal.[48] Some owners who stood to lose their business premises protested, pointing to the fact that the inspector in charge of the public inquiry had recommended against the takings.[49] As noted by Justice Collins, the main line of argument presented against the taking was that it did not serve a "proper purpose".[50] This argument was dismissed, however, with Justice Collins concluding as follows:

> There is nothing in the material put before and accepted by the Inspector which persuades me that that decision was ill founded or was one which the Secretary of State was not entitled to reach. Developments which result in regeneration of an area are often led by private enterprise. Mr Horton perforce accepts that that is so, but submits that this is not the sort of situation where, for example, a private development is the anchor for a particular scheme. I disagree.[51]

Hence, unlike the case of *Smith*, where the Court did in fact carry out its own assessment of proportionality, the *Alliance* Court was content with deferring to the assessment carried out by the executive branch.[52] As such, the case appears to follow the pattern of judicial review of CPOs established before the Human Rights Act 1998. This means that the decision also contrasts with how English courts have approach the Convention in relation to other rights, such as those of Article 8 addressed in *Smith*.

Whether the approach taken in *Alliance* is good law after *Sainsbury* is unclear; from Lord Walker's opinion, it seems that a more substantive assessment can be demanded for similar cases

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48 *Alliance Spring Co Ltd v The First Secretary of State* [2005] EWHC 18 (Admin).

49 *Alliance Spring Co Ltd v The First Secretary of State* (n 48) 6-7.

50 *Alliance Spring Co Ltd v The First Secretary of State* (n 48) 19.

51 *Alliance Spring Co Ltd v The First Secretary of State* (n 48) 19.

52 This has been criticized, e.g., by Kevin Grey who describes the reference to Convention Rights in Alliance as "worryingly brief". See Gray, 'Recreational Property' (n 4).

in the future. While this might not imply a different outcome for a case like *Alliance*, it would mean that courts would have to engage in independent review of the purpose and merits of contested CPOs that benefit commercial actors. In particular, English courts would have to change the way they approach such cases, by being better prepared to assess for themselves whether a fair balance is struck between the interests of the developer and the property owners. Hence, it is not unlikely that the category of economic development takings will become an important point of reference in the future, both for the law and those who study it.

3.4 The Property Clause in the European Convention of Human Rights

The starting point for property adjudication at the ECtHR is that States have a "wide margin of appreciation" with regard to the question of whether or not an interference in property rights is in the public interest.[53] This question is thought to depend on democratically determined policies to such an extent that it is rarely appropriate for the Court to censor the assessments made by member states. At the same time, the Court has gradually adopted a more active role in assessing whether or not particular instances of interference are proportional and able to strike a fair balance between the interests of the public and the property owners.[54] As argued by Tom Allen, this has caused P1(1) to attain a wider scope than what was originally intended by the signatories.[55].

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53 See *James and others v United Kingdom* (1986) Series A no 98, para 54.

54 See *Sporrong and Lónnroth v Sweden* Series A no 52, para 69 and *James* (n 53) para 120. The standard account of the protection against interference inherent in P1(1) describes it as consisting of three rules. First, there is the rule of *legality*, asserting that an interference needs to be authorized by statute. Second, there is the rule of *legitimacy*, making clear that interference should only take place in pursuance of a legitimate public purpose. Both of these rules are of little practical significance, however, as the margin of appreciation has been regarded as very wide in regards to both. The third rule is the "fair balance" principle, which is applied by the ECtHR in almost all cases when it finds that there has been a violation of P1(1). In the following, I focus only on this rule and on those aspects of it that I think are most relevant to the question of economic development takings. For a more detailed description of P1(1) generally, I refer to Allen, *Property and the Human Rights Act 1998* (n 11).

55 Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (2010) 59(04) International & Comparative Law Quarterly 1055, 1055.

In the case law behind this development, the focus has predominantly been on the issue of compensation, with the Court gradually developing the principle that while P1(1) does not entitle owners to full compensation in all cases of interference, the fair balance will likely be upset unless at least some compensation is paid, based on the market value of the property in question.[56] The focus on compensation has also been reflected in academic work on P1(1), which tends to address proportionality from a financial perspective, by investigating to what extent owners are entitled to compensation based on the market value of their property. Indeed, when considering case law and literature on the subject, one is left with the impression that "fair balance" with regards to P1(1) is crucially linked to financial entitlements, primarily used as a standard that can justify a right to compensation that goes beyond what the wording of P1(1) might initially suggest.

In recent case law, however, it has become clear that the fair balance test encompasses more than this. In particular, it sometimes gives the Court in Strasbourg occasion to reflect on the social context and purpose of interference, in a manner largely consistent with the social function approach to property.

In *Chassagnou and others v France* the situation was that landowners were compelled to permit hunting on their land, following compulsory membership in a hunting association which was set up to manage hunting in the local area.[57] The owners protested this on the grounds that they were ethically opposed to hunting. The Court agreed that there had been a breach of P1(1).

In the later case of *Hermann v Germany*, the circumstances were similar and the Court followed the precedent set in *Chassagnou*. In addition, the Court commented that they had "misgivings of principle" about the argument that financial compensation could provide adequate protection in such a case.[58] In this way, the hunting cases illustrate that to the ECtHR, the right to property

[56] See *Scordino v Italy* ECHR 2006–V 276, para 103. The case also illustrates that the Court has adopted a fairly strict approach to the question of when it is legitimate to award less than full market value.

[57] *Chassagnou and Others v France* ECHR 1999–III 22.

[58] See *Hermann v Germany* ECHR 2010 1110, para 91.

is more than a financial entitlement. The fair balance that must be struck could pertain to other aspects, such as the owner's right to make use of his property in accordance with his convictions and to take part in decision-making processes regarding how it should be managed.[59]

In addition, the Court has adopted a similarly broad approach in recent cases involving rent control schemes and housing regulation. There are obvious financial interests at stake in such cases, for both landlords and tenants. However, the Court has addressed them by looking to the fairness of the underlying regulation more generally, by taking into account the social, economic and political context. Moreover, the Court has not shied away from using concrete cases as a starting point for providing an assessment of the sustainability of national law as such.

In *Hutten-Czapska v Poland*, for instance, the Court concluded that the case demonstrated "systemic violation of the right of property".[60] The case concerned a house that had been confiscated during the Second World War. After the war, the property was transferred back to the owners, but in the meantime, the ground floor had been assigned to an employee of the local city council. The state implemented strict housing regulations during this time, which eventually led to the applicant's house being placed under direct state management.[61] Following the end of communist rule in 1990, the owners were given back the right to manage their property, but it was still subject to strict regulation that protected the rights of the tenants.[62] In addition to rent control, rules were in place that made it hard to terminate the rental contracts. Hence, it became impossible for the owners to make use of the house themselves.[63]

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59 The assessment of proportionality should be concrete and contextual, and it is not based on a narrow or formalistic concept of property as dominion. This is demonstrated, for instance, by *Chabauty v France* ECHR 2012 1784. Here the Court found no violation of P1(1) although the facts seemed close to those of *Chassagnou*. The case differed, however, in that the owner himself was not opposed to hunting, but wanted to withdraw his land from the hunters' association to enjoy exclusive hunting rights.

60 *Hutten-Czapska v Poland* ECHR 2006–VIII 628, para 239.

61 *Hutten-Czapska* (n 60) paras 20-31.

62 *Hutten-Czapska* (n 60) paras 31-53.

63 *Hutten-Czapska* (n 60) paras 20-53.

After an in-depth assessment of the relevant parts of Polish law and administrative practice, the Grand Chamber of the ECtHR concluded that there had been a violation of P1(1). Importantly, they did not reach this conclusion by focusing on the house as a source of financial entitlements for the owners. Rather, they focused on the overall character of the Polish system for rent control and housing regulation, as it manifested in the concrete circumstances of the applicant's case. The financial consequences for the owners were considered, as was the financial situation of the tenants.[64] The Court was particularly concerned with the fact that the total rent that could be charged for the house was not sufficient to cover the running maintenance costs.[65] In particular, it was noted that the consequence of this would be "inevitable deterioration of the property for lack of adequate investment and modernisation".[66]

In the end, the Court highlighted how three factors combined to leave owners in a precarious position. First, the rigid rent control system made it hard to sustainably manage rental property. Second, tenancy regulation made it hard for owners to terminate tenancy agreements. Third, the Court noted that the state itself had set up these tenancy agreements during the days of direct state management, shedding doubt on the legitimacy of the commitments that these contracts imposed on owners. In combination, these factors led the Court to conclude that a fair balance had not been struck.[67]

The contextual nature of the Court's reasoning in *Hutten-Czapska* is evidenced not only by the extent to which the concrete circumstances were assessed against the goal of fairness. It is also illustrated by how the Court explicitly places the "social rights" of the tenants on equal footing with the property rights of the owners.[68] The result, therefore, was not premised on a narrow

64 *Hutten-Czapska* (n 60) paras 60-61.

65 *Hutten-Czapska* (n 60) para 224.

66 *Hutten-Czapska* (n 60) para 224.

67 *Hutten-Czapska* (n 60) paras 224-225.

68 *Hutten-Czapska* (n 60) para 225.

understanding of property protection as an individual entitlement, but on a broader vision of property as a social institution.

It is also of interest to note how the Court concludes that the root of the problem is found in the Polish legal order as such. In this regard, great weight is placed on the observation that the regulatory system suffers from a lack of adequate safeguards to protect owners against imbalances such as those identified in *Hutten-Czapska*. In particular, the Court reflects on the position of owners and comments on "the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with the maintenance of property or to have the necessary repairs subsidised by the State in justified cases". Hence, the rent control scheme alone was not the whole problem, the Court also criticised what it saw as a defective way of implementing it.[69] Moreover, the Court did not censor the political reasoning that motivated Polish housing legislation, but concluded instead that the "burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole".

I think this is the most important aspect of the case, pointing to the core function that the ECtHR should embrace more generally. It seems to me, in particular, that objections can be raised against the appropriateness of having the Court in Strasbourg assess concretely what is fair regarding the relationship between owners and tenants in a specific house in Gdynia. Its remoteness to the local conditions, as well as its lack of sensitivity and accountability to local democratic institutions suggests that the Court is not ideally placed to carry out the kind of contextual assessment that it prescribes for such cases. In addition, the amount of resources and time needed to independently scrutinize these aspects risks undermining its ability to deal expediently with its case load. The ECtHR will hardly be able to protect human rights in Europe on a case-by-case basis.

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69 *Hutten-Czapska* (n 60) para 224.

Instead, the aim should always be to get at the systemic features that cause perceived imbalances. As in *Hutten-Czapska v Poland Hutten-Czapska*,[70] the Court serves its function best when it is able to identify a sense in which the domestic legal order needs to be improved to better comply with human rights standards. This is particularly true when, as in that case, the Court notes that the applicants have insufficient options available for achieving a fair balance by appealing to institutions within the domestic legal order. By demanding *institutional* changes, the Court effectively delegates responsibility for ensuring the kind of fair balance that is required under the ECHR. Moreover, by scrutinizing the procedures and principles that the states apply when fulfilling this duty, it is likely that the Court will still be able to steer and unify the development of the case law.

Importantly, they would then be able to do so without having to engage extensively in concrete assessments of fairness. Against this, one may argue that the judicial or administrative bodies of the signatory states can easily circumvent their obligations by giving a superficial or biased assessment of the facts in human rights cases, to avoid embarrassment for the state's political or bureaucratic elite. However, this might then be raised as a procedural complaint before the ECtHR, resulting in cases revolving around Articles 6 (fair trial) and 13 (effective remedy).[71] In this way, the Court can streamline its functions, by always aiming to direct attention at issues that arise at a higher level of abstraction. This, in my view, is desirable. The ECtHR should not aim to micromanage the signatory states, particularly not in relation to a norm such a P1(1), which the Court itself regards as highly dependent on context.

However, the question arises as to what kind of institutions the Court should focus on in its effort to ensure fairness in relation to Convention rights such as property. It is not given, in particular,

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70 *Hutten-Czapska* (n 60).

71 I note that this also fits with recent developments at the ECtHR, toward somewhat broader scrutiny under Article 6, see *Khamidov v Russia* ECHR 2007 928.

that directing attention towards domestic judicial bodies is the most appropriate approach. Rather, it is logical to assume that those institutions most in need of reform will be exactly those that are most often responsible for violations. A possible lack of an effective complaints procedure would be worrying, but not as problematic as systemic weaknesses of those institutions that act in ways that give rise to complaints in the first place.

By shifting attention towards the institutional context of the primary decision-maker, the Court can also avoid getting stuck in deference to domestic judicial bodies. This can then be accomplished alongside a shift of attention away from concrete assessment of alleged violations. The Court can achieve this by concretely and critically assessing those rules and procedures that are identified as causally significant to individual complaints, at the administrative rather than the judicial level.[72]

Indeed, the case of *Hutten-Czapska v Poland Hutten-Czapska*[73] is suggestive of a move towards such a perspective. While the Court went into great detail about the facts of the case, it *also* looked at the case from an alternative perspective, more in line with the suggestion sketched above. In fact, I think it is likely that the Court will eventually veer even more towards such an approach, while deferring to national judicial bodies when it comes to concrete factual assessments. If not as a result of policy, I imagine this will happen from necessity, due to the limited capacity of the Court to hear the merits of individual cases.

The proportionality doctrine could still be applied, but approached in more abstract terms as the question of what kinds of rules, and what kinds of institutions, member states need to put in place to ensure fairness. In *Hutten-Czapska v Poland Hutten-Czapska*,[74] the Court moved in this direction, especially when it explained the basic principle as follows:

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[72] In the future, one might even encounter cases when the Court prefers to remain agnostic about whether a substantive violation occurred, focusing instead on the possible violation inherent in excessive systemic risks and a shortage of adequate safeguards.

[73] *Hutten-Czapska* (n 60).

[74] *Hutten-Czapska* (n 60).

> In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.[75]

I note how the Court builds on the earlier precedent set by cases such as *Sporrong and Lónnroth v Sweden Sporrong and Lónnroth v Sweden*[76] and *James and others v United Kingdom James.*[77] The first half of the quote, therefore, stresses that the Court itself must "look to the realities of the situation". However, in clarifying what is meant by this, the Court goes on to emphasise procedural aspects. In particular, it is made clear that the Court regards such aspects as an integral part of those "realities" that need to be assessed. Indeed, the Court even makes specific reference to the importance of several values that arise in the context of administrative law, such as predictability and effectiveness.

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75 *Hutten-Czapska* (n 60) para 151.

76 *Sporrong and Lónnroth v Sweden* (n 54).

77 *James* (n 53).

The passage above was subsequently quoted in *Lindheim and others v Norway*. In this case, the applicants complained that their rights had been violated by a recent Norwegian act that gave lessees the right to demand indefinite extensions of ground leases on pre-existing conditions.[78] In the end, the Court concluded that there had indeed been a breach of P1(1). Interestingly, they engaged in the same form of assessment that they had adopted in *Hutten-Czapska v Poland Hutten-Czapska*.[79] They held, in particular, that the Ground Lease Act itself was the underlying source of the violation. The problem was not merely that it had been applied in a way that offended the rights of the applicants. Hence, the Court did not only award compensation, it also ordered that general measures had to be taken by the Norwegian state to address the structural shortcomings that had been identified.

The Court also commented that its decision should be regarded in light of "jurisprudential developments in the direction of a stronger protection under Article 1 of Protocol No. 1".[80] However, in light of the change in perspective that accompanies this development, it is interesting to ask in what sense the protection is stronger. In particular, it is not *prima facie* clear that the Court's remark should be read as a statement expressing a change in its understanding of the content of individual rights under P1(1). Rather, it may be read as a statement to the effect that the Court now assumes it has greater authority to address structural problems under that provision. This authority, in particular, extends to the fair balance requirement, not only the (much more narrowly drawn) legality and legitimacy rules. In effect, this would allow the Court to conclude that a violation has occurred due to structural unfairness, even when it is not possible to trace this back to any flawed decision that specifically targets the applicants.

Is this relevant to the issue of economic development takings? I believe so. Indeed, I am struck

78 *Lindheim and others v Norway* (n 11) para 119.

79 *Hutten-Czapska* (n 60).

80 *Lindheim and others v Norway* (n 11) para 135.

by how the reasoning of the ECtHR in recent cases on hunting and rent control mirrors the kind of reasoning that Justice O'Connor engaged in when considering *Kelo*. The emphasis is on structural aspects and fairness, grounded on the facts of the concrete case and what they reveal about the rules and procedures involved. In this way, the contextual approach to property gains focus without losing its bite. The crux of arguments used to conclude violation is the observation that the established system can offend against the role that owners *should* occupy in order to be able to meet those obligations and exercise those freedoms that are attached to the property that they posses.

On this narrative, interference becomes illegitimate when it demonstrates a failure of governance. In the case of *Hutten-Czapska v Poland Hutten-Czapska*,[81] this boiled down to the observation that it was illegitimate to address problems in the Polish housing sector by placing the burden "on one particular social group", namely the owners.[82] This conclusion was backed up by the concrete observation that the rules and procedures in place meant that owners who were obliged to maintain their properties in good condition for their tenants were in fact prevented from doing so because they were not permitted to charge rents that would cover the costs.

In the case of *Kelo*, Justice O'Connor argued in a similar fashion when she concluded that the system which had led to the decision to condemn Suzanne Kelo's house was likely to function so as to systematically "transfer property from those with fewer resources to those with more". To Justice O'Connor, there was little doubt that this could become a general pattern, if safeguards were not put in place. Indeed, it must be presumed that a multi-million dollar company is always in a better position than a homeowner when arguing that "economic development" will result from their ownership.

To conclude, I think the ECtHR would have been likely to approach a case like *Kelo* in a

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81 *Hutten-Czapska* (n 60).

82 *Hutten-Czapska* (n 60) para 225.

manner consistent with Justice O'Connor's approach. Whether they would reach the same result seems more uncertain, particularly since confidence in the nation states' ability and willingness to regulate private-public partnerships might be higher in Europe. However, it seems unlikely that the ECtHR would follow the majority in *Kelo*, by simply deferring to the determinations made by the granting authority. Moreover, with the recent change in perspective towards a more structural assessment of property institutions at the ECtHR, Justice O'Connor's predictions about the "fallout" of the *Kelo* decision would likely have been of great interest to justices at the Court in Strasbourg.

3.5 The US Perspective on Economic Development Takings

In this section, I consider US law in more depth. First, I track the development of the case law on the public use restriction in the Fifth Amendment and in various state constitutions. I consider the jurisprudential development from the early 19th Century up to the present day.[83] Many writers assert that the 19th and early 20th Century was characterised by a "narrow" approach to public use which eventually gave way to a broader conception.[84] Against this, I argue that it is more appropriate to think of this period as one when courts adopted a broad approach to *judicial scrutiny* of the takings purpose at state level. Importantly, I also argue that while different state courts expressed different theoretical views on the meaning of "public use", there was a growing consensus that the approach to judicial scrutiny should be contextual, focused on weighing the rationale of the taking against the concrete social, political and economic circumstances of the

[83] The public use clause in the US constitution was not held to apply to state takings until the late 19th Century, see *Chicago, Burlington & Quincy RR Co v City of Chicago* 166 US 226 (1897).

[84] See, e.g., Walt (n 10) 483; Allen, *The Right to Property in Commonwealth Constitutions* (n 16) 203-204. For a more in-depth argument asserting the same, see Philip Nichols, 'The Meaning of Public Use in the Law of Eminent Domain' (1940) 20 Boston University Law Review 615.

local area.[85] In particular, I argue that early state courts did not focus as much on the exact wording of the constitutional property clause as some later commentators have suggested.

I go on to show that the doctrine of deference that was developed by the Supreme Court early in the 20th Century was directed primarily at state courts, not state legislatures and administrative bodies.[86] I then present the case of *Berman*, arguing that it was a significant departure from previous case law.[87] After *Berman*, deference was suddenly taken to mean deference to the (state) legislature, meaning that there would be little or no room for judicial review of the takings purpose. I go on to present the subsequent developments at state level, characterised by increasing worry that the eminent domain power could be abused by powerful commercial actors. I discuss the case of *Poletown*, where a neighbourhood of about 1000 homes was razed to provide General Motors with land to assemble a car factory.[88] I link this to the subsequent controversy that arose over *Kelo*, suggesting that it should be seen as the eventual backlash of *Berman*, resulting from unease with the idea that the contextual approach to public use should be abandoned in favour of an almost absolute rule of deference.

After the historical overview, I go on to briefly present the vast amount of research that has targeted economic takings in the US after *Kelo*. I devote special attention to proposals for new legitimacy-enhancing institutions for facilitating economic development of jointly owned land. I focus on two suggestions in particular, targeting compensation and participation respectively.[89] These proposals will serve as important reference points later on, when I consider the Norwegian appraisal and land consolidation courts in Chapters 4 and 5.

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85 A summary of state case law that supports this view is given in the little discussed Supreme Court case of *Hairston v Danville & W R Co* 208 US 598 (1908).

86 See *City of Cincinnati v Vester* 281 US 439 (1930) (echoing and citing *Hairston v Danville & W R Co* (n 85)).

87 *Berman v Parker* (n 1).

88 *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (1981).

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

3.6 The History of the Public Use Restriction

Going back to the time when the Fifth Amendment was introduced, there is not much historical evidence explaining why the takings clause was included in the bill of rights. Moreover, there is little in the way of guidance as to how it was originally understood. James Madison, who drafted it, commented that his proposals for constitutional amendments were intended to be uncontroversial to Congress.[90] Hence, it is natural to regard the property clause as a codification of an existing principle, not a novel proposal. Indeed, several state constitutions pre-dating the Bill of Rights also included takings clauses, seemingly based on codifying principles from English Common law.[91]

As I discussed in subsection 3.3.1 above, English legal theory from this time tended to hold private property in high regard. With this background it is not surprising that Madison regarded the property clause as an uncontroversial amendment.[92] Its importance may in fact have been greater as a legitimising force, increasing confidence in the regulatory power of the newly established state by setting up clear parameters for the exercise of that power. However, while the principle of the Fifth Amendment might have been theoretically self-evident, it was never clear what it would mean in practice, particularly in cases when takings where challenged on the basis that they were not for a "public use".[93]

There are two points that I would like to record about early US jurisprudence on this point. First, the distinction between public use and public purpose does not appear to have been con-

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90 See letters from Madison to Edmund Randolph dated 15 June 1789 and from Madison to Thomas Jefferson dated 20 June 1789, both included in James Madison, *The papers of James Madison, vol. 12, 2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789* (Charles F Hobson and Robert A Rutland eds, University Press of Virginia 1979).

91 See Emily A Johnson, 'Reconciling Originalism and the History of the Public Use Clause' (2011) 79 Fordham Law Review 265, 299.

92 Indeed, early American scholars also emphasised the importance of private property. For instance, in his famous *Commentaries*, James Kent described the sense of property as "graciously implanted in the human breast" and declared that the right of acquisition "ought to be sacredly protected", see James Kent, *Commentaries on American law* (1st edn, Commentaries on American Law, vol 2, O Halsted 1827) 257.

93 See Johnson (n 91) 317.

sidered sharp. In his *Commentaries*, James Kent first makes clear that the power of eminent domain is for "public use, and public use only", but then goes on to qualify this by stating that a taking which served a "purpose not of a public nature" would be unconstitutional.[94] He does not address this limitation in any detail, however, suggesting that it was not the subject of much debate at this time. To the founders, it seems that the right to compensation was considered more practically important, a sentiment that is also reflected in the *Commentaries*.[95] The public use limitation was probably taken for granted as a matter of principle, while it had not yet proved problematic as a matter of practical adjudication. Moreover, it appears to have been accepted that takings which clearly benefited the public would be legitimate regardless of whether or not the property was physically put to use by the public.[96]

An interesting early illustration of how courts approached takings controversies at this time can be found in *Stowell v Flagg*, a Massachusetts case from 1814. In this case, a landowner complained that his land had been flooded by a mill and sought a remedy in common law. The mill owner protested, however, since he was entitled to flood the land according to a special mill act, which allowed him to exercise the power of eminent domain to gain the right to flood his neighbour (provided statutory compensation was paid). The focus in the case was on whether a common law claim for damages could still be made, irrespective of the act's clear intention to deprive the affected neighbours of this opportunity. Hence, the court implicitly dealt with the legitimacy of the mill act itself, and they actively engaged with the public use requirement in the state constitution when making their assessment.[97] In the end, they found that the act was legitimate, and they highlighted the purpose of the interference, commenting that "these mills, early in the settlement

94 See Kent (n 92) 275-276.

95 James Kent held it to be "founded in natural equity" and described it as an "acknowledged principle of universal law", see Kent (n 92) 276.

96 Johnson (n 91).

97 *Stowell v Flagg* 11 Mass 364 (1814).

of this country, were of great public necessity and utility".[98]

At the same time, however, the court had misgivings about how the act had come to be applied and expressed concern that "the legislature, as well as the courts of law in this state, seem to have been disposed rather to enlarge, than to curtail, the power of mill owners".[99] Still, after noting that affected land owners were entitled to compensation under the act, the court concluded that the act had to be observed and that it precluded any claims for damages under common law. Hence, the case is an early example of judicial deference to the legislature in takings cases. More importantly, however, it also illustrates that the public use requirement was beginning to emerge as a potentially problematic issue in its own right. The presiding judge stated that he could not help thinking that the statute was "incautiously copied from the ancient colonial and provincial acts". It was not without reservation, therefore, that he held in favour of the mill owner, concluding that "as the law is, so must we declare it".[100]

While judicial deference was recognised as a guiding principle early on in US takings law, it is important to note in this regard that eminent domain was seldom used in a way that would raise serious controversy. English legal practices at this time ensured that the takings power would typically only be used as a last resort. As Meidinger notes, the British were never really charged with abuse of eminent domain, and private property tended to be respected, also in the colonies.[101] This undoubtedly influenced early US law. Indeed, the cautious approach to takings was expressed by the Supreme Court early on, as an example of a fundamental legal principle.[102] Hence, the relative lack of judicial interest in the question of legitimacy does not appear to have been due to

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98 *Stowell v Flagg* (n 97) 366.

99 *Stowell v Flagg* (n 97) 366.

100 *Stowell v Flagg* (n 97) 368.

101 Errol Meidinger, 'The 'Public Uses' of Eminent Domain: History and Policy' (1980) 11 Environmental Law 1, 17.

102 As reflected in *de dicta* comments from *Calder v Bull* and *Vanhorne's Lessee v Dorrance*, see *Calder v Bull* 3 US 386, 388 (1798); *Vanhorne's Lessee v Dorrance* 2 US 304, 310 (1795).

a broad view on the scope of eminent domain, but an established practice of narrow use of that power, inherited from the English.

The traditional attitude to eminent domain would eventually give way to a more expansive approach, however. This development became particularly marked during the period of great economic expansion and industrialisation in the mid to late 19th century, when eminent domain was increasingly used to benefit (privately operated) railroads, hydroelectric projects, and the mining industry.[103] During this time, it also became increasingly common for landowners to challenge the legitimacy of takings in court, undoubtedly a consequence of the fact that eminent domain was now used more widely, for new kinds of projects.[104] Controversy arose particularly often with respect to mill acts.[105] Such acts were found throughout the US, many of them dating from pre-industrial times when mills were primarily used to serve the farming needs of agrarian communities.[106] However, following economic and technological advances, acts that were once used to facilitate the construction of grist mills would increasingly also be relied on by developers wishing to harness hydropower for manufacturing, and eventually, for hydroelectric projects.[107]

Many legitimacy cases pertaining to mill acts came before state courts in the late 19th and early 20th century. In the next subsection I present some of these cases, to shed light on how states courts developed their own approach to the question of legitimacy of takings.

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103 Meidinger (n 101) 23-33.

104 Meidinger (n 101) 24.

105 Meidinger (n 101) 24. See also Johnson (n 91) 306-313 and Morton J Horwitz, 'The Transformation in the Conception of Property in American Law, 1780-1860' (1973) 40 University of Chicago Law Review 248, 251-252.

106 A total of 29 states had passed mill acts, with 27 still in force, when a list of such acts was compiled in *Head v Amoskeag Mfg Co* 113 US 9, 17 (1885). According to Justice Gray, at pages 18-19 in the same, the "principal objects" for early mill acts had been grist mills typically serving local agrarian needs at tolls fixed by law, a purpose which was generally accepted to ensure that they were for public use.

107 See, e.g., *Head* (n 106) 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

3.6.1 Legitimacy in State Courts

In the mill cases, we find the first clear evidence of how the public use requirement was applied to enable state courts to scrutinize the legitimacy of takings. Generally speaking, when a state court upheld a mill act interference, it would typically emphasise the broader purpose, often focusing on economic ripple effects.[108] By contrast, when a court decided that an interference was unconstitutional (with respect to the relevant state constitution), it would often focus on the concrete use made of the mill, pointing out that it did not directly benefit the public in the sense required by the public use restriction.[109] For a time, a doctrine which sought to distinguish between takings for public use and takings for a public purpose, played a significant role in many states. Under this doctrine, only those takings that were deemed to qualify as public use takings under a narrow view of that term would be upheld.[110]

It is tempting to associate the narrow view on public use with a more restrictive attitude towards the use of eminent domain. Similarly, it is natural to assume that a broad view on public use suggests a more relaxed attitude. To some extent, the primary sources warrant this. Unsurprisingly, those who endorsed a broad view on the public use question also often spoke in favour of judicial deference in legitimacy cases, while those endorsing a narrow view tended to emphasise the importance of constitutional safeguards against abuse of eminent domain. However, it seems that both groups were quite heterogeneous and that differences of opinion about the public use

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108 See, e.g., *Hazen v Essex Co* 66 Mass 475 (1853); *Scudder v Trenton Delaware Falls Co* 1 NJ Eq 694 (1832); *Boston & Roxbury Mill Corp v Newman* 29 Mass 467 (1832). A more comprehensive list of cases adopting a broad view can be found in Nichols (n 84) 617.

109 See, e.g., *Sadler v Langham* 34 Ala 311 (1859); *Ryerson v Brown* 35 Mich 333 (1877); *Gaylord v Sanitary Dist of Chicago* 68 NE 522 (1903); *Minnesota Canal & Power Co v Koochiching Co* (n 107). A more comprehensive list can be found in *Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain* 54 ALR 7 (American Law Reports, 1928).

110 Professor Nichols goes as far as to conclude that this emerged as the "majority" opinion on public use, see (Nichols [n 84] 617-618). But contrast this with Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1978) 57 Oregon Law Review 203 and Meidinger (n 101) 24, who argue that the narrow view was only dominant in a handful of states, led by New York.

requirement did not necessarily reflect any deep ideological divisions.

It is clear, for instance, that many of the courts which favoured a broad interpretation of public use still viewed the constitutional limitation on the takings power as an important safeguard, not only as a guarantee for compensation but also as a restriction on the purpose of takings. Indeed, it seems that most late 19th Century Courts, including those that upheld economic takings, were influenced by the growing body of case law across the US that actively scrutinized takings, sometimes striking them down. In particular, it seems that the strict deferential view was largely abandoned in economic takings cases during this period. Deference to the legislature still played an important role and was typically called on as an important argument in takings cases. However, it became much more common to discuss legitimacy also in terms of substantive arguments, by directly addressing the context and circumstances of the taking complained of. I believe this is an important insight to record about the case law from this period. Despite differences of opinion about the meaning of public use, a consensus appears to have emerged that judicial review of legitimacy was appropriate and important in economic takings cases.[111]

A good example is the case of *Dayton Gold & Silver Mining Co. v. Seawell*, concerning a Nevada Act which stipulated that mining was a public use for which the power of eminent domain could be exercised to acquire additional rights needed to facilitate extraction.[112] The Supreme Court of Nevada decided that the Act was constitutional and adopted a broad understanding of the property clause in the Nevada constitution.[113] Interestingly, it argued for this interpretation partly on the basis that it would provide *better* protection for landowners:

> If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature

[111] A similar point is made by Merrill, see **merril86**

[112] *Dayton Gold & Silver Mining Co v Seawell* 11 Nev 394 (1876).

[113] Nev Const Art 8 § 1.

> would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. [...] Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor.[114]

The quote shows that a broad understanding of "public use" need not be synonymous with a less cautious attitude to abuse of the takings power. Indeed, while the Court decided to uphold the Act, it did so only after a careful assessment of legal arguments and factual circumstances. In particular, the Court considered the importance of mining, concluding that it was the "greatest of the industrial pursuits" in the state, and that all other interests were "subservient" to it.[115] Moreover, the Court commented that the benefits of the mining industry was "distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills".[116]

This shows that the Court actively engaged with the purpose of the Act, thoughtfully assessing it against the constitution. Importantly, it did not do so in isolation, as a linguistic exercise or by attempting to recreate its "original intent". Rather, the court approached the constitutional safeguard by making detailed references to the prevailing social and economic conditions in the state of Nevada. The Court noted the importance of deference to the legislature on matters of

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114 *Dayton Gold & Silver Mining Co v Seawell* (n 111) 410-411.

115 *Dayton Gold & Silver Mining Co v Seawell* (n 111) 409.

116 *Dayton Gold & Silver Mining Co v Seawell* (n 111) 409.

policy, but it did so only after it had satisfied itself that the Act could be "enforced by the courts so as to prevent its being used as an instrument of oppression to any one".[117] More generally, the court commented as follows on the public purpose test that had to be performed in takings cases, elucidating on the principles on which it should be founded:

> Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent.[118]

In light of this, *Dayton Gold & Silver Mining Co. v. Seawell* must be regarded as an early example of a contextual approach to legitimacy. A formalistic approach based on the phrase "public use" was abandoned, but not in favour of general deference. Rather, a more nuanced view was adopted, to respect the idea that the legislature should have the final say on policy while also recognising that courts should play a crucial role in protecting citizens from abuse of the takings power.

The case is not unique, but rather exemplifies the type of reasoning that was used to assess economic development takings cases at this time. Interestingly, many common elements exist between courts that upheld and struck down such takings, irrespective of whether or not they subscribed to a narrow or broad view on the public use test. One example is *Ryerson v. Brown*, a case often cited as an authority for a narrow view of public use.[119] Here the Supreme Court of Michigan explicitly qualifies its decision by stating that it is "not disposed to say that incidental benefit to the public could not under any circumstances justify an exercise of the right of eminent domain".

The case concerned the constitutionality of a mill act, and while the court argues that public

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117 *Dayton Gold & Silver Mining Co v Seawell* (n 111) 412.

118 *Dayton Gold & Silver Mining Co v Seawell* (n 111) 398.

119 *Ryerson v Brown* (n 109).

use should be taken to mean "use in fact", it is clear that "use" is understood rather loosely, not literally as physical use of the property that is taken.[120] Moreover, when clarifying its starting point for judicial scrutiny of mill acts, the court explains that "in considering whether any public policy is to be subserved by such statutes, it is important to consider the subject from the standpoint of each of the parties". Following up on this, the court found, with respect to the Act in question, that " the power to make compulsory appropriation, if admitted, might be exercised under circumstances when the general voice of the people immediately concerned would condemn it". After considering this and other possible consequences, the court eventually declared the Act to be unconstitutional, summing up its assessment as follows: "What seems conclusive to our minds is the fact that the questions involved are questions not of necessity, but of profit and relative convenience".[121]

Hence, far from nitpicking on the basis of the public use phrase, the court adopts a contextual approach to takings that is rather similar to the approach of *Dayton Gold & Silver Mining Co. v. Seawell*. The outcome is different, but it is also based on a different assessment of the context and the consequences of the takings complained about. Importantly, the case does not rest on any *a priori* assumption that economic development takings of the kind in question could not meet a public use test – no general rule is relied on at all. Hence, it is somewhat strange that later commentators have focused on the case for its comments on public use rather than its broad, but restrictive, assessment of legitimacy.

Many of the important cases from the late 19th Century, on both sides of the public use debate,

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120 The court explains its stance on the public use restriction by stating (emphasis added) "it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to *accommodations*." The court continues with an illustrative example: "A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbour to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed the two last named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade". See *Ryerson v Brown* (n 109) 336.

121 *Ryerson v Brown* (n 109) 336.

shares many crucial features with the two cases discussed above.[122] This points to a unifying perspective on legitimacy adjudication from this time. Some commentators describe the case law as chaotic, characterised by different ideas competing for dominance.[123]. However, it might be more accurate to say that a broad consensus developed during in this period, regarding the need for special judicial scrutiny of economic development cases. Moreover, state courts were clearly conscious of the special challenges that arose at a time when eminent domain was being used to benefit specific commercial actors. Differences of opinion about public use terminology was an important part of this, but it was rarely considered in isolation from other aspects. On a deeper level, the fact that the public use debate was regarded as important in the first place clearly suggests that deference to the legislature was not held to be an exhaustive answer to the question of legitimacy. This, is an important observation which is also made in the work of Merrill, but which appears to have been somewhat overlooked in the literature following *Kelo*.

I believe it is a relevant observation not only in relation to state law, but also when considering the takings doctrine that has later developed at the federal level. While the narrow view of public use was indeed losing ground at the beginning of the 20th century, the doctrine of extreme deference that was about to be adopted by the Supreme Court represented a new development.

Importantly, the doctrine of deference was not originally directed primarily at the legislature, but rather towards the judiciary at the state level. Moreover, the balance of power between states and the federal government played an important role in early federal takings jurisprudence, as discussed in the next subsection.

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122 See, e.g., *Scudder v Trenton Delaware Falls Co* (n 108) (Eminent domain power upheld, but said: "The great principle remains that there must be a public use or benefit. That is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to a general rule. What may be considered a public use may depend somewhat on the situation and wants of the community for the time being."), *Fallsburg Power & Mfg Co v Alexander* (1903) 101 Va 98 (Eminent domain struck down, on holding that "the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain"), *Board of Health of Portage Tp v Van Hoesen* 87 Mich 533, 538 (1891) (Eminent domain struck down, qualified by "not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use").

123 Berger (n 110); Meidinger (n 101).

3.6.2 Legitimacy as Discussed in the Supreme Court

Initially, the Supreme Court held that the takings clause in the US Constitution did not apply to state takings at all.[124] Federal takings, on the other hand, were of limited practical significance since the common practice was that the federal government would rely on the states to condemn property on their behalf.[125]. This changed towards the end of the 19th Century, particularly following the decision in *Trombley v. Humphrey*, where the Supreme Court of Michigan struck down a taking that would benefit the federal government. *Trombley v Humphery* 23 Mich 471 (1871) Not long after, in 1875, the first Supreme Court adjudication of a federal taking occurred, marking the start of the development of the Supreme Court's own doctrine on public use and legitimacy.[126] Eventually, in 1897, the Court would also hold that state takings could be scrutinized under the takings clause of the constitution.[127]

This development can be traced to the passage of the Fourteenth Amendment after the civil war, concerning due process.[128]. Indeed, some early Supreme Court cases dealing with state takings were adjudicated against the due process clause directly.[129]

After the Supreme Court started developing its own case law on the legitimacy issue, the deferential stance soon became entrenched. As argued by Horwitz, the mid- to late 19th Century was the period in US history when control over property was transferred on a massive scale from agrarian communities to various agents of industrial expansion.[130] Moreover, it was a period of great optimism about the ability of *laissez faire* capitalism to ensure progress and economic growth.

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124 *Barron v City of Baltimore* 32 US 243 (1833).

125 Meidinger (n 101) 30.

126 *Kohl v United States* 91 US 367 (1875).

127 *Chicago, Burlington & Quincy RR Co v City of Chicago* (n 83).

128 Johnson (n 91).

129 See, e.g., *Head* (n 106).

130 Horwitz (n 105).

This was reflected in the case law on eminent domain, particularly as developed by the Supreme Court. A particularly clear expression of this can be found in *Mt. Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co*.[131] This case dealt with the legitimacy of condemnation arising from the construction of a hydropower plant. The Supreme Court held that it was legitimate, with the presiding judge arguing briskly as follows:

> The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. The respect due to the judgment of the state would have great weight if there were a doubt. But there is none.[132]

The quote serves as an indication of how deference was fast gaining ground, without yet being established doctrine. On the one hand, the Court notes the importance of deference to the *state* judgement (not specifically the judgement of the state legislature). On the other hand, it prefers to conclude on the basis of its own assessment of the purpose of the taking. This assessment, however,

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131 *Mt Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co* 240 US 30 (1916).

132 *Mt Vernon-Woodberry Cotton Duck Co* (n 130).

is not grounded in the facts of the case or the circumstances in Alabama. Rather, it is based on sweeping assertions about "all our welfare" and the desire to "save mankind from toil that it can be spared".

This judgement, from 1916, was given during the so-called *Lochner* era of jurisprudence in the US. During this time, the Supreme Court would famously engage in active censorship of regulation that was meant to promote greater social and economic equality.[133] In particular, much case law from this period witnesses to a general lack of deference towards political decision-makers. Hence, it is surprising to find that deference actually played an increasingly important role in takings cases.[134] As early as *United States v. Gettysburg Electric Railway Co.*, a case from 1896, deference was described as a fundamental guiding principle, which should be adhered to except in very special circumstances.[135] In particular, Justice Peckham relied on a deferential stance, expressed as follows:

> It is stated in the second volume of Judge Dillon's work on Municipal Corporations (4th Ed. § 600) that, when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule

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133 Charles E Cohen, 'The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate' (2008) 46 Duquesne Law Review 375.

134 The *Lochner* era in general was characterised by courts engaging in censorship of state regulation, but this general tendency is not well reflected in how eminent domain law developed over the same period. This is interesting, as it points to the shortcoming of another commonly held view on property protection, namely that it largely serves the interests of property-owning elites, to the detriment of regulatory efforts to promote social equality. The cases through which *Lochner* era courts developed the deferential stance suggest a different interpretation; those who benefited most directly from takings in these cases were commercial interests, not vulnerable groups of society. Moreover, they benefited from acquiring land rights from members of agrarian communities, not from the elites. Hence allowing such takings to go ahead was no affront to the ideology of progress through *laissez faire* capitalism, quite the contrary. In particular, if it is true as many have argued, that the *Lochner* courts were ideologically committed to the promotion of unrestrained capitalism, there was little reason for them to oppose expansion of eminent domain into the commercial arena: those who would be likely to benefit were market actors who were proposing large scale commercial development projects. Indeed, the case law from this period makes it natural to argue that the deferential stance developed primarily to cater to the needs of the capitalists, under the perceived view that they represented the class which would bring progress and prosperity to the nation as a whole.

135 *US v Gettysburg Electric R Co* 160 US 668 (1896).

commends itself as a rational and proper one.[136]

The case did not turn on the public use issue, however, as the condemned land would be used for battlefield memorials at Gettysburg, Pennsylvania, clearly a public use. In addition, the case concerned a federal taking authorized by Congress. Hence, its weight as a precedent should have been rather limited.

Indeed, the deferential stance was not adopted in later federal cases originating from the states. As late as in 1930, in *Cincinatti v Vester*, the Supreme Court commented that "it is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one".[137] In this judgement, Chief Justice Hughes also describes how the judicial assessment of the public use question should be carried out:

> In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[138]

Notice how this echoes the contextual approach developed at the state level, while explicitly prescribing particular deference to state *courts*. In *Hairston v. Danville & W. R. Co.*, the same idea was expressed even more clearly by Justice Moody, who surveyed the state case law and declared that "the one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."[139] Justice Moody continued by

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136 *US v Gettysburg Electric R Co* (n 134) 680.

137 *City of Cincinnati v Vester* (n 86) 447.

138 *City of Cincinnati v Vester* (n 86) 447.

139 *Hairston v Danville & W R Co* (n 85) 606.

describing in more depth the typical approach of the state courts in determining public use cases:

> The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected.[140]

Justice Moody goes on to give a long list of cases illustrating this aspect of state case law, showing how assessments of the public use issue is inherently contextual.[141] He then cites three further Supreme Court cases, pointing out that all of them express similar sentiments of support for state case law on this issue.[142] Following up on this, he points out that "no case is recalled" in which the Supreme Court overturned "a taking upheld by the state *court* as a taking for public uses in conformity with its laws" (my emphasis). After making clear that situations might still arise where the Supreme Court would not follow state courts on the public use issue, Justice Moody goes on to conclude that the cases cited "show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people".[143]

I believe *Hairston* is a crucially important case for two reasons. First, it makes clear that initially, the deferential stance in cases dealing with state takings was primarily directed at state courts rather than legislatures and administrative bodies. Second, it demonstrates federal recognition of the fact that a consensus had emerged in the states, whereby scrutiny of the public use determination was consistently regarded as a judicial task.[144] Moreover, the Court clearly looked

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140 *Hairston v Danville & W R Co* (n 85) 606.

141 *Hairston v Danville & W R Co* (n 85) 607.

142 *Falbrook, Clark* and *Strickley.*

143 *Hairston v Danville & W R Co* (n 85) 606.

144 Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 86) 606.

favourably on the contextual approach whereby state courts would look to the concrete circumstances of the individual takings complained of. The Court's approval of this tradition is explicitly given as the reason for adopting a deferential stance. Put simply, the judicial test provided at state level was held to be of such high quality that there was little use for further scrutiny; a deferential stance was assumed, but made contingent on the fact that state courts would provide the required judicial scrutiny.

Despite this, *Hairston* would later be cited as an early authority in favour of almost unconditional deference in *US ex rel Tenn Valley Authority v Welch.*[145] This case concerned a federal taking and it cited *US v Gettysburg Electric R Co* as an authority in favour of strong deference with regards to the public use limitation.[146] However, the Court also paused to note that the later case of *City of Cincinnati v Vester* expressed the opposite view, namely that the public use test was a judicial responsibility.[147] In a very selective citation, the Court then purports to resolve this tension by quoting *Hairston* and the observation made there that the Supreme Court had never overruled the state courts in takings cases. Effectively, the importance of judicial scrutiny is thereby downplayed, although as we saw, the rationale behind *Hairston* was that state courts already offered high-quality judicial scrutiny of the public purpose.

Welch is particularly important because it is used as an authority in the later case of *Berman v Parker*, which endorses almost complete deference to the legislature regarding the public use issue.[148] This case concerned condemnation for redevelopment of a partly blighted residential area in the District of Colombia, which would also condemn a non-blighted department store. In a key passage, the Court states that the role of the judiciary in scrutinizing the public purpose of a

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145 *U S ex rel Tenn Valley Authority v Welch* 327 US 546, 552 (1946).

146 *US v Gettysburg Electric R Co* (n 134).

147 *City of Cincinnati v Vester* (n 86).

148 *Berman v Parker* (n 1) 32.

taking is "extremely narrow".[149] The Court provides only two citations for this claim, one of them being *Welch*. The other case, *Old Dominion Land Co v US*, concerned a federal taking of land on which the military had already invested large sums in buildings.[150] In my view, both cases are weak authorities for prescribing general deference regarding public use. Moreover, both cases are concerned with federal takings only, while in *Berman* the Court explicitly says that deference is due in equal measure to the state legislature.[151]

It is possible to regard this merely as a *dictum*, since the District of Columbia is governed directly by Congress. At the same time, this passage has had a great impact on future cases. In effect, *Berman* caused a departure from a significant and consistent body of case law on judicial scrutiny at state level without engaging with it at all.

In *Hawaii Housing Authority v Midkiff*, the Supreme Court further entrenched the principle expressed in *Berman*, in a case where the state of Hawaii had made used of the takings power to break up an oligopoly in the housing sector.[152] However, Justice Sandra Day O'Connor, joined by a unanimous Supreme Court, also expressed general disapproval of private takings. In particular, Justice O' Connor appears to have felt the need to provide further qualification for the deferential view, which she did in part by observing that "judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of eminent domain". Hence, judicial deference was not regarded as an absolute

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149 *Berman v Parker* (n 1) 32.

150 The Court commented on the public use test by saying that "there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress of what it had in mind. Its decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use". See *Old Dominion Land Co v US* 269 US 55, 66 (1925) Hence, the Court took the view that courts should be cautious in second-guessing the intentions of Congress on the basis of what its subordinates had subsequently done and said. This is far from a general deferential stance on public use. Moreover, no cases are cited at all on this point, suggesting further that the Court did not think its remarks would be of general significance. Still, a partial quote, used to substantiate broad deference to the legislature except when it involves an "impossibility", has become commonplace. In particular, such a quote was used in the much discussed *Hawaii Housing Authority v Midkiff* 467 US 229, 240 (1984).

151 *Berman v Parker* (n 1) 32.

152 *Midkiff* (n 149).

and systemic imperative, as in Berman, but made contingent on the fact that legislatures are "better able" than courts at conducting public purpose tests. Hence, some of the contextual ideas from earlier case law is echoed in the decision. Importantly, the attention is not directed at the state legislature rather than the courts. It should be noted that *Midkiff* follows *Berman* also in the authorities consulted. The case does not consider precedents for the importance of judicial scrutiny at state level.

The purpose of interference in *Midkiff* was to break up an oligopoly to the benefit of tenants, not to further economic development by allowing commercial interests to take land. Hence, the rationale behind the interference is likely to have struck the Supreme Court as sound and just. Moreover, it seems that such an interference would be easy to uphold also under the doctrine of contextual judicial scrutiny of public use. Indeed, Justice O'Connor partly relies on an assessment of the merits of the taking, when she points out that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers". In conclusion, the "extremely narrow" room for judicial review set up by *Berman* seems to have been replaced by a slightly more nuanced formulation, which nevertheless made clear that a legal precedent of deference had now become entrenched.

Indeed, *Midkiff* reaffirmed the main new principle, namely that the meaning of public use is a matter for legislatures and that the room for judicial review is narrow. So far, I have only commented on how the Supreme Court developed its own doctrine on the public use restriction in the early 20th Century. What was the effect of this doctrine at the state level?

As noted by Merrill, it seems clear that *Berman* had a significant effect, causing a shift of outlook that would eventually result in the public use clause being seen as a "dead letter".[153]. At the same time, however, eminent domain also became more controversial, as it was put to use more aggressively by some states.

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153 Thomas W Merrill, 'The Economics of Public Use' (1986) 72 Cornell Law Review 61.

While the takings power had traditionally been used mostly to condemn agrarian land rights, it was now regularly used to condemn middle class homes. The controversy surrounding the case of *Poletown Neighborhood Council v City of Detroit* illustrates this.[154] In *Poletown*, the Michigan Supreme Court held that it was not in violation of the public use requirement to allow General Motors to displace some 3500 people for the construction of a car assembly factory. The majority 5-2 cites *Berman*, commenting that its own room for review of the public use requirement is limited.[155]

The *Poletown* decision was controversial, and the minority, especially Justice Ryan, was highly critical of it. He objects both to the deferential stance in general and to the majority reading of *Berman* in particular, pointing out that the Supreme Court's doctrine of deference was in large part directed at the state courts.[156] Hence, he concludes, the majority's reliance on *Berman* is "particularly disingenuous".[157]

Justice Ryan was not alone in his disapproval of *Poletown* and the case is widely regarded as the prelude to an era of increased tensions over economic development takings in the US. This would culminate with *Kelo* which, despite upholding an economic development taking, also signalled a move towards more active judicial review of the public use requirement. This effect of *Kelo* has become clearer over time, primarily due to state legislative responses caused by disapproval of the outcome. However, it has also been remarked that both the majority and minority opinions in *Kelo* indicate that the Supreme Court itself may not be entirely at ease with the doctrine of strict deference that developed after *Berman*. In the next subsection, I will give an overview of recent developments, particularly from the secondary literature.

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154 See Timothy Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (2005) 28(2) Harvard Journal of Law and Public Policy 651, 380-381.

155 *Poletown Neighborhood Council v City of Detroit* (n 88) 632-633.

156 *Poletown Neighborhood Council v City of Detroit* (n 88) 668.

157 *Poletown Neighborhood Council v City of Detroit* (n 88) 668.

3.7 Economic Development Takings after *Kelo*

The fact that *Kelo* was decided against the homeowner met with wide disapproval among the public. In addition, many scholars expressed concern at what they saw as an ill advised "abdication" of the judiciary in takings cases.[158] The minority opinions given in *Kelo*, particularly the opinion of Justice O'Connor, also proved influential, causing further attention to be directed at the perceived dangers of eminent domain abuse. A massive amount of literature has since appeared devoted to studying economic development takings.

Moreover, many states have introduced reforms aimed at curbing the use of eminent domain for economic development.[159]

As of 2014, 44 states have passed post-*Kelo* legislation to curb the use of eminent domain for economic development.[160] Various legislative techniques have been adopted by the states to achieve this. Some states, including Alabama, Colorado, Michigan, enacted explicit bans on economic development takings and takings that would benefit private parties.[161] In South Dakota, the legislature went even further, banning the use of eminent domain "(1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue".[162]

In other states, more indirect measures were also taken, such as in Florida, where the legislature enacted a rule whereby property taken by the government could not be transferred to a private party

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159 For an overview and critical examination of the myriad of state reforms that have followed *Kelo*, I point to Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust Journal 799. See also Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100.

160 According to the Castle Coalition, a property activist project associated with the Institute of Justice. See http://www.castlecoalition.org/ for an up-to-date survey of state legislation on eminent domain.

161 See Eagle and Perotti (n 157) 107-108.

162 South Dakota Codified Laws § 11-7-22-1, amended by House Bill 1080, 2006 Leg, Reg Ses (2006).

until 10 years after the date it was condemned.[163] Many states also offer inclusive, often lengthy, lists of uses that should count as public, allowing the states to restrict the eminent domain power while also allowing condemnations that are regarded as particularly important to the state.[164]

Somin points to another interesting trend, namely that state reforms enacted by the public through referendums tend to be far more restrictive and effective in preventing economic and private-to-private takings than reforms passed through the state legislature.[165]

This reflects how strongly the US public opposed the decision in *Kelo*. Surveys show that as many as 80-90 % believe that it was wrongly decided, an opinion widely shared also among the political elite.[166] Indeed, *Kelo* has had a great effect on the discourse of eminent domain in the US, and this effect is perhaps of greater importance than the various state reforms that have been enacted. According to Somin, most of the reforms have in fact been ineffective, despite the overwhelming popular and political opposition against economic development takings.[167]

Somin is not alone in feeling that eminent domain reform in the US promised more than it delivered. A similar sentiment is expressed both by supporters and critics of *Kelo*.[168] On the other hand, while practitioners have noted that it is largely business-as-usual in eminent domain law, they also report a greater feeling of unease regarding the public use requirement, expressing hope that the Supreme Court will soon revisit the issue.[169] In this way, the public backlash against *Kelo* has served as an influential reminder that the rationale behind eminent domain for economic

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163 Eagle and Perotti (n 157) 809.

164 Eagle and Perotti (n 157) 804.

165 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 157) 2143.

166 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 157) 2109.

167 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 157) 2170-2171.

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169 See MM Murakami, BCK Ace and RH Thomas, 'Recent developments in eminent domain: Public use' (2013) 45(3) Urban Lawyer 809 ("Until the Supreme Court revisits the issue, we predict that this question will continue to plague the lower courts, property owners, and condemning authorities").

development is largely out of sync with the sense of fairness and justice endorsed by most non-experts.

But why have attempts at legislative reform been so inefficient? The underlying cause, according to Somin, can be traced to the fact that people are "rationally ignorant" about the economic takings issue. For most people, it is unlikely that eminent domain will come to concern them personally or that they will be able to influence policy in this area. Hence, it makes little sense for them to devote much time to learn more about it. This, in turn, helps create a situation where experts can develop and sustain a system based on practices that are in fact opposed by a large majority of citizens.[170] Indeed, Somin argues that surveys show how people tend to overestimate the effectiveness of eminent domain reform, possibly due to the fact that symbolic legislative measures are mistaken for materially significant changes in the law.[171]

I think Somin's analysis is on an interesting track. However, it should be noted that the notion of rational ignorance is a double-edged sword in this regard. In particular, it cannot be ruled out *a priori* that the critical attitude towards economic development takings is itself an instance of such ignorance. Perhaps people would change their opinion on economic development takings if they were better educated on the issue?

This possibility does nothing to detract from the main message, which is that the *Kelo* backlash have caused greater insecurity about what the law is, without significantly curbing those uses of eminent domain that are regarded by many as problematic. Arguably, this shows that the static legislative approach to eminent domain reform, which has dominated the scene in the US so far, needs to be supplemented by more dynamic proposals. In particular, it seems important to target the decision-making processes surrounding land use planning and eminent domain, to look for ways to imbue this process with legitimacy.

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170 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 157) 2163-2171.

171 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 157).

In a country where the population expresses antagonism towards eminent domain for economic development, a more inclusive process will likely cause such takings to become more uncommon. On the other hand, if principles of good governance are put in place, it might also restore confidence in eminent domain as a procedure by which to implement democratically legitimate decisions about how to weigh the interests of landowners against the interests of the public. In the next subsection, I will consider two proposals for principles of this kind. The first specifically targets the question of how compensation is determined in economic development cases, a crucial aspect of legitimacy. The second proposal targets the decision-making process more broadly, by proposing a framework for land assembly that is meant to replace the use of eminent domain in certain circumstances.

3.8 Institutional Proposals for Increased Legitimacy

In this subsection, I first present the Special Purpose Development Companies proposed by Lehavi and Licht.[172] I relate this proposals to theoretical approaches to the issue of compensation, before I go on to note some shortcomings and open questions that I will later address in my case study. I then go on to consider the Land Assembly Districts proposed by Heller and Hills.[173] I consider this proposal in light of the stated motivation, which is to design an effective mechanism of self-governance that can replace eminent domain in economic development cases. I present some unresolved questions and argue that there is a tension in the proposal between its narrow scope, imposed to prevent majority tyranny and other forms of abuse, and its broad goal of empowering local communities.

[172] Lehavi and Licht (n 89).

[173] Heller and Hills (n 89).

3.8.1 Special Purpose Development Companies

An important distinguishing feature of economic development takings is that they give the taker an opportunity to profit commercially from the development. This may even be the primary aim of the project, with the public benefitting only indirectly through potential economic and social ripple effects. Property owners facing condemnation in such circumstances might expect to take a share in the profit resulting from the use of their land. However, in many jurisdictions, including the US, the rules used to calculate compensation prevents owners from getting any share in the commercial surplus resulting from development.[174] In particular, various *elimination rules* are typically in place to ensure that compensation is based entirely on the pre-project value of the land that is being taken.[175] The policy reasons for such rules is that they ensure that the public does not have to pay extra due to their own special want of the property. After all, this is one of the main purposes of using eminent domain in the first place, to ensure that the public does not have to pay extortionate prices for land needed for important projects. However, when the purpose of the project is itself commercial in nature, there appears to be a shortage of good policy reasons for excluding this value from consideration when compensation is calculated. This is especially true when, as in the US, compensation tends to be based on the market value of the land taken. Why should a commercial condemner's prospect of carrying out economic development with a profit be disregarded when assessing the market value? In any fair and friendly transaction among rational agents, one would expect benefit sharing in a case like this. Yet for economic development backed up by eminent domain, the application of elimination rules ensures that all the profit goes to the developer.

Some authors have argued that failures of compensation is at the heart of the economic takings issue and that worry over the public use restriction is in large part only a response to deeper

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174 See, e.g., Lee Anne Fennell, 'Taking Eminent Domain Apart' (2004) 2004 Michigan State Law Review 957, 965-966.

175 See Robert H Freilich, 'Condemnation Blight: Analysis and Suggested Solutions' in *Current Condemnation Law: Takings, Compensation and Benefits* (American Bar Association 2006) 81.

concerns about the "uncompensated increment" of such takings.[176] In addition to the lack of benefit sharing, previous work has identified two further problems of compensation that also tend to become exasperated in economic development cases. First, the problem of "subjective premium" has been raised, pointing to the fact that property owners often value their own land higher than the market value, for personal reasons.[177] For instance, if a home is condemned, the homeowner will typically suffer costs not covered by market value, such as the cost of moving, including both the immediate "objective" logistic costs as well as more subtle costs, such as having to familiarize oneself with a new local community. Second, the problem of "autonomy" has been discussed, arising from the fact that an exercise of eminent domain deprives the landowner of their right to decide how to manage their property.[178]

In[179], the authors propose a novel approach for addressing the "uncompensated increment" in economic takings cases. Their proposal is based on a new kind of structure that they dub a *Special Purpose Development Corporation* (SPDC). The idea is that owners affected by eminent domain will be given a choice between standard pre-project market value and shares in a special company. This company will exist only to implement a specific step in the implementation of the development project: the transaction of the land-rights. The SPDC may choose either to offer their rights on an auction or else negotiate a deal with a designated developer.[180] Hence, the idea is to ensure that the owners are paid a value that reflects the post-project value of the land, but in such a way that the holdout problem is avoided. In particular, the SPDC will have a single task: to sell

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176 See Fennell (n **??**) 962.

177 Fennell (n **??**) 963.

178 Discussed in Fennell (n **??**) 966-967. For a general personhood building theory of property law, see Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press 1993). For a general economic theory of the subjective value of independence, see Matthias Benz and Bruno S Frey, 'Being Independent Is a Great Thing: Subjective Evaluations of Self-Employment and Hierarchy' (2008) 75(298) Economica 362.

179 Lehavi and Licht (n 89).

180 Lehavi and Licht (n 89) 1735.

the land for the highest possible price within a given time frame.[181] After the sale is completed, the SPDC will divide the proceeds as dividends and be wound up.[182]

Other suggestions have taken a more static approach to compensation reform, such as proposing to give owners a fixed premium in cases of economic development, or developing mechanisms of self-assessment to ensure that compensation is based on the true value the owner attributes to his own land.[183] Compared to such proposals, the idea of SPDCs is more sophisticated and should be looked at in more depth.

The conceptual premise for the proposal is that takings for economic development can be seen as compulsory incorporation, a pooling of resources useful in overcoming market failures.[184] Just as the corporation is formed to consolidate assets in order to facilitate effective management, so is eminent domain used to assemble property rights in order to facilitate efficient organization of development. According to Lehavi and Licht, this also provides a viable approach to problems of "opportunistic behavior"; hierarchical governance after assembly ensures that order and unity can be regained even if interests in the land are distributed among a large and heterogeneous group of potentially mischievous shareholders.[185] In the words of Lehavi and Licht:

> The exercise of eminent domain powers thus resembles an incorporation by the government of all landowners with a view to bringing all the critical assets under hierarchical

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181 Lehavi and Licht (n 89) 1741.

182 Lehavi and Licht (n 89) 1741.

183 A range of static proposals have been proposed in the literature: Merrill proposes 150 % of market value for takings that are deemed to be "suspect", including takings for which the nature of the public use is unclear, see Merrill (n 152) 90-93. Krier and Serkin propose a system that provide compensation for a property's special suitability to its owner, or a system where compensation is based on the court's assessment of post-project value, see James E Krier and Christopher Serkin, 'Public Ruses' (2004) 2004 Michigan State Law Review 859, 865-873. Fennell proposes a system of self-evaluation of property for takings purposes with tax-breaks given to those who value their property close to market value (to avoid overestimation), see Fennell (n **??**) 995-996. Bell and Parchomovsky also propose self-evaluation, but rely on a different mechanism to prevent overestimation; tax liability is based on the self-reported value and no property can be sold by its owner for less than his reported value, see Abraham Bell and Gideon Parchomovsky, 'Taking Compensation Private' (2007) 59(4) Stanford Law Review 871, 890-900.

184 Lehavi and Licht (n 89) 1732-1733.

185 Lehavi and Licht (n 89) 1733.

> governance. Establishing a corporation for this purpose and transferring land parcels to it thus would be merely a procedural manifestation of the substantive economic reality that already takes place in eminent domain cases.

As soon as we look at the rationale behind economic development takings in this way, any remnant of good policy reasons for ensuring that the developer gets all the profit seems to disappear. Rather, we are led to consider compensation as an issue entirely separate from the exercise of the takings power. After the land has been reorganised by eminent domain and an SPDC has been formed, the land rights might as well be sold *freely* to a developer. In this way, the land will be sold for a price that is closer to an actual market value, on the market where the land is destined for development.[186] More generally, the SPDC becomes an aid that the government can use to create more favourable market conditions for transferring land that has commercial potential in its public use. Due to the compulsory pooling of resources, no owner can exercise monopoly power by holding out, but due to decoupling of compensation from assembly, the owners can now negotiate with potential developers for a share of the resulting profit. Moreover, the fact that the SPDC offers its rights on an actual market can also help ensure that more information becomes available regarding the true economic value of the development, something that may in turn help ensure that only the good projects will be successful in acquiring land. Hence, according to Lehavi and Licht, an additional positive effect of SPDCs is that developers and governments will shy away from using the eminent domain power to benefit projects that are not truly welfare-enhancing.[187]

In addition to these substantive consequences, the SPDC-proposal also stands out because it has a significant institutional component, pointing to its potential for restoring procedural legitimacy as well as substantive fairness. Lehavi and Licht discuss corporate governance issues at some length, but without committing themselves to definite answers about how the operations of the SPDC

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186 Lehavi and Licht (n 89) 1735-1736.

187 Lehavi and Licht (n 89) 1735-1736.

should be organised.[188] Indeed, while their proposal is perhaps most interesting because of its procedural aspects, it also appears to be rather preliminary in this regard. The main idea is to let the SPDC structure piggyback on existing corporative structures, particularly those developed for securitisation of assets.[189] The basic idea is that the corporate structure should be insulated from the original landowners to the greatest possible extent; it should have a narrow scope, it should be managed by neutral administrators, and it should entrust a third party with its voting rights.[190] This is meant to prevent failures of governance within the SPDC itself, making it harder for majority shareholders and self-interested managers to co-opt the process. For instance, if a possible developer already holds a majority of the shares in an SPDC, this structure would prevent him from using this position to acquire the remaining land on favourable terms.

Lehavi and Licht observe that under US law, the government would often be required to make shares in an SPDC available to the landowners as a public offering.[191] Lehavi and Licht deem this to be desirable, arguing that full disclosure will provide owners with a better basis on which to decide whether or not to accept SPDC shares in place of pre-project market value. It will also facilitate trading in such shares, so that they will become more liquid and therefore, presumably, more valuable.[192]

Lehavi and Licht's proposal is interesting, but I think a fundamental objection can be raised against it. In particular, it seems that their governance model more or less completely alienate property owners from the decision-making process after SPDC formation. Limiting the participa-

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188 Lehavi and Licht (n 89) 1040-1048.

189 See generally Steven L Schwarcz, 'The Alchemy of Asset Securitization' (1994) 1(1) Stanford Journal of Law, Business & Finance 133. For an up-to-date overview, targeting special challenges that became apparent during the 2008 financial crisis, see Steven L Schwarcz, 'Securitization, Structured Finance, and Covered Bonds' (2013) 39(1) Journal of Corporation Law 129.

190 Lehavi and Licht (n 89) 1742.

191 Lehavi and Licht (n 89) 1745.

192 Lehavi and Licht (n 89) 1746.

tion of owners is to a large extent an explicit aim, since governance by experts is held to increase the chances of ensuring good governance. But is expert rule really the answer?

It seems that from the owners' point of view, Lehavi and Licht's proposals for governance reduces the SPDC to a mechanism whereby they can acquire certain financial entitlements. These may exceed those that would follow from standard compensation rules, but they do not directly empower owners vis-á-vis developers and the government. Instead, a largely independent structure will be introduced. It is this new organisational structure, rather than the owners, that will now become an important actor in the eminent domain process. In principle, it is meant to represent owners, but to what extent can it do so effectively? After all, it is specifically intended to operate as neutral player, charged with maximising the price, nothing more. Hence, it appears that the SPDC will not be able to give owners an arena to negotiate on the basis of the personal and social importance they attribute to their land rights. How the problem of "autonomy" is addressed by the proposal is therefore hard to see and the "subjective premium" also appears to be in danger, unless it can be objectively quantified and covered by the surplus from a voluntary sale. But if such quantification is possible, then why not simply tell the appraiser to award some premium under standard compensation rules?

More generally, it seems to me that while all three categories of "uncompensated increments" are interesting to study from a financial viewpoint, severe doubts can be raised regarding the feasibility of addressing the subjective aspects of this as a question of compensation. It may be that issues related to "subjective premium" and "autonomy" are seen as public use issues for good reason; they are hard to quantify otherwise. Moreover, attempting to do so might do more harm than good. On the one hand, it might skew the political process, since owners that have been "bought off" don't object to ill-advised development projects, as long as they generate financial revenue. But what about projects that are undesirable for other reasons, for instance because they completely change the character of a neighbourhood, or because they are harmful to the environment? On the

other hand, the very idea that money can compensate for the subjective importance of property and autonomy can itself prove offensive. At least it seems likely that it would often come to be seen as inadequate and inefficient.[193] Moreover, an owner that is compelled to give up his home after an inclusive process where the public interest has been debated and clearly communicated is likely to feel like he incurs less costs related both to his subjective premium and his autonomy. Hence, the lack of participation in the decision-making process can in itself increase the uncompensated loss. Clearly, no externally managed "bargain-oriented" SPDC will be able to resolve this problem. Of course, some "objective" elements of, such as relocation costs or cost for juridical assistance, can still be addressed under the banner of compensation. But in most jurisdictions, they already are.[194] For more subtle aspects, the aftermath of *Kelo* itself can serve as an illustration of how a compensatory approach is unsatisfactory:

After the case, Suzanne Kelo remained defiant, until she eventually decided to settle in 2006, for an offer of $ 442 155, more than $ 319 000 above the appraised value.[195] Apparently, the other owners affected by the same taking were not particularly pleased, arguing that recalcitrant owners were actually rewarded for holding out.[196] On the other hand, there is no indication that Suzanne Kelo was not genuine in her opposition to the taking. Indeed, after the long struggle she had taken part in, it is easy to imagine that financial compensation, if it was to be an effective remedy at all, would have to be very high. Even after she had settled, Kelo apparently toured the country speaking out against economic takings. This, too, is a statement to the inadequacy of a purely financial approach to legitimacy.

I conclude that SPDCs have serious shortcoming with regards to the subjective aspects of

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193 For more detailed criticism of the compensation approach to the public use issue, see Nicole Stelle Garnett, 'The Neglected Political Economy of Eminent Domain' (2006) 105(1) Michigan Law Review 101.

194 See, e.g., Garnett (n **??**) 121-126.

195 Lehavi and Licht (n 89) 1709.

196 Lehavi and Licht (n 89) 1709.

undercompensation, aspects that can only be addressed if the focus turns towards participation. However, SPDCs do seem promising when it comes to profit-sharing. This, after all, is what the structure is specifically aiming to achieve. In addition, I agree that SPDCs will likely have a positive effect on the other actors in the eminent domain process. In particular, I agree with Lehavi and Licht that greater openness is likely to result, revealing the true merits of development projects, at least in so far as these are translatable into financial terms. The fact that developers must negotiate with an SPDC who can threaten to make the land available an an open auction will likely deter developers and government from pursuing fiscally inefficient projects. Hence, the risk that governments will subsidised such projects by giving them cheap access to land will also be reduced. In addition, the presence of a third voice, speaking on behalf of owners, is likely to help achieve a better balance of power in development takings.

Even if the individual landowners do not have a voice in this process, the fact that the landowners are better represented as a group is then still likely to have a positive effect on legitimacy. On the other hand, as long as the power of the SPDC is limited to choosing the best offer and negotiating over price, it seems that SPDCs will easily end up being dominated by developers and government. This is a particular concern in cases when competition fails to arise after SPDC formation. To ensure that there are other interested parties, in particular, sems like an important precondition for the proposal to work in practice. In this regard, it is important to realise that a lack of interest from other developers may not be due to the superiority of the original developer's plans. It might rather be due to the fact that the scope of the assembly giving rise to the SPDC is so defined as to make alternatives unfeasible. The danger of abuse in this regard seems significant, particularly when developers themselves participate in coming up with the plans that give rise to SPDC formation.

Moreover, as long as owners remain marginalized in the planning phase, it is easy to imagine situations where the plan itself will be formulated in such a way that only one developer is in a

position to successfully implement it. A simple example would be if a prospective developer already owns some of the land that is critical to the plan, and is able to ensure that this land is kept out of the scope of the SPDC. Clearly, if SPDCs are to operate effectively, such instances of manipulation need to be avoided, suggesting that the proposal as it stands needs to be fleshed out in greater detail.

The problems addressed here both seem to point to the fact that the SPDCs, while more flexible than other suggestions, are still too static to achieve many of their objectives. In particular, to arrive at genuine market conditions for assessing post-project value, there is still a need for changes in the dynamics of the planning process underlying the taking. Moreover, to ensure legitimacy, there is a need for a mechanism that goes beyond expert bargaining and provides owners with better access to the decision making process. In the next subsection, I will consider a proposal that aims to address this, by proposing a framework for self-governance.

3.8.2 Land Assembly Districts

In a recent article, Heller and Hills propose a new institutional framework for carrying out land assembly for economic development. Interestingly, it is meant to replace eminent domain altogether. The goal is to ensure democratic legitimacy while also creating a template for collective decision-making that will prevent inefficient gridlock and holdouts.

The core idea is to introduce *Land Assembly Districts* (LADs), institutions that will enable property owners in a specific area to make a collective decision about whether or not to sell the land to a developer or a municipality.[197] The idea is that while anyone will be able to propose and promote the formation of a LAD, the official planning authorities and the owners themselves must consent before it is formed.[198] Clearly, some kind of collective action mechanism is required

[197] Heller and Hills (n 89) 1469-1470.

[198] Heller and Hills (n 89) 1488-1489.

to allow the owners to make such a decision. Hiller and Hill suggest that voting under the majority rule will be adequate in this regard, at least in most cases.[199] How to allocate voting rights in the LAD is given careful consideration, with Heller and Hills opting for the proposal that they should in principle be given to owners in proportion to their share in the land belonging to the LAD.[200] Owners can opt out of the LAD, but in this case eminent domain can be used to transfer the land to the LAD using a conventional eminent domain procedure.[201]

Heller and Hills envision an important role for governmental planning agencies in approving, overseeing and facilitating the LAD process. Their role will be most important early on, in approving and spelling out the parameters within which the LAD is called to function.[202] Hence, it appears to be assumed that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue. A possible challenge that arises, not discussed by Heller and Hills at any length, is that the scope of the LAD needs to be broad enough to allow for meaningful competition and negotiation after LAD formation. But there will probably be a push, both by governments and initiating developers, to ensure that the scope is defined narrowly enough to give confidence that zoning permissions will not be denied at a later stage. Hence, the LAD proposal needs to ensure a balanced approach to the issue of how the initial development plan should be defined, and to what extent it should limit the authority of the LAD.

If the owners do not agree to forming a LAD, or if they refuse to sell to any developer, the government will be precluded from using eminent domain against them to assemble the land.[203]

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199 See Heller and Hills (n 89) 1496. However, when many of the owners are non-residents who only see their land as an investment, Heller and Hills note that it might be necessary to consider more complicated voting procedures, for instance by requiring separate majorities from different groups of owners. See Heller and Hills (n 89) 1523-1524.

200 See Heller and Hills (n 89) 1492. For a discussion of the constitutional one-person-one-vote principle and a more detailed argument in favour of the property-based proposal, see Heller and Hills (n 89) 1503-1507.

201 Heller and Hills (n 89) 1496.

202 Heller and Hills (n 89) 1489-1491.

203 Heller and Hills (n 89) 1491.

This is the crucial novel idea that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. LADs will not only ensure that the owners get to bargain with the developers over compensation, it will also give them an opportunity to refuse any development to go ahead. Hence, the proposal shifts the balance of power in economic development cases, giving owners a greater role also in preparing the decision whether or not to develop, and on what terms. This makes the proposal stand out in the recent literature on economic takings. It is the first concrete suggestion that addresses the democratic deficit in a dynamic, procedural manner, without failing to recognise that the danger of holdouts is real and that institutions are needed to avoid it.

There are some problems with the model, however. First, observe that planning authorities might have an incentive to refuse granting approval for LAD formation. After all, doing so entails that they give up the power of eminent domain for the land in question. For this reason, Heller and Hills propose that a procedure of judicial review should exist whereby a decision to deny approval for LAD formation can be scrutinized.[204]

After the formation of the LAD, the government will not be able to use eminent domain against it, but the planning authorities will still occupy an important role. Heller and Hills envision a system of public hearings, possibly organised by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[205] In this process, it is assumed that other interests will also be represented, such as owners of adjoining land, who might want to raise objections against the project. However, their role in the process is not clarified in any detail, raising worries about the extent to which the LAD will undermine local democracy by giving property owners a privileged position with respect to policy questions that should be decided jointly by all members of the local community.

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[204] Heller and Hills (n 89) 1490.

[205] See Heller and Hills (n 89) 1490-1491.

The LAD proposal also raises issues pertaining to the proposed mechanism of collective decision-making among owners. As Kelly points out, the basic mechanism of majority voting is imperfect.[206] He argues, in particular, that if different owners value their property differently, majority voting will tend to disfavour those with the most extreme viewpoints, either in favour of, or against, assembly. If these viewpoints are assumed to be non-strategic and genuine reflections of the welfare associated with the land, the result can be inefficiency. In short, the problem is that a majority can often be found that does not take due account of minority interests.

For instance, if a minority of owners are planning alternative development, conflicting with the LAD proposal, they might simply be ignored. Indeed, they might have to be ignored, since the formation of the LAD itself precludes the kind of development they wish to pursue. This could become particularly inefficient in cases when this development would also be more socially desirable than the development that will benefit from assembly. The role of the LAD in such cases will not improve the quality of the decision to develop, since it pushes the decision-making process into a track where those interests that *should* prevail are voiced only by a marginalised minority inside the new institution.[207]

More generally, the lack of clarity regarding the role of LADs in the planning process is a problem. As it stands, the proposal leaves it uncertain how LADs will affect the decision-making process regarding development.

However, the ideal is clearly stated. LADs should help to establish self-governance for land assembly. In particular, Heller and Hills argue that LADs should have "broad discretion to choose any proposal to redevelop the neighbourhood – or reject all such proposals".[208] As they put it, two

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206 Daniel B Kelly, 'The Limitations of Majoritarian Land Assembly' (2009) 122 Harvard Law Review Forum 7.

207 Of course, one might imagine these landowners opting out of the LAD, or pursuing their own interests independently of it. However, they are then unlikely to be better off than they would be in a no-LAD regime. In fact, it is easy to imagine that they could come to be further marginalised, since the existence of the LAD, acting "on behalf of the owners", might detract from any dissenting voices on the owner-side.

208 See Heller and Hills (n 89) 1496.

of the main goals of LAD formation is to ensure "preservation of the sense of individual autonomy implicit in the right of private property and preservation of the larger community's right to self-government".[209] Unfortunately, these ideals are somewhat at odds with the concrete rules that Heller and Hills propose, particularly those aiming to ensure good governance of the LAD itself.

In relation to the governance issue, Heller and Hills echo many of the "corporate governance"-ideas that also feature heavily in Lehavi and Licht's proposal. Indeed, in direct contrast to their comments about "broad discretion" and "self-governance", Hiller and Hills also state that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[210] This is a good thing, according to Heller and Hills, since it provides a safe-guard against mismanagement, serving to prevent LADs from becoming battle grounds where different groups attempt to co-opt the community voice to further their own interests. As Heller and Hills puts it, the narrow scope of LADs will ensure that "all differences of interest based on the constituents' different activities and investments, therefore, merge into the single question: is the price offered by the assembler sufficient to induce the constituents to sell?".[211]

But this means that there is an internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighbourhood bickering and majority tyranny on the other. Moreover, it is hard to see how LADs can at once have both a "narrow purpose" as well as enjoy "broad discretion" to choose between competing proposals for development. If such discretion is granted to LADs, what prevents special interest groups among the landowners from promoting development projects that will be particularly favourable to them, rather than to the landowners as a group? What is to prevent landowners from making behind-the-scene deals with favoured developers at the expense of their neighbours? It might be difficult to come up with

209 See Heller and Hills (n 89) 1498.

210 See Heller and Hills (n 89) 1500.

211 Heller and Hills (n 89) 1500.

rules that prevent mechanisms of this kind, without also making meaningful "self-governance" an impossibility.

If a LAD is obliged to only look at the price, this might prevent abuse. But it will not give owners broad discretion to choose among development proposals. Effectively, it will render LADs as little more than a variant of SPDCs, where the owners are awarded an extra bargaining-chip, namely the option to refuse all offers.

In my view, such a restriction on the operations of LADs is not desirable. It is easy to imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will emerge in response to the formation of a LAD. Such proposals may involve novel solutions that are superior to the original development plans, in which case it is hard to see any good reason why they should not be taken into account, even if they are proposed by a minority. Moreover, it is hard to see why they should be disregarded simply because they are less commercially attractive, even if the price offered is not competitive. In particular, the formation of a LAD and the competition for development that ensues creates an opportunity for tapping into a greater pool of ideas for redevelopment, ideas which may then also be rooted more firmly in the local community. Surely, getting such proposals to the table would be desirable. Moreover, it would take us to the heart of self-governance. At the same time, it is easy to acknowledge that problematic situations may arise, for instance if a majority forms in favour of a scheme that involves razing only the homes of the minority, maybe on the rationale that these are the most blighted properties. That would likely give rise to accusations of unfair play, which may or may not be warranted. But irrespective of this, an alternative project of this kind might well be a better use of the land in question, also from the point of view of the public. Hence, it would seem that the planning authorities would be obliged to give it some serious consideration. Then, however, the LAD has truly become an arena for a new kind of power play among different interests, and a potential vehicle of force for whomever secures support from a majority of owners within the district.

In their proposal, Heller and Hills are aware of this potential problem, which they propose to resolve by strict regulation. In particular, they argue that "LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler".[212] But this raises further questions. For one, what is meant by "affiliation" here? Say that a landowner happens to own shares in some of the companies proposing development. Should he then be barred from voting? If so, should he be barred from voting on all proposals, or just those involving companies in which he is a shareholder? If the answer is yes, how would this be justified? Would it not be easy to construe such a rule as discrimination against landowners who happen to own shares in development companies? On the other hand, if the landowner in question is allowed to vote on all other proposals, would it not be natural to suspect that his vote is biased against assembly that would benefit a competing company? Or what about the case when some of the landowners are employed by some of the development companies? Should such owners be barred from voting on proposals that could benefit their employers? This seems quite unfair as a general rule, especially if a low-level employment relationship has such a dramatic effect. But in some cases even low-level ties could play a decisive factor. This might happen, for instance, if an important local employer proposes development in a neighbourhood where it has a large number of employees.

Of course, the most pressing issue that arises is the following: who exactly should be empowered to make the determination of when an affiliation is such that an owner should be deprived of his voting rights? Heller and Hills give no answer, but it is easy to imagine that whoever is given this task in the first instance, the courts would soon enough be asked to consider the question. At this point, the circle has in some sense closed in on the proposal. In particular, one might ask: why is it easier to determine if someone can be deprived of his voting rights due to an "affiliation", than it is to determine if someone can be deprived of his land due to some planned "public use"?

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[212] Heller and Hills (n 89).

In any event, to come up with a set of rules ensuring that LADs can deliver both self-governance and good governance largely remains an open problem. This is acknowledged by Hiller and Hills themselves, who point out that further work is needed and that only a limited assessment of their proposal can be made in the absence of empirical data. Later in the thesis, I will shed light on this challenge when I consider the Norwegian rules relating to land consolidation, showing how these can be looked at as a highly developed institutional embedding of many of the central ideas of LADs. The assessment of how they function in cases of economic development, and how they are increasingly used as an alternative to expropriation in cases of hydropower development, will allow me to shed further light on the issues that are left open by Heller and Hills' important article.

3.9 Conclusion

In this chapter, I have given a more in-depth presentation of economic development takings. I began by noting that the issue is particularly pressing for land users that are not regarded as bringing about economic growth. Hence, I argued that the issue is closely related to that of land grabbing, which is currently receiving much attention, both academic and political. Under the social function understanding of property there is in principle no difference between protecting property rights arising from formal title and property rights arising from use. That said, special issues arise in the latter case, not least because it is unclear how the law should deal with rights resulting from cultural practices that western property regimes are not designed to handle. In addition, I noted that special issues related to poverty and basic necessities such as food and water arise with particular urgency in relation to land grabbing.

The nature of my case study makes it natural for me to focus on traditional western systems of property law. Hence, I went on to discuss how economic development takings are dealt with in such legal systems, focusing on Europe and the US respectively. For the case of Europe, this assessment was made more difficult by the fact that the category is not an established part of legal

discourse. However, by looking to England for concrete examples, I noted that such cases do arise and that they are increasingly seen as controversial.

I then went on to consider the property protection offered by P1(1) of the ECHR, and how it is applied by the Court in Strasbourg. I zoomed in on those aspects that I believe to be the most relevant for economic development takings. While I noted that this category has yet to be discussed by the ECtHR, I argued that a recent shift in the Court's property adjudication is suggestive of the fact that it would likely approach such cases similarly to how Justice O'Connor approached *Kelo*. In particular, I noted how the Court has recently adopted a stricter standard of assessment. This standard, I argued, is characterised primarily by increased sensitivity to systemic imbalances causing alleged P1(1) violations. Hence, to regard economic development takings as a special category appears to fit well with recent jurisprudential developments at the Court in Strasbourg.

I went on to consider US sources on economic development takings, noting that the issue has receive an extraordinary amount of attention in recent years. I adopted an historical approach to the material, by tracing the case law surrounding the public use restriction in the fifth amendment to the US constitution, which was much debated even before the specific issue of economic development takings rose to prominence. I focused particularly on case law developed by state courts, and I argued that it shows great sensitivity to the need for contextual assessment. Indeed, it seems that many state courts originally adopted an implicit social function view of property when assessing such cases.

I then looked at the history of Supreme Court adjudication of public use cases. I noted that the doctrine of deference was developed early on, but that it was initially directed mainly at state courts. In fact, I showed that the Supreme Court itself explicitly approved the contextual and in-depth approach these courts relied on when dealing with the legitimacy issue.

The shift, I argued, came with *Berman*, in which the Supreme Court adopted a deferential doc-

trine that was directed specifically at the state legislature.[213] This was quite a dramatic departure from the Court's previous attitude towards state takings. Moreover, it was almost entirely backed up by precedent set in cases when *federal* takings had been ordered by Congress.

I went on to consider the fallout of *Berman* at state level, which culminated with the infamous *Poletown* case. This case prompted wide-spread accusations of eminent domain abuse and thus set the stage for *Kelo*.

After completing the historical overview, I went on to consider the literature after *Kelo*. I expressed particular support for those responses that focus on the need for *institutional* reform, to address dangers that Justice O'Connor pointed to in her minority opinion. As a shorthand, I proposed referring to the mechanisms she identified as the *democratic deficit* of economic development takings.

I then gave a thorough presentation of two recent reform suggestions that might help address this deficit. Both are institutional in nature, based on setting up formally recognised coalitions of land owners that can act as a counterweight to the disproportional power of commercial beneficiaries. The first suggestion, by Lehavi and Licht, is limited to dealing with the issue of compensation, recognising the need for a system whereby the land owners are compensated based on post-project value. However, this idea alone represents a fairly dramatic break with the currently dominant doctrine in takings law, where compensation is almost always based on the pre-project value of the land *to the owner*.[214]

In Chapter 5, I will briefly discuss how this principle was abandoned in Norway, for some case types involving hydropower development. However, the broader point that will interest me in thesis concerns the conceptual premise of Lehavi and Licht's proposal. By suggesting that economic

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213 *Berman v Parker* (n 1).

214 This is a reflection of the no-scheme principle, mentioned briefly in Section 3.3.1 above. For further details, I refer to Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 20).

development takings can be viewed as a form of compulsory incorporation of private rights, they effectively undermine the justification for disallowing the original owners to take up a corresponding share in the resulting enterprise. This, in my view, is a powerful idea that has implications that go well beyond the issue of compensation. In particular, it points to the possibility of avoiding eminent domain altogether, by proposing a suitable framework for collective action regarding economic development.

The second suggestion I looked at in depth, proposed by Heller and Hills, is based on a similar idea. However, it does not go as far as to explicitly suggest that owners themselves should be granted shares in the development enterprise. Instead, the focus is on organising a process for selling the properties required, without the use of compulsion. According to this proposal, local communities should be entitled to greater self-governance in economic development scenarios. At the same time, the proposal recognises the need for a mechanism to avoid inefficient and socially harmful gridlock due to holdouts among unwilling owners. Instead of eminent domain, however, a different mechanism is proposed, namely that of a majority decision made by a land assembly district.

This is also a new type of institution, and I pointed out some problems and seeming inconsistencies in the proposal. I highlighted the lack of clarity regarding the exact role LADs are supposed to play during the planning process. I argued that while the risk of abuse and failure increases with the level of participation, so does the overall potential for achieving a positive effect on legitimacy. I concluded that to reduce the democratic deficit in economic development cases, a wide power of participation must be granted to the land owners and their communities. This is needed, in particular, to restore balance in the relationship between owners and others directly connected with the land, the planning authorities, and the commercial actors interested in development for profit. The question that is as of yet unresolved is how to organise such participation in a way that avoids obvious pitfalls, such as administrative inefficiency and tyranny by majorities or elites that

gain control of the local agenda.

In Chapter 6, I will shed light on this question by considering the Norwegian institution of land consolidation, which has a very long tradition behind it. It is a flexible framework which includes, among other things, a template for establishing institutions that can function as a LAD. I will focus on how land consolidation functions in cases of economic development that would otherwise likely be pursued by eminent domain. The case study is based on considering hydropower development, but I will also discuss planning law and development more generally, as the Norwegian government is now considering making consolidation, traditionally a rural institution, a primary mechanism for land development even in urban areas.

Before I delve into this, I will present an overview of Norwegian hydropower and the role of waterfalls as private property. This will serve as an introduction to the second part of this thesis, to which I now turn.

Part II

A Case Study of Norwegian Waterfalls

4 Norwegian Waterfalls and Hydropower

4.1 Introduction

Norway is country of mountains, fjords and rivers, where around 95 % of the annual domestic electricity supply comes from hydropower.[1] The right to harness energy from streams and waterfalls tends to belong to local landowners under a riparian system.[2] Historically, waterfalls were very important to local communities, particularly as a source of power for flour mills and saw mills.[3] Indeed, the fact that peasants in Norway controlled local water resources can help explain why they enjoyed great freedom, both economically and socially, compared to many other places in Europe.[4]

Following the industrial revolution, however, local ownership and management came under

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1 See Statistics Norway, data from the year 2011, http://www.ssb.no/en/elektrisitetaar/.

2 This arrangement is rooted in the first known legal sources in Norway, the so-called "Gulating" laws, thought to have been in force well before AD 1000. See Knut Robberstad (ed), *Gulatingslovi* (4th edn, An edition of the old "Gulatingsloven", a collection of the first known legal principles used by a Norwegian court (the Gulating), dating back to before AD 1000, Det Norske Samlaget 1981) 111-112,120. Historically, the law emphasised ownership of traditional agrarian water resources, such as fishing rights. However, new sticks were added to the waterfall bundle over the years, including the right to develop hydropower. For an historical overview, I point to Arne Vislie, *Grensene for Grunneierens Rådighet over Vassdrag* (Centraltrykkeriet 1944) 14-32. For a detailed presentation of the history of water law in pre-industrial times, I refer to UA Motzfeld, *Den Norske Vasdragsrets Historie indtil Aaret 1800 med Domsamling* (Brøgger 1908).

3 See Terje Tvedt, *A Journey in the Future of Water* (IB Tauris 2013) 121.

4 See Tvedt (n 2) 121.

increasing pressure. At the beginning, this pressure was exerted by commercial interests, often foreign investors, who saw the industrial potential in hydropower and started speculating in Norwegian water resources. Later, the pressure on local self-governance was exerted mainly by the state, following the introduction of a more centralised management system.

This process gained momentum after the Second World War, when the Norwegian electricity sector came to be organised as a government monopoly. Following this, most hydropower schemes would be carried out by public utilities which were often under direct political control.[5]

Then, in the early 1990s, the energy sector was reformed yet again, largely inspired by the market-orientation and privatisation of the public sector in the UK under Thatcher.[6] The production sector was liberalised, leading to a process of commercialisation. At the same time, the regulatory system was decoupled from both political and commercial decision-making processes, to become more expert-based. Moreover, the sector underwent additional centralisation, as a result of mergers and acquisitions among former public utilities.

Following the reform, access rights to the national grid were to be granted equally to all potential actors on the energy market, including private companies.[7] After the passage of the Energy Act 1990, the energy companies controlling the local grids were no longer authorised to shut out competitors.[8] A side-effect of this is that it has become possible for local landowners to undertake their own hydropower projects. Local owners can now access the grid to sell the electricity they produce on the market.[9] This has led to increased tension between local interests and established

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5 See generally Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006).

6 See generally Atle Midttun and Steve Thomas, 'Theoretical ambiguity and the weight of historical heritage: a comparative study of the British and Norwegian electricity liberalisation' (1998) 26(3) Energy Policy 179.

7 See generally Ulf Hammer, 'Hovedtrekk ved Organiseringen og Reguleringen av Kraftmarkedet' [1996] Lov og Rett 390. For an interesting presentation and analysis of grid-based markets in general, see Ingvald Falch, *Rett til Nett: Konkurranse i Nettbundne Sektorer* (Universitetsforlaget 2004).

8 See the Energy Act 1990 s 3-4.

9 See generally Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Erstatning for erverv av fallrettigheter' (2006) 2006 Tidsskrift for eiendomsrett 175; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Fallerstatning – Ulebergdommen' (2008) 2008 Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Er

hydropower companies. The following fundamental question arises: who is entitled to benefit from waterfalls, and who is entitled to a say in decision-making processes concerning their use?

In this chapter, I will set the stage for discussing this question in more depth, by detailing how the hydropower sector is organised. I will look to the law as well as to commercial and administrative practices and I will focus on those aspects that have changed following the reform of the early 1990s. I will pay particular attention to the growing importance and competitiveness of so-called *small-scale* hydropower, including development projects that are undertaken by local owners, or in cooperation with them. Several commercial actors have emerged who now specialise in such cooperation, by offering waterfall owners a significant share of the commercial value resulting from development.

To bring out the multi-faceted character of the current debate on hydropower in Norway, I will begin in Section 4.2 by offering a basic overview of the Norwegian political system. I will focus on the role that property, and particularly rights to water, has played in the history of Norwegian democracy. In Section 4.3, I move on to describe the law relating to hydropower development. I first identify a basic tension in the law – some would call it an inconsistency – between hydropower as a private right on the one hand, and a public good on the other. I then go on to explain how this tension permeates the law, by presenting the statutory regulation of hydropower development in more depth.

I follow this up by considering hydropower in practice, especially practices that relate to small-scale development in cooperation with local owners. I trace the history of the dominant model used to organise this form of development, going back to the first expression I could find of the core principles, given in the so-called *Nordhordlandsmodellen*, from 1996.[10] I note how the core

naturhestekraftmetoden rettshistorie?' (2012) 2012(1) Tidsskrift for eiendomsrett 21.

[10] See Otto Dyrkolbotn and Arne Steen, *Nordhordlandsmodellen* (A manifesto on local hydropower development, published following a seminar at Dyrkolbotn Leirskole, fall of 1996, Dyrkolbotn Leirskole 1996).

financial compensation mechanism presented there was later adopted by the market. However, I also discuss other ideas expressed in the model, regarding the importance of sustainable governance, the involvement of non-owners, and the desirability of long-term planning based on local conditions and local participation in decision-making processes.

In Section 4.6, I go on to observe that these non-financial aspects of the model have largely failed to make an impact on the market, and I hypothesise that this might be part of the reason why small-scale hydropower now appears to be falling out of favour. I note, moreover, how a recent change in the perception of small-scale hydropower has also lead to a resurgence of large-scale development. This, I argue, is now threatening to undermine the position of local communities and owners.

Based on this, I argue for the importance of maintaining a social function perspective on local ownership of waterfalls. Hence, my analysis in this chapter largely echoes the theoretical discussion presented in the first part of the thesis. Moreover, I set the stage for the chapters to follow, wherein I specifically address the use of expropriation – and alternatives to it – to facilitate hydropower development.

4.2 Norway in a Nutshell

Norway is a constitutional monarchy, based on a representative system of government.[11] The executive branch is led by the King in Council, the Cabinet, headed by the Prime Minister of Norway. Legislative power is vested in the Storting, the Norwegian parliament, elected by popular vote in a multi-party setting.[12] In 1884, the parliamentary system first triumphed in Norway, as

[11] For constitutional law in Norway, see generally Johs Andenæs and Arne Fliflet, *Statsforfatningen i Norge* (10th edn, Akademika 2006).

[12] It should be noted that the executive branch also enjoys considerable legislative power under Norwegian law. Both informally, because it prepares new legislation, and also formally, because it has wide delegated powers to issue so-called *directives* (forskrifter). Indeed, it is typical for acts of parliament to include a general delegation rule which permits the executive to legislate further on the matters dealt with in the act, by clarifying and filling in the gaps left open by it.

the cabinet was forced to resign after it lost the confidence of the Storting. The principle has since obtained the status of a constitutional custom. In particular, the cabinet can not continue to sit if the Storting expresses mistrust against it. However, an express vote of confidence is not required. In practice, due to the multi-party nature of Norwegian politics, minority cabinets are quite common. These can sustain themselves by making long-term deals with supporting parties, or by looking for a majority in the Storting on a case-by-case basis.

The judiciary is organised in three levels, with 70 district courts, 6 courts of appeal, and the Supreme Court. The district courts have general jurisdiction over most legal matters; there is no division between constitutional, administrative, civil, criminal courts. [13] The courts of appeal have a similarly broad scope. Moreover, the right to appeal is considered basic, although not absolute.[14] The Supreme Court, on the other hand, operates a very strict restriction on the appeals it will allow.[15] It typically only hears cases if a matter of principle is at stake, or if the law is thought to be in need of clarification.[16]

The Norwegian legal system is often said to be based on a special "Scandinavian" variety of civil law, which includes strong common law elements: Legislation is not typically as detailed as elsewhere in continental Europe, some legal areas lack a firm legislative basis, it is generally accepted that courts develop the law, and the opinions of the Supreme Court are considered crucial to the legislative interpretation of the lower courts.[17] At the same time, legislation remains the primary source used to resolve most legal disputes. Moreover, when applying the law, the courts

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13 However, a special court exists for *land consolidation*, and both the district courts and the courts of appeal follow special procedural rules in *appraisement disputes*, for instance when compensation is awarded following expropriation. See the Land Consolidation Act 1979 and the Appraisal Act 1917 respectively, discussed in more detail in later chapters.

14 In civil cases, for instance, it is generally required that the stakes are above a certain lower threshold, measured in terms of the appellants' financial interest in the outcome. See Civil Dispute Act 2005 s 29-13.

15 See the Civil Dispute Act 2005, s 30-4.

16 See, generally, Jens Edvin A Skoghøy, 'Anketillatelse til Norges Høyesterett' in *Festskrift til Lars Heuman* (Jure 2008).

17 See, generally, Ulf Bernitz, 'What is Scandinavian law?' (2007) 50 Scandinavian Studies in Law 13.

tend to place great weight on preparatory documents procured by the executive branch. These documents, in particular, are widely regarded as expressions of legislative intent.[18]

The Constitution of Norway dates back to 1814 and was heavily influenced by contemporaneous political movements in the US and France. Moreover, it was influenced by a desire for self-determination, as Noway was at that time a part of Dennmark.

Following the Napoleonic wars, Norwegian politicians sought to take advantage of Dennmark's weak position and gain independence. In the end, Norway was instead forced to enter into a union with Sweden, but the Constitution remained in place. Moreover, after the triumph of parliamentary system in 1884, Norway would also eventually gain independence, in 1905, following a peaceful and democratic process.

During the 19th century, the peasants emerged as a powerful group in Norwegian politics. This, it is commonly held, was in large part due to the fact that they were also landowners, whose rights and contributions were not limited to traditional farming.[19] Importantly, Norwegian farmers and small-holders had a significant voice in the management of land rights and resources in general. The feudal tradition was never as strong in Norway as elsewhere in Europe.[20]

The majority of Norwegian peasants were tenants in the 17th century, but they generally enjoyed better protection against abuse. In addition, the remoteness of many rural communities and the challenging natural environment meant that large feudal estates could hardly operate effectively without granting much autonomy to local peasants. Moreover, the black death had severely taken its toll on the population in Norway, wiping out entire communities, including the feudal elites and the social and physical infrastructure that sustained them. It should be noted that this is also

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[18] However, in light of how the legislative process is usually organised, it is probably fair to say that these documents tend to demonstrate the intent of the executive, not necessarily the Storting.

[19] The "classic" presentation of the political influence of farmers in Norway is Halvdan Koht, *Norsk Bondereising: Fyrebuing til Bondepolitikken* (Aschehough 1926).

[20] See Tore Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (Samlaget 1999) 59-60.

considered an important reason why Dennmark could dominate Norway, and hold on to it as long as they did.[21]

Later, when the Danish-Norwegian nobility fell into a fiscal crisis in the 18th century, farmers in Norway began to buy land from their landlords, including grazing grounds and non-arable land.[22] As a result, Norwegian peasants were no longer tenants, not even formally speaking, and the distribution of land ownership in Norway became quite egalitarian. It is worth noting that farmers would typically purchase shares of larger estates. They would acquire sole ownership over their own house and cultivated ground, while becoming co-owners of the surrounding land, alongside other local farmers. Hence, many resources attached to land came to be owned jointly by several members of the local community. In addition, farmers would often partition their land further, for instance to make room for younger sons to set up their own farms. As a result, Norway became a society were land ownership was not a privilege for the few, but held by the many, at least compared to feudal Europe.

In 1814, the landed nobility in Norway was further marginalised. Indeed, the Constitution itself prohibited the establishment of new noble titles and estates.[23] Then, in 1821, all hereditary titles were abolished (although existing nobles kept their titles for their lifetimes).[24] By the mid 19th century, ordinary farmers had gained even greater political influence. In fact, they emerged as the leading political class, alongside the city bureaucrats.[25] During this time, Norway also introduced a system of powerful local municipalities. These were organised as representative democracies,

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21 The origins of Dennmark-Norway was the so-called Kalmar union, which also included Sweden. Initially, Norway took part on relatively equal footing with Sweden and Dennmark. Later, however, after Sweden left the union, Dennmark developed a much stronger position than Norway.

22 See Pryser (n 19) 59-60.

23 Constitution of the Kingdom of Norway 1814, s 23.

24 See 'Lov, angaaende Modificationer og nærmere Bestemmelser af den Norske Adels Rettigheder' (Act of August 1 1821).

25 See generally Marthe Hommerstad, *Politiske bønder - Bondestrategene og kampen om demokratiet 1814–1837* (Spartacus 2014).

becoming miniature versions of the cherished, as of yet unfulfilled, nation state (Norway was still in a union with Sweden at this time). Even today, municipalities retain a great deal of power in Norway, particular in relation to land use planning.[26] They represent a highly decentralised political structure, with a total of 428 municipalities in force as of 01 January 2013. [27]

As an aspect of ownership over the land, control of water resources was particularly important to the farmers of Norway. According to Terje Tvedt, 10 000 - 30 000 mills were in operation in Norway in 1830s.[28] As he argues, the fact that these mills were under local control was particularly important, as it helped ensure self-sufficiency. In addition, saw mills became an important source of extra income for Norwegian farming communities. While some of the larger mills were controlled and operated on behalf of non-local owners, most of them were run by the farmers themselves. Indeed, even during feudal times, tenant farmers often successfully argued that their tenancy entitled them to engage freely in the saw mill and timber industry.

Today, the importance of water is clearly felt throughout Norwegian society. This is so not only because water is the main source of domestic energy, or because local owners may be able to develop hydropower for financial gain. It is also undeniably the case that water occupies a special place in Norwegian culture. It is important to the identity of many communities, particularly in the western part of the country, where majestic waterfalls are important symbols both of the hardship of the natural conditions and the sturdiness of local people. One particular aspect of this, with significant economic implications, is that waterfalls are an important asset to Norwegian tourism. The so-called "Norway in a nutshell" tours, for instance, have become greatly popular, based on delivering access to wild and unspoilt nature, with fjords, waterfalls, idyllic villages, and railway

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[26] They are the primary decision-makers for spatial planning, as pursuant to Planning and Building Act 2008.

[27] This is down from the all-time high of 747 in 1930. There have long been proposals to reduce the number of municipalities further, but so far the political resistance against this has prevented major reforms. See https://www.regjeringen.no/nb/tema/kommuner-og-regioner/kommunereform/ (report to the Ministry from an expert committee on municipality reform, 2014).

[28] See Tvedt (n 2) 121.

lines that seem to defy gravity.[29]

This all speaks to the fact that water resources is embedded in the social fabric in such a way that a narrow and individualistic view on property rights to water resources would be largely inappropriate. Hence, the case of Norwegian streams and waterfalls is particularly suited to an investigation based on a social function view on property. Moreover, waterfalls serve to bring out tensions between rights and obligations in property, while also shedding light on the question of how to organise decision-making processes regarding economic development.

In the next section, I will argue that the present law on water in Norway tends to recognise only a small part of the relevant picture. On the one hand, it recognises the financial entitlements of individual owners, which it tries to balance against the regulatory needs of the state. But it largely fails to take into account that owners have broader interests, even obligations, relating to their streams and their waterfalls. Moreover, I will set out to show that the law fails to take into account that commercial interests can exert a strong pull on various state bodies, particularly those that are only weakly grounded in processes of democratic decision-making.

As a result, I believe the current narrative on water resource management in Norway, is based on a false dichotomy that sees the interests of "profit-maximising" owners, acting out of self-interest, pegged against the interests of a "benevolent" state, acting for the common good. In the following, I will shed further light on this narrative by presenting the legal framework in more depth.

4.3 Hydropower in the Law

Under Norwegian law, streams and waterfalls are regarded as private property. The system is riparian, so by default, a stream belongs to the owner of the land over which the water flows.[30] This does not mean that the landowners own the water as such – freely running water is not

[29] See http://www.norwaynutshell.com/en/explore-the-fjords/.

[30] See the Water Resources Act 2000, s 13.

subject to ownership – but it entitles the owner of the waterfall to harness the potential energy in the water over the stretch of riverbed belonging to him. This right can be partitioned off from any rights in the surrounding land, and large scale hydropower schemes typically involve such a separation of water rights from land rights, giving the energy company the right to harness the energy, while the local landowners retain ownership of the surrounding land.

Norwegian rivers, and especially rivers suitable for hydropower schemes, tend to run across grazing land and non-arable land that is owned jointly by local farmers. Hence, rights to streams and waterfalls are typically held among several members of the rural community.[31] Such original owners might not always be willing to give up their ownership to facilitate development, especially not on the terms proposed by external developers. However, the hydropower sector was traditionally regulated as a public sector monopoly, and local owners were rarely in a position to negotiate for better terms. The use of expropriation, in particular, came to play an important role for Norwegian hydropower companies.

This has resulted in a legal tension where, on the one hand, streams waterfalls are regarded as private property, yet, on the other hand, they are also considered as belonging to the public. The following two quotes illustrate this ambivalence:[32]

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[31] Rivers tend to run through land that has not to been enclosed. Moreover, in places where there has been a land enclosure, water rights are often explicitly left out, such that they are still considered jointly owned rights, belonging to the community of local farmers. For more details on (forms of) joint ownership among Norwegian farmers, see, e.g., Geir Stenseth, 'Utmarksstrekninger med Mange Rettighetshavere. Noen Linjer mellom Historiske Forhold og Gjeldende Rett' in Øyvind Ravna (ed), *Areal og Eiendomsrett* (Universitetsforlaget 2007) 570.

[32] The first quote is taken from the general water law, with roots going back a thousand years to the so-called "Gulating" laws mentioned in Section 4.1. The second quote is taken from a law directed specifically at large-scale hydropower, introduced during the early days of the hydropower industry.

> A river system belongs to the owner of the land it covers, unless otherwise dictated by special legal status. [...]
>
> The owners on each side of a river system have equal rights in exploiting its hydropower.
>
> (Section 13, Water Resources Act 2000)

> Norwegian water resources belong to the general public and are to be managed in their interest. This is to be ensured by public ownership.
>
> (Section 1, Industrial Concession Act 1917 (amended 2008))

As a consequence of liberalisation in the early 1990s, this tension in statute is now also of great practical significance, as owners who are interested in undertaking their own development schemes attempt to fend off energy companies wishing to expropriate their waterfalls. Indeed, the question of how to manage the internal contradiction on ownership of water resources in Norwegian law has arisen with increasing force in recent years, resulting in several Supreme Court decisions. In the following, I present the most important legislation regarding hydropower development, aiming to bring out those aspects that are particularly relevant to the position of local owners and their communities.

4.3.1 The Water Resources Act

The Water Resources Act 2000 contains the basic rules regarding water management in Norway.[33] This act is not only concerned with hydropower, but regulates the use of river systems and groundwater generally.[34]

In s 8, the Act sets out the basic license requirement for anyone wishing to undertake measures in a river system.[35] The main rule is that if such measures may be of "appreciable harm or nuisance"

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33 Act relating to river systems and groundwater of 24 November 2000 No. 82 (unofficial translation provided by the University of Oslo, http://www.ub.uio.no/ujur/ulovdata/lov-20001124-082-eng.pdf).

34 See the Water Resources Act 2000, s 1. A river system is defined as "all stagnant or flowing surface water with a perennial flow, with appurtenant bottom and banks up to the highest ordinary floodwater level", see Water Resources Act 2000, s 2. Artificial watercourses with a perennial flow are also covered (excluding pipelines and tunnels), along with artificial reservoirs, in so far as they are directly connected to groundwater or a river system, see the Water Resources Act 2000, s 2a-2b.

35 Measures in a river system are defined as interventions that "by their nature are apt to affect the rate of flow, water

to public interests, then a license is required.[36] Further rules regarding the licensing procedure is set out in Chapter 3 of the Act.

In s 18, it is made clear that the water authorities are competent to decide whether a given measure requires a license pursuant to s 8.[37] Moreover, they are obliged to issue such a decision if the developer, an affected authority, or others with a legal interest, request it. In addition, they may prohibit implementation before the decision is reached. In relation to hydropower development, it is established practice that most hydropower projects over 1000 kw will be deemed to require a license.[38]

The basic criteria for granting a license is formulated in such a way that a license "may be granted only if the benefits of the measure outweigh the harm and nuisances to public and private interests affected in the river system or catchment area".[39] Hence, it falls under the discretion of the water authorities to decide if a licence *should* be granted, if the condition is fulfilled. The courts may not censor the administrative decision in this regard.[40]

The procedure that the water authorities follow in licensing cases is largely determined by regulation passed by the Ministry of Petroleum and Energy (MoPE) pursuant to s 65, and by administrative practice developed by the water authorities themselves.[41] Many of the rules in

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level, the bed of a river or direction or speed of the current or the physical or chemical water quality in a manner other than by pollution", see the Water Resources Act 2000, s 3a.

36 See the Water Resources Act 2000, s 8. There are two exceptions, concerning measures to restore the course or depth of a river, and concerning the landowner's reasonable use of water for his permanent household or domestic animals, see the Water Resources Act 2000, s 12.

37 See Water Resources Act 2000, s 18.

38 See, e.g., http://www.nve.no/no/Konsesjoner/Vannkraft/Konsesjonspliktvurdering/ (accessed 16 August 2014). Exceptions are possible, for instance projects that upgrade existing plants, or which utilise water between artificial reservoirs.

39 See Water Resources Act 2000, s 25.

40 This is an expression of the principle of "freedom of discretion" for the administrative branch, a fundamental tenet of Norwegian administrative law. See generally Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 71-74.

41 I return to a presentation of administrative practice in Section 4.3.5.

Public Administration Act 1967 also apply. However, these more general rules tend to play a minor role in practice compared to sector-specific administrative practices.[42]

Only a few basic rules are encoded in the Water Resources Act 2000 itself. This includes rules to ensure that the application is sufficiently documented, so that the authorities have enough information to assess its merits.[43] Moreover, a basic publication requirement is enforced, stating that applications are public documents and that the applicant is responsible for giving public notice. The intention is that interested parties should be given an opportunity to comment on the plans.[44] More detailed rules for public notice of applications are given in s 27-1 of the Planning and Building Act 2008, which also applies with regards to licenses under the Water Resources Act 2000, s 8.

Furthermore, an important rule of principle is given in s 22, regarding the relationship between applications for licenses and governmental "master plans" for the use or protection of river systems in a greater area. These plans have no clear legislative basis, but were introduced through parliamentary action in the 1980s, when the Storting decided to initiate such planning in an effort to introduce a more holistic basis for assessment of licensing applications.[45] According to s 22 of the Water Resources Act 2000, if a river system falls within the scope of a master plan that is under preparation, an application to undertake measures in this river system may be delayed or rejected without further consideration.[46] Second, a license may only be granted if the measure is

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42 This was a point of contention in the Supreme Court case of *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393. The case is discussed and presented in depth in Chapter 5, Section 5.6.

43 See Water Resources Act 2000, s 23.

44 See Water Resources Act 2000, s 24. There are some exceptions to the requirement to give public notice, however. It may be dropped in case it appears superfluous, or if the application must be rejected or postponed, see Water Resources Act 2000, s 24a-24c.

45 Today, the planning authority is delegated to the Directorate of Natural Preservation and the NVE, with the system being scheduled for reform as a consequence of Norway's implementation of the water directive of the European Union. See

46 See Water Resources Act 2000, s 22, first paragraph.

without appreciable importance to the plan.[47] In addition, once a plan has been completed, the processing of applications is to be based on it, meaning that an application which is at odds with some master plan may be rejected without further consideration.[48] It is still possible to obtain a license for such a project, but if it results in less hydropower than the use indicated by the plan, s 22 indicates that only the Ministry may grant it.[49]

The rules considered so far all apply to any measures in river systems, not only hydropower projects. Many special procedures apply to hydropower cases, but most of these have been developed through administrative practice. Some are also provided for in other statutory provisions. In s 19, the relationship between the Water Resources Act 2000 and the Water Resources Act 2000 is described. The latter act is specifically aimed at a certain subgroup of hydropower schemes, namely those that involve regulation of a watercourse.[50] However, according to s 19 of the Water Resources Act 2000, many of the rules from the Watercourse Regulation Act 1917 also apply to unregulated, run-of-river, hydropower schemes, if they generate more than 40 GWh/year.[51]. In the next section, I will present these rules in more detail.

4.3.2 The Watercourse Regulation Act

In order to maximise the output of a hydropower scheme, the flow of water may be regulated using dams or diversions. Regulation was particularly important in the early days of hydropower, before the national electricity grid was developed. Consumers did not want to pay for more energy than they needed when the flow was high, and they wanted to avoid power cuts in periods of drought. At this time, a few local hydropower plants were typically the only sources of electricity in any

47 See Water Resources Act 2000, s 22, first paragraph.

48 See Water Resources Act 2000, s 22, second paragraph.

49 See Water Resources Act 2000, s 22, second paragraph.

50 See Section 4.3.2 below.

51 See Water Resources Act 2000, s 19

given area. This meant that regulation of the waterflow was needed to even out the level of output, otherwise the electricity supply would be unstable. Indeed, in the early days, it was common for electricity producers to get paid based on the stable effect they were able to deliver, rather than the total amount of energy they harnessed.

This changed with the development of a wide-ranging electricity grid, which allowed electricity to be imported and exported between different geographical areas depending on the levels of output from those areas.[52] Today, producers get paid based on the total amount of electricity produced, measured in kilowatt hours (KWh). The price fluctuates over the year, and the supply-side is still influenced by instability in the waterflow in Norwegian rivers. However, the smoothing effect of the national grid means that run-of-river schemes can be carried out profitably, even if the majority of electricity is produced during peak production periods. They are also often regarded as less environmentally controversial, since they don't disturb the flow of water to the same extent as a project involving regulation. In addition, due to technological advances, the kinds of generators needed to exploit fluctuating levels of water have become much cheaper.

Despite the growing importance of run-of-river scheme, many key rules regarding all kinds of hydropower are found in the Watercourse Regulation Act 1917.[53] The Act defines regulations as "installations or other measures for regulating a watercourse's rate of flow". It also explicitly states that this covers installations that "increase the rate of flow by diverting water".[54] The core rule of the Act is that watercourse regulations that affect the rate of flow of water above a certain threshold are subject to a special licensing requirement.[55] The threshold is defined in terms of the notion of a "natural horsepower".

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52 See generally Christian Sontum and Einar Sofienlund, 'Ekspropriasjon av vannkraft – hvorfor den historiske metoden fra norsk rettspraksis ikke er relevant i dagens marked' (2007) 2007(4) Småkraftnytt.

53 Act relating to the regulation of watercourses of 14 December 1917 No. 17.

54 See Watercourse Regulation Act 1917, s 1.

55 See Watercourse Regulation Act 1917, s 2.

I will return to this notion briefly below. For now, it suffices to say that most watercourse regulations undertaken in the context of hydropower development will indeed require a special license. In addition, as I mentioned above, the Water Resources Act 2000 stipulates that many rules in the Watercourse Regulation Act 1917 apply to any hydropower scheme that will generate more than 40 GWh annually.[56]

The criteria for granting a regulation license are similar to those for granting a license pursuant to the Water Resources Act 2000. In particular, s 8 of the Watercourse Regulation Act 1917 states that a license should ordinarily be issued only if the benefits of the regulation are deemed to outweigh the harm or inconvenience to public or private interests.[57] In addition, it is made clear that other deleterious or beneficial effects of importance to society should be taken into account.[58] Finally, if an application is rejected, the applicant can demand that the decision is submitted for review by the Storting.[59]

The Watercourse Regulation Act 1917 contains more detailed rules regarding the procedure for dealing with license applications. The most practically important is that the applicant is obliged to organise an impact assessment pursuant to the Planning and Building Act 2008.[60] This means that the applicant must organise a hearing, and submit a detailed report on positive and negative effects of the development, prior to submitting a formal application for development. Effectively, *two* detailed assessments of the merits of the project are required.

However, as I discuss in more depth in Section 4.3.5 below, impact assessments tend to focus on environmental issues as well as broader societal consequences. The local perspective, and the immediate effects of development on local owners, is usually not a primary concern. In addition

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56 See Water Resources Act 2000, s 19.

57 See Watercourse Regulation Act 1917, s 8.

58 See Watercourse Regulation Act 1917, s 8.

59 See Watercourse Regulation Act 1917, s 8.

60 Act no 71 of 27 June 2008 relating to Planning and Building Applications.

to prescribing impact assessments, the Watercourse Regulation Act 1917 contains more specific rules concerning the second public hearing that should take place, when the application as such is assessed.

First, the applicant should make sure that the application is submitted to the affected municipalities and other interested government bodies.[61] Second, the applicant should send the application to organisations, associations and the like whose interests are "particularly affected".[62] Along with the application, these interested parties should be given notification of the deadline for submitting comments, which should not be less than three months.[63] The applicant is also obliged to announce the plans, along with information about the deadline for comments, in at least one commonly read newspaper, as well as the Norwegian Official Journal.[64] In so far as the water authorities find it "reasonable", the applicant is also obliged to compensate landowners and other interested parties for expenses accrued in relation to legal and expert assistance sought in relation to the application.[65]

A license pursuant to the Watercourse Regulation Act 1917 might be cumbersome to obtain, but a successful application also results in a significant benefit. Most importantly, the license holder then automatically has a right to expropriate the necessary rights needed to undertake the project, including the right to inconvenience other owners.[66]

One may ask whether this approach, making expropriation a side-effect of a regulation license, is a legitimate manner in which to organise interference in property rights. It is clear that the issue of expropriation rarely receives separate treatment in regulation cases. In particular, the assessment

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61 Watercourse Regulation Act 1917, s 6.

62 Watercourse Regulation Act 1917, s 6.

63 See Watercourse Regulation Act 1917, s 6.

64 Watercourse Regulation Act 1917, s 6. The Norwegian Official Journal is the state's own announcement periodical.

65 Watercourse Regulation Act 1917, s 6.

66 See Watercourse Regulation Act 1917, s 16.

undertaken by the water authorities is focused on the licensing issue, which does not compel them to direct any special attention towards owners' interests.[67]

In general, the issue of who owns and controls the water resources in question receives little attention in relation to licensing applications, both pursuant to the Watercourse Regulation Act 1917 and the Water Resources Act 2000. Instead, the focus is on weighing environmental interests against the public's interest in electricity and economic development. The issue of resource ownership comes up in relation to a third important statute, however, namely the Industrial Licensing Act 1917.

4.3.3 The Industrial Licensing Act

In the early 20th century, industrial advances meant that Norwegian waterfalls became increasingly interesting as objects of foreign investment. To maintain national control of water resources, parliament passed an act in 1909 that made it impossible to purchase valuable waterfalls without a special license. The follow-up to this act is the Industrial Licensing Act 1917, which is still in force.[68] It applies to the purchase or lease of waterfalls that may be exploited to that they yield more than 4000 natural horsepowers.

In practice, this means that the Act does not apply to many run-of-river hydropower schemes, even large-scale projects. Even some regulation schemes fall outside the scope of the Industrial Licensing Act 1917, although most large-scale regulation schemes are covered.

Originally, the main rule in the Industrial Licensing Act 1917 stated that all licenses granted to private parties were time-limited, and that the waterfalls would become state property without compensation when they expired, after at most 60 years.[69] This was known as the rule of *reversion*

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67 I demonstrate this, and discuss it in much more depth, in Chapter 5, Section 5.6.

68 Act relating to acquisition of waterfalls, mines, etc. of 14 December 1917 No. 16.

69 See the old Industrial Licensing Act 1917, s 2, in force before the amendment on 26 September 2008.

in Norwegian law (a misnomer, since most waterfalls were originally owned by local peasants, not the state).

In a famous Supreme Court case of 1918, the rule was upheld after having been challenged by owners on constitutional grounds.[70] I return to this decision in some more depth in Chapter 5, but mention here that the main conclusion in this case was that the rule of reversion represented a form of regulation of property, not expropriation, and that this did not give rise to any constitutional claims, even if the owners were not awarded compensation.

While the rule of reversion withstood internal challenges, it was eventually struck down by the EFTA Court in 2007, as a breach of the EEA agreement.[71] This conclusion was fuelled by the fact that reversion only applied to privately owned companies, so that it represented a form of discrimination. After this ruling, the Industrial Licensing Act 1917 was amended. Today, only companies where the state controls more than 2/3 of the shares may purchase waterfalls to which the Act applies.[72]

This means that such waterfalls can only be bought, leased or expropriated by companies in which the state is a majority shareholder. In practice, however, landowners are still able to sell the land from which the right to the waterfall originates, even if this also means transferring the waterfalls to a new owner. The rule is only enforced when waterfalls as such are transferred, specifically for the purpose of hydropower development. Moreover, local owners may in theory still develop hydropower in waterfalls that fall under the Act, since they already own them. But this

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

71 See *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Court Report 164. The EEA (European Economic Area) agreement sets up a framework for the free movement of goods, persons, services and capital between Norway, Iceland, Lichtenstein and the European Union. The EFTA (European Free Trade Association) oversees the implementation of the EEA for those members of EFTA that are also members of the EEA (all except Switzerland). For further details, see generally Henrik Bull, 'The EEA Agreement and Norwegian Law' [1994] (12) European Business Law Review 291; Mads Magnussen, 'Traktatbruddssøksmål ved EFTA-domstolen' [2002] Lov og Rett 131; Halvard Haukeland Fredriksen, 'Er EFTA-domstolen mer Katolsk enn Paven?' [2009] Tidsskrift for Rettsvitenskap 507.

72 See the Industrial Licensing Act 1917, s 2.

would be difficult in practice if they are denied permission to partition the water rights off from the surrounding land, to make them available as stand-alone security for debt commitments. In effect, local owners would have a hard time acquiring financing for projects in these waterfalls, particularly if they do not wish to put their entire land holdings down as security.

Moreover, if they succeed in acquiring financing, a development license would likely be hard to obtain. It is quite clear, in particular, that the Norwegian government takes the view that hydropower projects in waterfalls falling under the Industrial Licensing Act 1917 should only be undertaken by companies in which the state has at least 2/3 of the shares. Moreover, they do not seem to differentiate between development by outside commercial interests and development by local owners.

For instance, in the ongoing case of *Sauland*, the local owners of a large waterfall wish to develop a project that would fall under the Industrial Licensing Act 1917. At the same time, a large-scale development involving the same waterfall is planned by a company in which the state owns more than 2/3 of the shares. The case is still pending a final decision, but the water authorities have stated their unwillingness to assess any licensing application from the local owners, unless they ensure that the state takes up at least a 2/3 stake in the development.[73]

In this case, the authorities use s 2 of the Industrial Licensing Act 1917 to deprive the owners of control over the development of their waterfalls. This, moreover, would hardly be regarded as expropriation under Norwegian law. Hence, it would likely not result in an obligation to pay compensation to original owners. The question is whether the government acted in accordance with the Industrial Licensing Act 1917 in this case, or extended its scope in an illegitimate way. After all, the project that the water authorities refused to consider did not in fact involve transferring control over the waterfalls to any new, non-local, owners.

The question of how to apply the Industrial Licensing Act 1917 in this situation has not yet been

[73] Source: NVE (www.nve.no).

clarified by the courts. If local owners may be deprived of the development potential under the act, it also raises the further question of what the consequences will be for the level of compensation when this development potential is subsequently transferred to a company in which the state controls more than 2/3 of the shares. If the initial deprivation is regarded as regulation rather than expropriation, it would seem to follow from general expropriation law that no compensation is payable for the hydropower potential, as it can no longer be said to represent a foreseeable source of income for the original owners. In this case, the Industrial Licensing Act 1917 would have the effect of allowing state-backed actors on the energy market to reassert their claim of cheap access to waterfalls through the use of expropriation.

The policy justification for the Industrial Licensing Act 1917 is based on the idea that giving preference to state-owned actors will protect the public interest in Norwegian hydropower. As quoted earlier, s 1 of the Act explicitly stipulates that the hydropower resource belongs to the public and should be managed in its interest. However, this perspective clashes with the fact that the electricity sector itself has been liberalised. The state may be a majority shareholder in the most powerful companies, but these companies are now run according to commercial principles, with little or no political involvement.

In the next section, I look at the basic legislation that sets up this system. I will argue that the preference given to companies where the state is a majority shareholder amount to little more than a symbolic nod to the public interest. On the other hand, it puts in place a system of systematic discrimination against smaller companies that do not have state backing. This attains practical significance internally on the market, since the most powerful actors are often in a position to gain advantages that run counter to the policy ideas that motivated the original move to liberalise the system.

4.3.4 The Energy Act

Before 1990, the Norwegian energy sector was organised as a distributed monopoly.[74] There were several local monopolists, owned and controlled by the state or the municipalities. These were held responsible for energy supply and distribution in their region. There was no real competition on the market, neither on the supply side nor on the demand side. In particular, the local monopolists could deny other energy producers access to the distribution grid.

At the same time, the system ensured that energy companies were more or less directly politically accountable. They were typically run by politically appointed boards, often organised as administrative bodies of local government. Moreover, they were not subject to commercial management principles that insulated them from the political discourse of the local area in which they operated.

This system was abandoned following the passage of the Energy Act 1990.[75] This Act set up a new regulatory framework, where management of the grid was decoupled from the hydropower production sector.[76] In particular, the Act established a system whereby consumers could choose their electricity supplier freely. At the same time, the Act aimed to ensure that producers were granted non-discriminatory access to the electricity grid. This laid the groundwork for what has today become an international market for the sale of electricity, namely the NordPool.[77]

In this way, the Energy Act served to establish a market where any actor, privately owned or otherwise, could supply electricity to the grid, and profit commercially from hydropower. In response to this, monopoly companies were reorganised, becoming commercial companies that were

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74 See generally Torstein Bye and Einar Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (2005) 40(50) Economic and Political Weekly 5269; Dag Ove Skjold and Lars Thue, *Statens nett: systemutvikling i norsk elforsyning 1890-2007* (Universitetsforlaget 2007).

75 See generally Jens Naas-Bibow and Gunnar Martinsen, *Energiloven med kommentarer* (2nd edn, Gyldendal 2011).

76 See generally Bye and Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (n **??**).

77 See http://www.nordpoolspot.com/About-us/. See generally Skjold and Thue (n 74); Lars Galtung, 'Nord Pool og Kraftmarkedet' 39(6) Plan 22.

meant to compete against each other, and against new actors that entered the market.[78] As a result, the local and political grounding of the energy sector, which used to be ensured through decentralised municipal ownership, has been significantly weakened. In addition to commercialisation, the market-orientation of the sector has also lead to centralisation, as many of the locally grounded municipality companies have disappeared as a result of mergers and acquisitions.[79]

At the same time, the fact that any developer of hydropower is now entitled to connect to the national grid gives non-state actors a possibility of entering the Norwegian energy market. They may do so not merely as minority shareholders in state companies, but also as *competitors*. This has been especially important for local owners of waterfalls, since it makes owner-led development possible. In practice, however, the large actors in the hydropower sector still have many opportunities to block the aspirations of local owners, not least through the use of expropriation. I return to this in depth in the next chapter.

In the next section, I give a step-by-step presentation of the licensing procedure for hydropower, which serves to put the information presented in this and preceding sections into a dynamic context.

4.3.5 The Licensing Procedure

The water authorities in Norway are centrally organised. The most important body is the Norwegian Water Resources and Energy Directorate (NVE), based in Oslo.[80] In many cases, the NVE have been delegated authority to grant development licenses themselves, but in case of large-scale development, they only prepare the case, then hand it over to the Ministry of Petroleum and En-

78 See DH Claes and A Vik, 'Kraftsektoren: fra samfunnsgode til handelsvare' in DH Claes and PK Mydske (eds), *Forretning eller fordeling? Reform av offentlige nettverkstjenester* (Universitetforlaget 2011).

79 Today, the 15 largest companies, largely controlled by the state and some prosperous city municipalities, own roughly 80% of Norwegian hydropower, measured in terms of annual output. See Ot.prp.nr.61 (2007-2008) 28. I remark that the process of consolidation started even before the market-oriented reform of the sector. In particular, from 1960 onwards there was a significant push towards centralisation, as the state became a more dominant actor in the hydropower sector. For the state's increasing influence on the sector generally, see Skjold (n **??**); Lars Thue and Yngve Nilsen, *Statens Kraft 1965-2006: Miljø og Marked* (Universitetsforlaget 2006).

80 See www.nvn.no.

ergy.[81] The Ministry, in turn, gives its recommendation to the King in Council, who makes the final decision.[82] As mentioned in Section 4.3.2, parliament must also be consulted for regulations that will yield more than 20 000 natural horsepower.[83]

As indicated by the survey of relevant legislation the previous sections, there are many categories of hydropower projects. Moreover, different categories call for different licenses. Hence, the first step in the application process is for the developer to determine exactly what kind of license they require. This is further complicated by the fact that some categories overlap, since they are based on different measuring sticks for assessing the scale of an hydropower project.

One important parameter is the installed effect in the hydropower generator, measured in MW (Megawatts). There are four categories of hydropower formulated on this basis: the micro plants (< 0.1 MW), the mini plants (< 1 MW), the small-scale plants (< 10 MW), and the large-scale plants (> 10 MW). In practice, however, one tends to use small-scale hydropower to refer to all projects less than 10 MW. Still, a further qualification is sometimes required. For example, the authority to grant a license for a micro or mini plant has been delegated to the regional county councils since 2010, in an effort to reduce the queue of small-scale applications at the NVE.[84] The council's decision is based on a (simplified) assessment made by the regional office of the NVE. In addition, licenses for micro and mini plants may be granted even in watercourses that have protected status pursuant to environmental law.[85]

For small-scale plants proper, the authority to grant a license is delegated to the NVE, with

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81 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705) and directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270), pursuant to Water Resources Act 2000 s 64.

82 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

83 See Watercourse Regulation Act 1917, s 2.

84 See delegation letter from the Ministry of Petroleum and Energy, dated 07 December 2009, available at http://www.nve.no (accessed 24 August 2014).

85 See Decision no 240, Stortinget (2004-2005), St.prp.nr.75 (2003-2004) and Innst.S.nr.116 (2004-2005).

the Ministry serving as an instance of appeal.[86] For large-scale plants, the granting authority is the King in Council, based on a recommendation from the Ministry.[87] However, in practice, the decision is usually closely based on assessments and recommendations provided by the NVE.[88]

While the relevant licensing authority depends on the effect of the planned plant, the kind of license required depends on a different categorisation, relating to the level of regulation in the planned project, measured in natural horsepower (NatHp). Here, there are three categories: run-of-river schemes (< 500 NatHp), non-industrial regulations (< 4000 NatHp), and industrial regulations (> 4000 NatHp).[89]

Almost all hydropower schemes require a license pursuant to the Water Resources Act 2000, s 8.[90] For run-of-river schemes, no further licenses are required for the development itself, although an operating license pursuant to the Energy Act 1990 is typically required for the electrical installations. For schemes involving a non-industrial regulation, an additional license pursuant to the Watercourse Regulation Act 1917, s 8 is required. Industrial regulation schemes require yet another license, pursuant to the Industrial Licensing Act 1917, s 2.

As is to be expected, the complexity of the licensing procedure tends to increase with the number of different licenses required. However, the licensing applications tend to be dealt with in parallel, so that all licenses are granted at the same time, following a unified assessment. In practice, when the Watercourse Regulation Act 1917 applies, it structures the procedure as a whole, also those aspects that pertain to other licenses. In addition, yet another categorisation of hydropower

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86 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705).

87 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

88 For a detailed guide to the administrative process for large-scale applications, published by the NVE, see Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010).

89 See Watercourse Regulation Act 1917 s 2 and Industrial Licensing Act 1917, ss 1,2.

90 As mentioned in Section 4.3, the exceptions are very small schemes (usually mini or micro) that are deemed to be relatively uncontroversial. Such schemes only require a license pursuant to the Planning and Building Act 2008.

schemes is used to determine the relevant application procedure.

This categorisation is based on the annual production of the proposed plant, measured in GWh/year. There are three categories: simple schemes (< 30 GWh/year), intermediate schemes (< 40 GWh/year), and complicated schemes (> 40 GWh/year). For complicated schemes, the most important rules in Watercourse Regulation Act 1917 applies, regardless of whether or not the scheme involves a regulation.[91] In addition, applications for such schemes must be accompanied by an impact assessment pursuant to the Planning and Building Act 2008, s 14-6.

This means that the applicant is required to organise a public hearing prior to submitting his formal application, to collect opinions on the project and provide an overview of benefits and negative effects of the plans, particularly as they relate to environmental concerns.[92] In practice, if an impact assessment is required this significantly increased the scope and complexity of the application processing.

For intermediate schemes that do not involve regulation, the rules in Watercourse Regulation Act 1917 do not apply. However, impact assessments *may* still be required.[93] This is determined by the NVE after a concrete assessment. For simple schemes, impact assessments are in not required. Such schemes make up the core of what is described as small-scale hydropower in daily language.

The time from application to decision can vary widely, depending on the complexity of the case, the level of controversy it raises, and the priority it receives by the licensing authority. Usually, the assessment stage itself will last 1-3 years, sometimes longer.[94] While large-scale schemes involve more complicated procedures, they are also typically given higher priority than small-scale schemes.

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91 See Water Resources Act 2000, s 19.

92 See directive of 19 December 2014 (FOR-2014-12-19-1758), pursuant to the Planning and Building Act 2008, ss 1-2,14-6.

93 See Stokker (n **??**) 20. The threshold of 30 GWh/year has been set by the NVE, who have been delegated a more general authority to require impact assessments for hydropower projects even when these yield less than 40 GWh/year. See directive of 19 December 2014 (FOR-2014-12-19-1758).

94 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø, 'NOU 2012:9' , 84-85.

In recent years, following the surge of interest of small-scale development, a processing queue has formed at the NVE.[95] This means that small-scale applications typically have to wait a long time, sometimes several years, before the NVE begins processing them.[96]

As I will discuss in more depth in the next chapter, the issue of expropriation is rarely given special attention during the application assessment. This is so even in cases when an application to expropriate waterfalls is submitted alongside the licensing application. The issue of expropriation is rarely singled out for special treatment, at least not in cases of large-scale development. Moreover, as mentioned in Section 4.3, an automatic right to expropriate follows from the Watercourse Regulation Act 1917, s 16.

This rule is not understood to cover waterfalls, but it *is* understood to cover the right to divert water away from river systems where the applicant has no waterfall rights.[97] This is a *de facto* expropriation of waterfalls, and it is recognised as such in relation to the issue of compensation. However, it does not count as expropriation of a waterfall, meaning that no special expropriation permission is required. Recently, the Supreme Court held that this also implies that the special procedural rules that apply to expropriation do not apply.[98] Rather, the procedural rules and practices related to the development license are considered exhaustive.

These rules and practices pay little attention to the interests of local owners and the immediate local community. Usually, the only locally grounded actor that is recognised as playing an active role in the process is the municipality. However, even the role of the municipality is limited. Once a license is granted according to a sector-specific statute, no regular planning license needs to be obtained from the municipality.[99] Hence, the municipalities do not in fact enjoy any substantial

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95 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 84.

96 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 84.

97 See *Jørpeland* (n **??**).

98 See *Jørpeland* (n **??**).

99 See Planning and Building Act 2008 s 12-1.

decision-making power in hydropower cases.

Still, the municipalities must be notified of any application that might affect their interests, and they are expected to express their views.[100] In addition, they may protest against the plans using a form of objection that requires the NVE to enter into dialogue with them about possible changes and improvements.[101] However, even if an agreement is not reached, a license can still be approved, although then always by the Ministry, not the NVE.[102]

The local owners are in a weaker position. In fact, the NVE is not even obliged to notify them of licensing applications concerning their waterfalls. Instead, the NVE expects the applicant to notify affected owners when submitting a license application. But it is not established practice for the NVE to do so on its own accord, or to check that the applicant has fulfilled its obligation in this regard.[103] More generally, the expropriating party that is responsible for managing several aspects of the assessment process, including in cases that involve expropriation.[104]

One might think that this would raise competency questions. After all, applicants effectively acts as case workers on their own expropriation applications. However, it is established practice for the NVE to delegate much of the responsibility for preparing licensing cases to applicants, a practice that the Supreme Court has held to be beyond reproach.[105]

In cases that fall under the Watercourse Regulation Act 1917, the NVE must send its recommendation to the Ministry to interested parties for comments.[106] However, it is established practice

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100 See Watercourse Regulation Act 1917, s 8 and Water Resources Act 2000, s 24.

101 See Planning and Building Act 2008, ss 5-4,5-6, c.f., Water Resources Act 2000, s 24.

102 See Planning and Building Act 2008, s 5-6.

103 See *Jørpeland* (n **??**), and the discussion in Chapter 5, Section 5.6.

104 This follows from the extensive extent to which the applicants themselves are expected to organise and retrieve the information that forms the basis of the administrative decision. In particular, the water authorities rarely conduct extensive independent investigations, meaning that the information provided by the applicant tends to dominate. This is implicit already in Stokker (n **??**). For a concrete example of its effect in expropriation cases, I refer to *Jørpeland* (n **??**) and the detailed assessment of this case offered in the next chapter.

105 See *Jørpeland* (n **??**).

106 See Watercourse Regulation Act 1917 s 6.

that local owners do not count among the interested parties in this regard.[107] This includes owners of those waterfalls that the applicant wishes to expropriate. Hence, while the municipalities and various environmental interest groups are informed of how the case progresses and asked to comment on specific points prior to the final decision, the owners must inquire on their own accord if they wish to be kept up to date on the application process.

The lack of procedural safeguards protecting the interests of local owners is reflected in the kind of assessments that tend to be carried out. It is typical, in particular, for these assessments to focus primarily on the benefit of increased electricity production weighed against the negative effects on the natural environment. This, indeed, is the perspective that permeates the whole system, from the rules setting out the expected content of applications, through the procedures followed when assessing cases, on towards the criteria used to determine if licenses should be granted.[108] This also influences which voices receive attention. Great significance is attached to the opinions of environmental groups and expert agencies, while the owners' typically struggle to make an impact.[109]

To sum up, hydropower cases are assessed from within an expert-based system of governance, which also relies heavily on data that is collected and presented by the applicant. Political voices tend to remain distant. Municipality companies have been replaced by commercial actors on the applicant side, while the most important administrative decision-maker, the NVE, is a centralised, expert-based, directorate.

This is the procedural context of Norwegian hydropower, entrenched in law. In the next section, I will shift attention towards practical reality, focusing on the changes that resulted from the liberalisation reform of the early 1990s. I will begin by considering the established part of the sector,

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107 See *Jørpeland* (n **??**).

108 See Stokker (n **??**).

109 See *Jørpeland* (n **??**).

by presenting the ownership and management structures surrounding large-scale plants and the management of the national grid. Then I go on to consider specifically the surge of interest in small-scale hydropower, which represents an important counterweight to the process of centralisation and depoliticisation that has followed in the wake of the reform.

4.4 Hydropower in Practice

The history of hydropower in Norway can be roughly divided into four stages. The first stage was the development that took place prior to 1909. During this time, private actors dominated, with public ownership playing a minor role.[110] In fact, in the early days on Norwegian hydro-power, in the first half of the 20th century, there were quite a few locally owned and operated power plants, often providing local communities with electricity. In addition to this, there were many private interests speculating in acquiring Norwegian waterfalls, anticipating the value that these would have for industrial development.

After 1909, the introduction of licensing obligations and the rule of reversion meant that the state gained increased control over Norwegian water resources. At the same time, local municipalities began to invest in hydropower to provide electricity to its citizens, a service they were increasingly regarded as being obliged to provide.[111] This marked the start of the second stage of hydropower development, which saw the development of a monopolised, but decentralised, structure of municipality companies.

The third stage of hydropower came after the Second World War, when the central government began to invest heavily in hydropower, alongside municipality-owned companies. This period saw further marginalisation of private companies, as well as local owners. To increase the cost-effectiveness of the companies responsible for providing electricity to the public, it was often de-

[110] See Ot.prp.nr.61 (2007-2008) (n 78).

[111] See Ot.prp.nr.61 (2007-2008) (n 78).

manded, as a condition for allowing local communities access to the grid, that local hydropower plants had to be shut down.[112] During this time, the development of hydropower was seen as an important aspect of rebuilding the nation, a task carried out in the public interest.

The fourth state of hydropower development began in 1990 after the passage of the Energy Act 1990. The liberalisation that followed saw the transformation of the hydropower sector into a commercial market, based on profit-maximising and competition. As a result, the structure of decentralised management withered away further, as the municipality companies were either bought up by more commercially aggressive actors or forced to merge and change their business practices in order to remain competitive. At the same time, however, a new decentralised force emerged in the sector, in the form of local owner-led projects.

The core idea behind the Energy Act 1990 was that the energy sector should be restructured in such a way that production and sale of electricity, activities deemed suitable for market regulation, would be kept organisationally separate from electricity distribution over the national grid, a natural monopoly. However, the Act itself does not explain in any depth how this is to be achieved, and in practice, the divide has not been very strictly implemented. In particular, most of the large energy companies in Norway continue to maintain interests in both distribution, production and sale of electricity, a phenomenon known as "vertical integration".[113] In fact, since the liberalisation caused centralisation, the degree of vertical integration in the energy sector has increased since the passage of the Energy Act 1990.[114]

The water authorities do try to respond to this, particularly by making use of their authority to give organisational directives when they grant distribution licenses.[115] Moreover, energy companies

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112 See Hans Hindrum, *Elektrisitetsforsyning ved hjelp av statsstøtte* (NVE 1994) p.111.

113 See Jens Bibow, 'Energiloven, forvaltningspraksis og EØS-retten: Organisatoriske krav til energiselskaper' (2003) 42(10) 579, 580-583.

114 See Bibow (n **??**) 583.

115 See Energy Act 1990, s 4-1, para 2, no 1.

are required to keep separate accounts for production, distribution and sale of electricity.[116] It is also required that transactions across these functional divides are clearly marked, and that they are based on market prices.[117] Moreover, the NVE serves a control function in this regard, as they review the accounts of distributors on an annual basis.[118]

In practice, the water authorities have also gone further, by requiring that a separate company is set up to manage the distribution activities.[119] However, it is permitted for this reorganisation to take place by formation of a conglomerate, under a single parent company that controls both the distribution company, the production company and the sales company. Indeed, this model has now been implemented by most of the large energy companies in Norway.[120]

It seems unclear whether this approach really achieves the stated objective. By adopting the conglomerate model of organisation, the major players on the market have successfully gained control over a larger share of both the production and distribution facilities for electricity. Hence, these actors effectively control the core infrastructure that makes up the backbone of the Norwegian energy sector. The *intention* is that monopoly power should only be exercised with respect to the distribution grid on strictly regulated, non-discriminatory, terms. But is this realistic when the same commercial players have significant stakes also in production and sale of electricity?

This question calls for a separate study, and I will not be able to address it in any depth here. However, I will direct attention at one aspect of this that arises with particular urgency for small-scale development of hydropower. It is quite common, in particular, that small-scale projects remain unrealised because the grid is regarded to lack sufficient capacity.[121] Indeed, the

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116 See directive of 11 March 1999 (FOR-1999-03-11-302), s 4-4 a and s 2-6, issued by the NVE pursuant to directive of 7 December 1990 (FOR-1990-12-07-959), s 9-1, c.f, Energy Act 1990, s 10-6.

117 See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-8.

118 See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-1.

119 See Bibow (n **??**) 581-582.

120 Bibow (n **??**) 582.

121 See, e.g., Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 84,161-162.

distribution company is authorised to deny access in such cases, in keeping with their responsibility for providing an efficient and stable public service.[122]

Often, the distribution company will be a sister company of an energy producer operating in direct competition with the company seeking access. This raises obvious questions about the impartiality of the assessments carried out by the distribution company. In expropriation cases, this tends to become a thorny issue, particularly in relation to the assessment of alternative development schemes. Waterfall owners are rarely pleased when they realise that the expropriating party is part of the same conglomerate as the grid company that estimates the grid connection costs associated with an owner-led development scheme.

The water authorities themselves have recognised that access rights soon become illusory if it is too easy for the grid companies to deny access based on efficiency considerations.[123] At the same time, they point to the need for responsible management of the national grid, which, as they see it, requires delegation of authority to the grid companies. Hence, the authorities are left with a dilemma. So far, they have responded to this mainly by issuing more regulation, not by reducing the level of power-concentration in the energy sector.

The Energy Act was changed in 2009, such that grid companies are now subjected to a more wide-reaching duty to allow access for producers, even when this necessitates new investments.[124] But who should pay, and how much? This is often unclear, and while the water authorities have a supervisory function, it is the grid companies themselves that determine this in the first instance.[125] In addition, grid companies may still deny access in cases when the needed investments are not "socio-economically rational".[126] Hence, one may argue that the new rules only push the

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[122] See Energy Act 1990, s 3-4, c.f., directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

[123] See Ot.prp.nr.62 (2008-2009) .

[124] See Act no 105 of 19 June 2009 regarding changes in the Energy Act 1990.

[125] See directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

[126] See Energy Act 1990, s 3-4. The authority to decide whether this requirement is fulfilled is vested with the Ministry.

question of fairness and accountability further into the details of the decision-making process. Unsurprisingly, controversies continue to arise, particularly when owner-led and small-scale projects remain unfulfilled due to grid constraints.

As I have already mentioned, the market-orientation of the electricity sector has reduced the level of political control and accountability. Today, a management model based on economic rationality and expert rule has become dominant. According to Brekke and Sataøen, this serves to set the reform that took place in Norway apart from similar energy reforms in Sweden and the UK.[127] Moreover, Brekke and Sataøen argue that this may be part of the underlying reason behind some recent controversies, particularly with regards to the development of the national grid.

The most serious case so far is that of *Sima - Samnanger*, a new distribution line that will cut through the area known as *Hardanger*, a scenic part of south-western Norway. The local population vigorously protested the plans.[128] It would destroy a valuable part of Norwegian nature, they argued, without providing the people living there with anything in return.[129]

The controversy surrounding the *Sima - Samnanger* line also suggests that the current management of the national grid may lead to projects that fail to produce local benefits even when such benefits would result from reasonable alternatives.[130] As a consequence of this, local communities will easily come to feel that they have to pay the price without getting a share of the benefit.

As I have already mentioned, the reform of the early 1990s saw the emergence of a new kind of market player, namely the small-scale developer cooperating with local owners. Since the mid- to late 1990s, the small-scale sector has grown significantly. It has been estimated that about one third of the remaining potential for hydropower in Norway, measured in annual energy output, will

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127 See Ole Andreas Brekke and Hogne Lerøy Sataøen, 'Fra Samkjøring til Overkjøring' (2012) 44(6) Plan 22.

128 See Brekke and Sataøen (n **??**) 22-23.

129 Brekke and Sataøen (n **??**) 26-27.

130 Brekke and Sataøen (n **??**) 27.

come from small-scale projects.[131]

Many established energy companies have entered into the small-scale market, but they are facing serious competition from new actors, several of which are completely owner-controlled. This development has been a counterweight to the increasingly centralised ownership pattern of the grid and the existing large-scale hydropower plants. In many ways, owner-led and owner-cooperating companies have replaced the municipality companies as the local anchor of the hydropower sector.

In a recent report, the potential for profitable small-scale hydropower projects was estimated to be around 20 TWh/year.[132] On this basis, the authors of the report estimate that the total present-day value of the waterfalls suitable for small-scale hydropower is about 35 billion Norwegian kroner, i.e., about 3.5 billion pounds.[133] This calculation is based on a model where the waterfalls are exploited in cooperation with a commercial company, *Småkraft AS*. It might be an underestimate of what small scale hydro-power could represent for local communities if they remain in charge of development themselves.

Clearly, small-scale hydropower has become socially and political significant in Norway. In the report mentioned above, it is estimated that the value of waterfalls amount to just under 50 % of the equity in Norwegian agriculture.[134] Moreover, hydropower is increasingly seen as a possibility for declining regions to counter depopulation and poverty. In addition, it awards these communities a chance to regain some autonomy and influence with respect to how local natural resources should be managed. In some regions, small-scale hydropower is the only growth industry, and takes on great political and social importance, not just for the owners of waterfalls, but also

131 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 231.

132 See Normann Aanesland and Olaf Holm, Verdiskapning av Småkraft (Rapport Nr. 31, Universitetet for miljø- og biovitenskap 2009). For comparison, suggesting the scale of this potential, I mention that the total consumption of electricity in Norway in 2011 amounted to 114 TWh, see http://www.ssb.no/en/energi-og-industri/statistikker/elektrisitetaar.

133 See Verdiskapning av Småkraft (n **??**) 1.

134 Verdiskapning av Småkraft (n **??**) 1.

for the community as a whole.

For an example of a community where small-scale hydropower has played such a role, I point to Gloppen, a municipality in the county of Sogn og Fjordane, in the western part of Norway. 19 schemes have already having been successfully carried out, all except one by local owners, amounting to a total production of over 250 GWh/year. This prompted the mayor to comment that "small scale hydro-power is in our blood".[135] When interviewed, he also directed attention at the fact that hydropower had many positive ripple effects, since it significantly increased local investment in other industries, particularly agriculture, which had been severely on the decline.

To achieve such effects, it is important to organise development in an appropriate manner. Moreover, to explain how waterfalls came to be as valuable as they are today, it is crucial to direct attention to the way in which waterfall owners asserted themselves on the market. In the following, I do this by giving an in-depth presentation of an early model for local involvement in hydropower development, published at a seminar in 1996.[136] This model contains an early expression of several organisational ideas that would prove influential to the development of the small-scale hydropower sector.

However, certain other aspects of the model have not been widely adopted in practice. These are aspects that pertain to the balance of power between owners and developers, as well as the relationship that should be established with larger communities of non-owners, including environmental groups and other water users. Hence, considering the model in some depth, and assessing its impact, will allow me to shed light on the social functions of waterfall ownership, and the extent to which this dimension plays a role on the market today.

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[135] See Andreas Starheim, 'Kommunen med Småkraft i Blodet' [2012] (3) Småkraftnytt.

[136] See Dyrkolbotn and Steen (n 9).

4.5 *Nordhordlandsmodellen*

In five brief points, the *Nordhordlandsmodellen* sets out a framework for cooperation between waterfall owners, professional energy companies, local communities, and greater society.[137] The first point makes clear that the aim of cooperation should be to ensure local ownership and control, with outside interests never holding more than 50 % of the shares in the development company. If such a company is organised as a limited liability firm, then the plan stipulates that local residents – not necessarily owners – are to be given a right of preemption in the event that shares come up for sale. The possibility of organising the development company as a local cooperative is also mentioned.

The second point of the model sets out the principle for valuing the waterfalls prior to development. It stipulates that the appraisement should reflect their real value, and goes on to propose that valuation should usually take place on the basis of lease capitalisation. That is, one assumes first that the owner of the waterfall is entitled to rent based on the level of annual production in the planned hydropower project. Then, for the purpose of appraisement, the expected rent is capitalised to find the present value of the waterfall, relative to this project.[138]

After such a value has been calculated, the model stipulates that owners are to be given a choice of either leasing out their waterfalls to receive rent, or to use the capitalised value of (part of) this rent as equity to acquire shares in the development company. The third point in the model then offers a clarification, by stating that the development company should not in any event acquire ownership of the waterfalls, but only a time-limited right of use. After 25-35 years, this usufruct

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137 See Dyrkolbotn and Steen (n 9). The model was presented at a seminar in 1996, as the result of a collaboration between Otto Dyrkolbotn, a farmer and a lawyer, and Arne Steen, the director of *Nordhordland Kraftlag*, a municipality-owned energy company.

138 This approach stands in stark contrast to the earlier valuation method used in the energy sector, which relied on a purely theoretical assessment based on the aforementioned notion of a natural horsepower. See 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); *Bergenshalvøens Kommunale Kraftselskap v Neset and others* Rt-1997-1594.

should fall away and full dominion over the waterfalls should revert back to the landowners, free of charge. This is the proposed rule also in cases when the landowners themselves control the majority of the shares in the development company. The plan demonstrates the commercial viability of this mode of development, by pointing to a concrete municipality-owned company that has stated its willingness to cooperate with owners on such terms, to help with financing and share the risk.[139]

The fourth and fifth points in the model go on to describe the intended role of company in society, by making clear that hydropower development should not take place in isolation from other interests and potential uses of the river. Rather, potential developers should expect to take on formal obligations towards other user groups. Moreover, obligations should not only be negatively defined, as duties to minimise or avoid harms. Positive obligations should also be introduced, such as duties to improve other qualities of the river system, and to engage in active cooperation with other users.

The model explicitly states that environmental concerns should be given due regard. As an illustration of a positive obligation arising from this, the model goes on to state that less invasive projects may have to be considered, even if this is not prescribed by the authorities. In some cases, environmental concerns can suggest solutions that are not economically optimal. In addition, fishing and tourism are mentioned as concrete examples of other water uses that the hydropower company should actively seek to promote.

The overall aim, it is made clear, is to ensure sustainable management of the river system as a whole. Interestingly, the model predicts that local ownership will make this easier, and will make a contribution to sustainability that exceeds what can be achieved through governmental regulation alone. This claim is then illustrated by a concrete example of a case in which the local owners decided to pursue a scheme that was less invasive than the project endorsed by the water

[139] The company in question is Nordhordland Kraftlag, where one of the authors of the model, Arne Steen, was a director.

authorities.[140]

The model goes on to emphasise the need for integrated processes of resource planning and decision-making, to ensure that hydropower development is not approached as an isolated environmental concern, but looked at in a broader social and political context. To achieve this, it is argued, local communities need to play an important role in the management of water resources. Another concrete example follows, regarding the master plan for Romarheimsvassdraget, a river system in the municipality of Lindås.

This river system was originally intended for large-scale development undertaken by BKK AS, with no involvement of local owners.[141] The project would involve a total of three river systems, such that the water from Romarheimselva and another river would be diverted to a neighbouring municipality for hydropower development there. After local owners got involved in the planning, they argued against these plans. Moreover, they were successful, as the NVE agreed to endorse an alternative consisting of 7 distinct run-of-river projects undertaken in cooperation with local owners.[142]

It is important to note that when Nordhordlandsmodellen was formulated, owner-led development of hydropower was still a recent phenomenon, driven forward by individual owners and smaller groups that saw the potential and had enough know-how to get organised. Later, however, commercial companies emerged that specialised in cooperating with local owners.[143] Today, many such companies operate, making it relatively easy to initiate a process of owner-led development. Moreover, owners that are not themselves aware of the potential in their waterfalls are often ap-

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[140] Today, this project has become Svartdalen Kraftverk, finalised in 2006. It produces 30 GWh annually, enough electricity for about 1500 households, see http://no.wikipedia.org/wiki/Svartdalen_kraftverk.

[141] This is one of the 15 biggest hydropower companies in Norway, which would later also purchase Nordhordland Kraftlag.

[142] See *Vassragsrapport nr. 25*, Direktoratet for Naturforvaltning, 1999.

[143] For a good survey of later developments, I point to Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 8); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 9); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 9).

proached by interested commercial actors, who will tend to compete for the chance of striking a deal. Most of these companies rely on cooperation on terms that reflect many of the key ideas expressed in the first three points of Nordhordlandsmodellen.

However, several adjustments have become standard, and they systematically benefit the external partner: the requirement that locals should at all times control a majority of the shares is dropped, the period of usufruct is typically longer than 35 years, the reversion to the landowners after this time is made conditional on payment for machines and installations, and no preemption rights are granted to local residents. Importantly, however, the core idea that waterfalls are to be valued based on a capitalisation of future rent is accepted. This means, in turn, that local owners rarely need to raise any additional capital to acquire shares in the development company. Moreover, the rent itself can become a significant source of income.

There are two main approaches to calculating this rent. The first approach, introduced already in Nordhordlandsmodellen, specifies the rent as a percentage of the gross income from sale of electricity, typically 10-30 %. In this way, passive owners need not take on any risk related to the performance of the hydropower company. The second approach has been developed by the company Småkraft AS, which is now the leading market actor specialising in cooperation with local owners.[144] According to their model, the waterfall owners are paid a share of the annual *surplus* from hydropower generation.

This share is usually higher than the rent payable based on the net income; often, the owners are entitled to 50% of the profit.[145] Hence, if the project is a success, the owners of the waterfall can expect to be better compensated. However, they do accept some risks as though they were shareholders, and they do so even though they might not have much of a say in how the company

[144] It is owned by several large-scale actors on the energy market, see www.smaakraft.no.

[145] See Verdiskapning av Småkraft (n **??**).

is run.[146]

To illustrate the financial scale of the kinds of rent agreements that have now become standard, let us consider a typical small-scale hydropower plant that produces 10 GWh annually. With an electricity price of 0.3 kr/KWh, this gives the hydropower plant an annual gross income of 3 million kr. If the rent payable is 20 %, the waterfall owners will receive kr 600 000 annually, some £ 60 000. By contrast, if the rights were expropriated, the traditional method of valuation, a theoretical calculation based on the natural horsepower of the development project, would rarely if ever result in more than kr 600 000 as a *one-time payment* for a waterfall that yields 10 GWh/year.[147]

Hence, the financial consequences of the ideas expressed in *Norhordlandsmodellen* have been dramatic. On the other hand, it seems that the latter two points of the model, addressing the importance of responsible and inclusive management of river systems, have not had the same degree of influence on the market. In the next section, I address this in more depth and comment on some recent developments that threaten to undermine the status of small-scale development as a sustainable alternative to large-scale exploitation. I argue, in particular, that the future of hydropower will likely leave local owners and their communities marginalised, unless a social function approach to small-scale development is adopted.

4.6 The Future of Hydropower

In recent years, there has been a growing tension between the small-scale hydropower sector and environmental groups. There is talk of a brewing "hydropower battle", as environmentalists grow

146 To limit the risk for owners, Småkraft operates a system of "guaranteed" rent, but this rent is usually quite a lot less than what the owners could expect from an agreement bade solely on rent based on net income.

147 Sometimes, the difference in valuation would be even greater, since the natural horsepower of a development project is highly sensitive to the level of regulation of the waterfall, much more so than the value of the development. For an illustration of how this affected compensation according to the natural horsepower method, one may consider the case *Bergenshalvøens Kommunale Kraftselskap v Neset and others* (n 138), which went to the Supreme Court. Here the owners were paid just over kr 1 million for a waterfall that would yield 100 GWh/year.

increasingly critical of what they regard as predatory practices.[148] Reports on small-scale producers who violate regulations help fuel the negative impression of the industry.[149] At the same time, the price of electricity has been much lower in recent years than what had previously been forecast, causing severe financial difficulty for many small-scale developers.[150] This has also revealed that some of the actors on the market have engaged in speculative practices, by aggressively entering into agreements with local owners, without carrying out much actual hydropower development.[151]

On the regulatory side, the water authorities have announced that they will adopt stricter procedures to assess licenses for small-scale hydropower.[152] In addition, different planning routines have been adopted to ensure that small-scale schemes are no longer considered individually, but in so-called "packages", collecting together applications from the same area. As a consequence of these changes, the number of rejected applications have increased dramatically in recent years.[153]

Many powerful market actors, who still favour a traditional mode of exploitation, have seized the opportunity to revive the idea of large-scale exploitation.[154] This, they argue, is preferable also from an environmental point of view. It might be more damaging to the affected area, the argument goes, but at the same time, a few large-scale projects mean that many other areas can

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148 See 'Det yppes til ny vassdragsstrid!' (2012) 44(03-04) Plan 34.

149 In 2010, the NVE conducted randomised inspections and announced that 4 out of 5 mini and micro plants operated in violation of regulations pertaining to the amount of water they may use at any given time. See http://www.tu.no/kraft/2010/12/13/sma-kraftverk-driver-ulovlig (accessed on 31 January 2015). In the largest newspaper in Norway, this was reported under the heading that four out of five small-scale plants break the law, see http://www.vg.no/nyheter/innenriks/stroemprisene/fire-av-fem-smaakraftverk-driver-ulovlig/a/10020264/ (accessed on 31 January 2015). This is misleading, since mini and micro plants are distinct from small-scale plants proper, in that they do not require a sector-specific development license. Because of this, it also seems plausible that the reported violations might in large part be due to lack of knowledge and professionalism. I remark that questions later emerged regarding the accuracy of the report itself. Apparently, one of the plants that was reported to have violated regulations did not even exist, see http://www.energibransjen.no/default.asp?menu=2&id=1722 (accessed on 31 January 2015).

150 See http://www.bondebladet.no/midten/smakraft-kong-midas-i-revers/.

151 See http://www.dn.no/nyheter/2014/03/20/Energi/solgte-for-kraftflopp.

152 See http://www.tu.no/kraft/2012/01/18/nve-varsler-flere-smakraft-avslag (accessed 31 January 2015).

153 In 2013, the number of rejections tripled compared to previous years, while the number of accepted applications remained stable. See http://www.bondebladet.no/nyhet/rekordmange-smakraft-avslag/ (accessed 31 January 2015).

154 See, e.g., http://www.nord24.no/nyheter/article7531155.ece.

be left undisturbed with no loss of total energy output. This argument has proven successful in many quarters, particularly among state agencies, such as the NVE and the Norwegian Environmental Agency.[155] It has also been claimed that this perspective is backed up by research done on environmental effects of small-scale and large-scale projects.[156] However, I believe this claim to be largely incorrect.

In particular, the research in question concludes that large-scale projects generally requires *much more* land per energy unit produced.[157]. At the same time, it is shown that small-scale plants indirectly affect a greater total area, per energy unit produced.[158]. This is not surprising, as small-scale development is a decentralised approach to hydropower, which requires plants at many different sites to match the energy produced by a single larger plant. However, the research on indirect effects has little or nothing to say about how exactly small-scale plants impact on the environment, compared to large-scale projects. In particular, the parameters used to compare the two are defined in terms of generic buffer zones, that do not take into account differences in the severity of different kinds of environmental intrusions.[159].

The only buffer that is determined from information about actual effects is the scenic buffer, the area from which some installation can be seen. But even for this parameter, no distinction is made based on the actual visual impression; a large dam that dries up a river and makes it possible to regulate the water in a lake by several meters counts the same as a small cabin with a

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155 See http://www.tu.no/kraft/2011/10/14/vil-ha-storre-vannkraftverk (accessed 31 January 2015).

156 See generally Tor Haakon Bakken and others, 'Development of Small Versus Large Hydropower in Norway– Comparison of Environmental Impacts' (2012) 20 Energy Procedia 185; Tor Haakon Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (2014) 140 Journal of Environmental Management 93.

157 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 156) 96.

158 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 156) 96-99.

159 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 156) 95.

generator inside.[160] For the other parameters, the data available on indirect effects is even more dubious, since the buffers are set rather arbitrarily, according to general rules of thumb.[161] For instance, a conflict with a threatened species is assumed to arise whenever a technical installation occurs within a certain distance from its natural habitat.[162] Importantly, nothing is said about the severity of conflict, and no distinction is made between a minor installation and a massive disturbance.

Even so, the idea that large-scale development is better for the environment is fast gaining ground among the administrative decision-makers in Norway. This change of opinion and, increasingly, of practice, has taken place despite a consistent political narrative that emphasises how large-scale projects are a thing of the past while small-scale hydropower represents the future. In his New Year's speech 01 January 2001, the Prime Minister declared that the age of large-scale development was over.[163]. The same phrase was then repeated in the policy platforms of two successive governments, in 2005 and 2009 respectively.[164] Despite this, the legal position of owners and local communities has weakened in recent years. The best example of this is the case of *Otra*, concerning a large-scale development project in the southern part of Norway.[165]

The developer of this project was granted permission to expropriate waterfalls, resulting in a legal conflict that went to the Supreme Court twice, as the waterfall owners argued that they should be compensated for the loss of a small-scale development potential.[166] First, the owners

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160 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 156) 95.

161 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 156) 95.

162 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 156) 95.

163 See, e.g., (n **??**) 34.

164 See the "Soria Moria" declaration from 2005, p 57, and "Soria Moria II", from 2009, p 52 (available at www.regjeringen.no).

165 See http://www.otrakraft.no/.

166 See *Otra Kraft DA, Otteraaen Brugseierforening v Bjørnarå and others* Rt-2010-1056; *Bjørnarå and others v Otra*

were successful in this claim, but the Supreme Court sent the case back to the appraisal court of appeal on a technicality.[167] The second time the case came before this court, it was decided that compensation for the lost small-scale potential should not be awarded, since a small-scale scheme could not expect to obtain a development license.[168] This was so, the court held, *because* the large-scale development – which presupposed expropriation – represented a superior form of exploitation.[169] The consequence of this was that the waterfalls were compensated based on the natural horsepower method. Only a few years earlier, leading hydropower lawyers had predicted that this method was a thing of the past.[170] After the decision in *Otra II*, there is reason to believe that the future will hold the opposite scenario in store; compensation for small-scale potentials will be a thing of the past, at least in all cases when expropriation takes place to benefit large-scale development.

The end of large-scale exploitation has simply not become a reality, despite being official government policy for almost 15 years. Interestingly, the leading national politicians are now changing their position as well. The timing of this shift is interesting in its own right, as it suggests that the politicians follow the lead of the expert planners and the commercial interests, rather than the other way around. Indeed, one of the first clear renunciations of the small-scale narrative came during the opening of the *Otra* plant, in 2014. The Minister himself presided over the festivities, and used the occasion to explicitly reject the previous political line, by publicly declaring that he

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Kraft DA, Otteraaens Brugseierforening Rt-2013-612.

167 See *Otra I* (n **??**).

168 See *Otra II* (n 166).

169 See *Otra II* (n 166). I note that the court's reasoning on this point is at odds with what is known as the "no-scheme" principle in the UK, see e.g., Compulsory Purchase and Compensation: Disregarding the Scheme (Discussion Paper, Law Commission 2001). This principle states, roughly, that compensation following expropriation should not reflect changes in value that are due to the expropriation scheme. A no-scheme principle is typically observed in Norway as well, but it is a general feature of Norwegian expropriation law that this principle is applied rather narrowly in case the expropriation scheme follows from public planning (in which case applying a no-scheme rule tends to result in higher compensation). See, e.g., Bjørn Stordrange, 'Reguleringsplaner og ekspropriasjonserstatning' [2007] Lov og Rett 107.

170 See Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 9).

was in favour of more large-scale development.[171]

This political shift is likely to result in a further weakening of property rights and the rights of local communities. For example, it provides indirect political legitimacy to the NVE, who now pursue an explicit policy of prioritising applications for large-scale projects when these come into conflict with small-scale schemes in the same rivers.[172] In effect, the NVE will refuse to consider applications from owners as long as there are applications pending that might result in the expropriation of their property.

All in all, it seems that small-scale hydropower is loosing both its force and its credibility as a sustainable alternative for development. I think the underlying causes of this deserve attention in future work. To what extent is the political shift attributable to lobbying from powerful market actors? Is the shift in attention motivated by the fact that waterfalls can be acquired cheaply by force if they are needed for large-scale development? A serious examination of these and related questions would require further empirical study, and must be left for future work.

Here I would instead like to emphasise how recent misfortunes for the small-scale sector suggest the importance of adopting a broader, non-commercial, perspective on privately held rights to waterfalls. In fact, I think the small-scale sector itself needs to be challenged with its seeming failure to comprehensively address social and environmental concerns. It seems plausible to hypothesise that part of the reason why the small-scale sector has been so easily undermined has to do with the fact that the industry itself has failed to broadly mobilise property owners and local communities in decision-making processes.

In fact, the small-scale industry has on occasion actively sought to undermine property rights, possibly in an effort to mimic the successes of their large-scale competitors. The industry has argued, in particular, that expropriation should be made more easily available as a tool for small-

171 See http://www.tu.no/kraft/2014/10/28/energiministeren-etterlyser-mer-regulerbar-vannkraft.

172 See letter from the NVE of 21 March 2012 regarding new routines for the assessment of hydropower applications.

scale developers and owners who wish to take property from reluctant neighbours.[173] The argument rests on a peculiar form of anti-discrimination reasoning; as long as large-scale developers are allowed to take property by force, small-scale developers should be allowed to do the same. In a world where takings are endemic, this might make some sense. However, it is hardly an attitude that helps the small-scale industry preserve its image as the more sustainable hydropower option.

My cautious and critical remarks should not detract from the fact that the growth in small-scale hydropower has led to dramatically increased benefit sharing with many local owners of waterfalls. However, I believe recent developments point to the importance of considering the broader societal context of new commercial practices. This echoes the more theoretical discussion in Chapter 2. There I argued that an entitlements-based perspective on property rights fails to do justice to the issue of economic development takings. In relation to hydropower development, this insight is strongly implicit in Nordhordlandsmodellen. However, in the current debating climate it seems to be at risk of disappearing from view.

To counter this, I believe the social function view of property must be developed further in the context of Norwegian hydropower. The aim should be to arrive at models of participation that further entrench the ideas implicit in Nordhordlandsmodellen, particularly the latter two points. I return to this issue in Chapter 6, where I argue that the system of Land Consolidation Courts can be used to achieve this. First, I will zoom in on the issue of expropriation, where the mechanisms identified in this section often lead to concrete legal disputes. This, in turn, gives rise to principles and rules that will play an important role in shaping the future framework for water management in Norway. Moreover, it brings into focus important issues surrounding the status of economic development takings under Norwegian law.

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[173] See Ola Brekken, 'Småkraftverk og ekspropriasjon' [2007] (4) Småkraftnytt; Ola Brekken, 'Småkraftverk og ekspropriasjon – replikk til NVE' [2008] (1) Småkraftnytt 21. The articles are written by a leading Norwegian energy lawyer, apparently in his capacity as legal representative of "Småkraftforeningen", an interest organisation for small-scale hydropower (the articles are published in the newsletter of this organisation).

4.7 Conclusion

In this Chapter, I introduced my case study and provided background information that places it in a broader context with respect to Norwegian law. I presented the legal and regulatory framework surrounding hydropower development, while also tracing its history back to pre-industrial times. I noted that local rights to hydropower has a long tradition in Norway. However, I also observed that after the advent of the industrial age, and particularly following the Second World War, the state took the view that hydropower was a public good that should be exploited in the public interest.

The tension that followed now permeates the law on hydropower, particularly following the liberalising reform of the early 1990s. This reform reorganised hydropower development as a commercial pursuit – the public interest would not longer be the guiding force behind the activities of Norway's leading hydropower companies. At the same time, local owners were empowered by the reform, as they were now able to engage in commercial hydropower development themselves. This was made possible by the fact that a market for electricity was set up, founded on the idea that all actors should have access to the grid on non-discriminatory terms.

I discussed the resulting system in some depth, addressing also the question of whether or not the market functions as intended. I noted that the energy reform led to a concentration of power in the energy sector, where commercial companies partly owned by the state now wield more power than ever before. This, I argued, threatens to undermine the intentions behind the reform. I also looked at the extent to which the regulatory framework is able to accommodate new actors and true competition on non-discriminatory terms. I focused particularly on the status of locally led projects as well as the companies that specialise in cooperating with owners. I also discussed controversies that have resulted, particularly relating to the perceived discrimination of smaller actors on the market.

Then I went on to present a prototype for the model by which the smaller actors now tend to

organise themselves. I observed that they too often appear to have adopted a strongly commercial outlook on the meaning of local hydropower development. I discussed how this departs from earlier ideas, which were based on seeing local development as an expression of local democracy and local management of resources. This earlier vision actively sought to ensure sustainability and incorporate other interests in the decision-making, a perspective that now seems to have largely disappeared from view.

I concluded by arguing that this is a likely reason why small-scale development now seems to be falling out of favour with the political elite, and, increasingly, also with the public. Today, critical voices claim that large-scale development is better, not only because it is more commercially optimal, but also because they claim it results in a less negative total effect on the natural environment. Moreover, issues relating to ownership, control, benefit sharing and local participation, appear only at the fringes, both of the current debate and the current regulatory framework.

This state of affairs, I think, foreshadows many of the issues that will be brought into focus in the next chapter. There, I will look specifically at expropriation of waterfalls, by tracking the position of owners under the current regime. I will argue that the law as it stands is based on a perspective that blocks out both the significant commercial interests of the taker, as well as the significant social functions and obligations of the original owners. The issue of expropriation, in particular, will invariably raise questions that seem difficult to address without adopting a broader view, which also takes into account the owners' communities and their role within it.

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, and to assess them against general principles of expropriation law.

Most legal scholars in Norway emphasise that the law of expropriation contains many procedural safeguards and that these are meant to ensure a careful assessment of owners' interests against the needs of the public. By contrast, the water authorities tend to consider expropriation of waterfalls as a minor issue, a natural consequence of a development license. In relation to the licensing question, moreover, the established practice is to focus on the environmental consequences of development, not how interference in property affects owners and local communities.

As I show in this Chapter, this has had a significant *practical* effect, also in relation to how the authorities assess the material question of whether or not an expropriation order should be granted. In particular, a *presumption* has developed, whereby the administrative decision-makers considers a license to undertake large-scale development as an indication that an expropriation order should also be granted.[1] Importantly, this presumption has remained in place, even though

[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.

the context and consequences of waterfall expropriation have changed since the liberalisation of the hydropower sector in the early 1990s. In the present Chapter, I give a detailed presentation of the history of current practices, before I illustrate their effects by considering the recent case of *Jørpeland*.[2]

The structure of this 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. In short, I argue that because hydropower generation was seen and organised as a public service, expropriation for this purpose 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) to a large-scale developer was in most cases the best thing an owner could hope for, in so far as he wished to benefit financially from his waterfall rights.

In Section 5.5, I pinpoint the end of the early era to the introduction of a general purpose expropriation authority introduced in the Water Resources Act 2000. For the first time in Norwegian history, waterfalls could now be expropriated for purely commercial gain, also by private companies. I go on to briefly present the resulting legal framework.

In Section 5.6, I use *Jørpeland* to show how owners' standing under administrative law is extraordinarily weak, particularly compared to the magnitude of their present-day interests in hydropower. Moreover, I 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 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.

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

5.2 Norwegian Expropriation Law: A Brief Overview

As mentioned in Chapter 3, the right to property is entrenched in s 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 widely, or not regarded as a requirement at all. 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.[3] Moreover, the Constitution is not understood as providing an authority to expropriate, it merely presupposes that expropriation is possible.[4] Hence, the administrative branch must rely on other provisions that authorises compulsory acquisition of property on specific terms.

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.[5] Today, many of these authorities have been collected, broadened, and included in the Expropriation Act 1959.[6] Still, many specific authorities remain, such as s 16 of the Watercourse Regulation Act 1917, which gives an automatic right to expropriate to the holder of a watercourse regulation license.

Following the Water Resources Act 2000, the general authority used to expropriate waterfalls has been included in the general act on expropriation.[7]. 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

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

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

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

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

7 Expropriation Act 1959, s 2 no 51.

expropriation orders apart from the various hydropower licenses discussed in Sections 4.3.1-4.3.4 of Chapter 4. In relation to the latter, in particular, the benefit is required to outweigh the harm, but it need not be ascertained that this is *undoubtedly* the case. However, the practical significance of this difference is limited. In particular, the additional requirement means that it should be clear that the benefit is greater, but does not imply that the benefit has to be significantly greater.[8]

The authorising authority is the King in Council. However, the Act also makes clear that this authority can be delegated further, to ministries or other state bodies that the King in Council may instruct.[9] The compensation to the owner is determined following a judicial procedure administered by the special appraisement courts.[10] 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, what 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.[11] 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. 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.[12] In addition, the Act requires the applicant to specify exactly what property they require, and to

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

9 See Expropriation Act 1959, s 5.

10 Expropriation Act 1959, s 2.

11 See Directive no 391 of 06 April 2001.

12 See Expropriation Act 1959, s 11.

include information about the type of property in question and the current use that is made of it.

The owners are to be notified, and the starting point is that every owner is to be given individual notice, although this obligation falls away when it is "unreasonable difficult" to fulfil[13] If individual notification is too difficult, it is sufficient that the documents of the case are made available at a suitable place in the local area. A public announcement must also be made in the official notification publication of the government, as well as in two widely read local newspapers.[14]

The licensing authority is required to ensure that the facts of the case are clarified to the "greatest extent possible".[15] This formulation seems very strict. At the same time, the exact meaning of the phrase "greatest possible extent" is clearly not so easy to pin down. Moreover, administrative practice from several fields, including the hydropower sector, suggests that when expropriation takes place to implement a public plan, little attention is devoted to expropriation as a special issue, separate from planning considerations.[16]

A decision to grant an expropriation license must be justified, and the parties should be informed of the reasons for the decision.[17] This rule is largely superfluous, as the obligation to give reasons would in most cases also follow independently from administrative law, c.f., Section 5.2.1.

The costs incurred by owners in relation to a pending application for expropriation against them is to be covered by the applicant.[18] 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

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

14 See Expropriation Act 1959, s 12.

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

16 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.

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

18 See Expropriation Act 1959, s 15.

Act 1959. In practice, an applicant will be denied costs if the competent authority takes the view that they are unreasonable or disproportionate to his interests in the case.[19]

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 this area of law, including the most important 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.[20] This development gained momentum after the Second World War, when administrative bodies also came to be placed more directly under centralised political control.[21] At the same time, the established system based on legal expertise and strict adherence to the letter of the law was replaced by a form of management that actively sought to pursue political goals. As a result, 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 by statutory authorities that only specified their purpose and competence in broad strokes. Importantly, this style of legislation, which is still the norm, leaves great room for the exercise of administrative discretion, coupled with greater centralised control.

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

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

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

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

obligations of specific individuals.[22]

In response to this, a general statute was proposed that would set out some minimum standards of due process for administrative decision-making. This proposal eventually became the Public Administration Act 1967.[23] The Act sets out the fundamental procedural principles that the executive is meant to 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*, which affect the rights and responsibilities of one or more specific persons.[24] Clearly, owners of property covered by an expropriation license fall into this category, so that owners are considered protected parties to the individual decision to grant such a license.

Many of the rules in the Public Administration Act 1967 mirror those of the Expropriation Act 1959, but tend 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.[25] 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 his interests in a proper manner".[26]

Hence, it is not enough simply to inform the party that a case is under way, the Act also explicitly stipulates that the notice has to meet a minimum quality standard. In relation to expropriation of waterfalls this becomes potentially significant, especially in light of the practice I discussed in Chapter 4, whereby expropriating parties sends out these notices themselves. One may ask, in particular, what owners are to think when they receive a letter from a commercial company

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22 See NUT 1958:3 (n **??**) 12-16.

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

24 Public Administration Act 1967, s 2.

25 See Public Administration Act 1967, s 16. Similarly to the advance notice rule in the Expropriation Act 1959, it may be permissible to not give individual notices if the parties are difficult to reach.

26 Public Administration Act 1967, s 16.

stating that unless a friendly settlement can be reached, their waterfalls will be expropriated.[27]

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 declare that cases are to be "clarified as thoroughly as possible" before a decision is made.[28] Importantly, however, 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 submit such information for comments in so far as the party must be assumed to have an interest in it.[29]

The duty to justify and give reasons for administrative decision is also expressed more clearly 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 information to which the party is not entitled.[30] As to the content of the reasons given, the authorities should mention the relevant rules authorising the decision, outline the factual assessment the underlies it, as describe the main considerations that have been decisive for the use of discretionary power.[31] In case law, the duty to give reasons has become quite important, as the Supreme Court has declared that insufficient reasons can indicate shortcomings of the assessment, which might in turn lead to the conclusion that the decision is invalid.[32] However, the duty to give reasons in hydropower cases is understood to pertain to the licensing question as a whole, so that the authorities are not obligated to give individuated reasons

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27 A formulation along these lines was used by the expropriating party in *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723. In general, according to my 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 are waterfall owners or simply affected by the building works). Clearly, such an approach does not encourage waterfall owners to engage in the planning process in a manner commensurate with the fact that they own the natural resource that the planning pertains to.

28 Public Administration Act 1967, s 17.

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

30 See Public Administration Act 1967, s 24. Moreover, the King is authorised to limit the duty to give grounds when "special circumstances so require". All these exceptions are unusual, and hardly ever apply to hydropower cases.

31 Public Administration Act 1967, s 25.

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

to waterfall owners, pertaining specifically to the expropriation question.[33]

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 cases, as many waterfall owners can not be expected to possess the technical, commercial, and legal knowledge necessary to understand what their ownership of this natural resource could entail, if an expropriation order is not granted. 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".[34] However, it is explicitly stated that the level of guidance must be adapted to the circumstances and the capacity that the 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 waterfalls are expropriated. But in practice, 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 a little 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 waterfalls needed for the hydropower development.

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33 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n **??**); *Jørpeland* (n 1) (discussed in more depth in Section 5.6).

34 Public Administration Act 1967 s 11.

However, it includes a right to transfer water away from a river course for development somewhere else. This is a *de facto* license to expropriate a waterfall, as the water disappears form the river in which the owners have rights. This form of interference is also treated as an expropriation of waterfalls in relation to the compensation issue, as compensation is paid for the value of the waterfalls as such.[35] Formally, however, the interference is not considered a waterfall expropriation, but rather as an expropriation of a right to deprive waterfalls of water (and, hence, their value).

The question arises whether or not the rules in the Expropriation Act 1959 and the Public Administration Act 1967 apply in such cases. In theory, the answer is clear: they do apply. First, the rules in the Public Administration Act 1967 express general principles of administrative law, pertaining to individual decision in general, including expropriation decisions, but also licensing decisions, in so far as they affect the rights of individuals. This condition is clearly fulfilled in cases pursuant to the Watercourse Regulation Act 1917. Second, the Expropriation Act 1959 explicitly states that it applies to expropriation pursuant to the Watercourse Regulation Act 1917.[36] However, here it is also said that the rules in the Expropriation Act 1959 only apply in so far as they are "suitable" and do not "contradict" sector-specific rules.[37] This points to the potential caveat that while a range of rather strict procedural rules apply in theory, they may be ignored in practice, in so far as they are deemed redundant or unsuitable.

This is practically significant. In particular, the established practice among the water authorities is to regard the procedural rules in the Watercourse Regulation Act 1917 as exhaustive.[38] 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

35 See *Jørpeland* (n 1).

36 See Expropriation Act 1959 s 30.

37 Expropriation Act 1959, s 30.

38 This is made clear in *Jørpeland* (n 1), where this practice also got a stamp of approval from the Supreme Court.

Act 1917.[39] This is so even though case law on the former assessment criterion emphasises the interests of owners in a way that case law on the latter does not.[40]

In light of this, it is very hard for owners to challenge the legality of a decision to allow expropriation of their waterfalls, particularly when expropriation takes place pursuant to the Watercourse Regulation Act 1917.[41] Moreover, even if the Watercourse Regulation Act 1917 does not authorise expropriation of waterfall rights, the water authorities tend to approach the expropriation in the same way, as long as the development is classified as a large-scale project. For such projects, the authorities tend to rely on a presumption that the conditions to permit expropriation are fulfilled whenever a development license may be granted.[42]

Hence, in order to defend themselves, owners must proceed in a roundabout manner by addressing the licensing question as such. 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, when the courts tended to defer greatly to the judgement of the administrative branch.[43]

In relation to procedural rules, the expropriation question is typically not recognised as a separate question at all. If environmental aspects have been dealt with thoroughly, procedural objections will tend to fail, even when these objections do not pertain to environmental issues,

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39 Again, see *Jørpeland* (n 1).

40 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, there the formulation is that a license should "normally" not be given, unless the benefits outweigh the harms.

41 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).

42 See Flatby (n 173).

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

but rather to the interests of owners.[44] Nevertheless, for a normative assessment of the law, it is interesting to consider how the practices and rules pertaining to expropriation of waterfalls, singled out for separate study, compare to the requirements of general administrative and expropriation law.

The rest of this Chapter is devoted to addressing this issue. I start by tracking the history of current practices. I believe this is quite important, because the context of expropriation has changed dramatically compared to the time when many of the current practices developed. Moreover, going back even further helps demonstrate that expropriation was once largely superfluous, and quite unheard of, in the Norwegian hydropower sector. For these reasons, I believe the historical perspective is very fruitful. Hence, I now embark on a chronological presentation, where I first address 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 the government to expropriate waterfalls, neither on its own behalf nor on behalf of private parties.[45] In the Water Systems Act 1888, a range of provisions authorised appropriation of water and land for specific purposes, but the criteria were narrow.[46] Waterfalls as such could never be made subject to expropriation, and

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44 I believe this striking conclusion is justified by case law from recent years, which shows that courts continue to rely on the *Alta* case as the primary precedent when assessing procedural complaints in hydropower cases. See, e.g., *Aktieselskabet Saudefaldene v Hallingstad and others* (n **??**); *Jørpeland* (n 1). As I will show in Section 5.4, the *Alta* case had nothing to do with expropriation and property rights. Rather, it arose from environmental concerns (and concerns about property-less indigenous people). In particular, the procedural objections that were raised in *Alta* were specifically related to the assessment of environmental consequences, an assessment that is usually carried out very thoroughly by the authorities in hydropower cases (even more than usual in the *Alta* case, which was already very controversial).

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

46 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 he acquired, but were obliged to use them in accordance with the public purpose for which expropriation was authorised. See, e.g., Per Rygh, Ekspropriantens raadighet over ekspropriert ting (Rt-1912-113) 133-140.

expropriation of other 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.[47]

More specifically, expropriation for hydropower development was only permitted when it would serve as an aid to owners who needed to acquire surrounding land in order to exploit waterfalls that they already owned.[48] At the same time, owners of waterfalls 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.[49] 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 3.6. As in the US, the kinds of takings in question here could be classified as economic development takings. However, the economic development potential itself was never taken in these cases. Rather, the takings only targeted additional rights that were needed in order for the owner to realise a potential for development of property that they already owned.

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.[50] 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 owner of a waterfall was held to possess a hydropower interest. As a result, they could not be deprived of waterfalls or water power by a taker whose interest was also related to hydropower development.

Following industrial advances, the interest in hydropower exploded in the late 19th century.[51]

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47 See Dahl (n **??**) 58,60.

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

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

50 See Dahl (n **??**) 168-170.

51 See Thor Falkanger, 'Acquisition of Real Property and State Approval' (1987) 31 Scandinavian Studies in Law 57,

As a result, the state increasingly came to see it as a political priority to secure that waterfalls were used in the public interest. The most important expressions of this came in the form of the licensing acts presented in Chapter 4, Sections 4.3.2 and 4.3.3. Recall that the Industrial Licensing Act 1917 set up a licensing framework that would make it hard for speculators to purchase waterfalls. The Watercourse Regulation Act 1917, on the other hand, established the principle that the right to regulate the flow of water in a river system did not belong to the owner at all, but the state. Still, this did not imply any difference in the right to waterfalls for hydropower generation. This right still belonged to the local landowners.

However, around the same time, parliament passed legislation that authorised expropriation of waterfalls for the benefit of public bodies, also when the purpose was hydropower development.[52] In 1940, these authorities were consolidated and integrated in the general water resources legislation, through the Water Systems Act 1940 (which was later replaced by the Water Resources Act 2000). Still, the authority to expropriate waterfalls could be granted only to the state and the municipalities. Moreover, an expropriation order could in principle only be granted when it was necessary in order to implement state projects, or to satisfy the general demand for electricity. For the municipalities, moreover, it was explicitly required that the purpose of expropriation was electricity supply in the local district.[53]

Hence, the public purpose of expropriation remained in focus, and expropriation licenses could not in principle be granted to private or purely commercial entities. Moreover, it was felt that benefit sharing was required, so special rules were introduced to ensure that the taker would have to pay *more* than full market value compensation (typically a 25 % premium, but in some cases the

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[52] 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 **??**) 29.

[53] 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.

owner was also given a right to opt for compensation in the form of a proportion of the electricity output of the plant).[54]

Expropriation was intended to have a clear public character; in so far as the letter of the law was respected, it would appear that expropriation was indeed taking place in the public interest. Moreover, the public had to benefit directly, and locally (in case of municipal expropriation). Economic development in itself did not seem to be a sufficiently public purpose to justify expropriation.

On the other hand, as I showed in Chapter 5, the electricity supply in Norway just after the passage of the Water Systems Act 1940 was quite well developed. Hence, in light of the seemingly strict public interest requirement of the expropriation authority, one would perhaps have expected expropriation for hydropower development to remain a rare occurrence. Instead, the use of expropriation for this purpose exploded after the war, as the state itself engaged much more actively engaged in hydropower development, also for more commercially oriented industrial exploits.[55]

Hence, despite the spirit and wording of the Water Systems Act 1940, this was the time when expropriation of waterfalls became a measure to facilitate economic development, although, for the time being, on non-commercial, politically governed, terms. In particular, the increased prevalence of expropriation seen during this time had little to do with any particularly 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, so that it became a more tightly controlled monopoly, under increasingly centralised political control.[56]

As I mentioned in Chapter 5, many of the local, privately owned, hydropower plants were

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54 See Hugo-Sørensen and Olafsen (n 53) 70-91,184,210. I also note that in case private parties already owned more than 50 % of the waterfall they wished to exploit, they could, on certain conditions, be granted permission to expropriate the remaining rights. See the Water Systems Act 1940, s 55. See also the commentary in Hugo-Sørensen and Olafsen (n 53) 70-74. This was a novel rule in the 1940 Act, which contradicted earlier theories about the legitimacy of allowing expropriation for private benefit.

55 See generally Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006).

56 See Skjold (n **??**); Lars Thue and Yngve Nilsen, *Statens Kraft 1965-2006: Miljø og Marked* (Universitetsforlaget 2006).

shut down during this period, as a result of an explicit policy meant to establish monopoly power in the sector. As the scale of development grew massively following the Second World War, local communities were marginalised in the decision-making processes concerning resource management. Moreover, the benefits from development would more often tend to accrue to urban areas. At the same time, the negative effects were of course mainly felt by the typically rural communities where the resource was found. At the same time, hydropower became increasingly politically sensitive, mainly as a result of growing environmental concerns about the consequences of large-scale development on nature.

The interpretation of the supply requirement in the Water Systems Act 1940 was relaxed significantly over the years, 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, but, indirectly, also the local supply situation might be said to improve.

However, the rule that private parties could not expropriate waterfalls was still respected. It remained in place until 2000. Only then, some 90 years after the introduction of a general expropriation right for the state and the municipalities, did it become possible for any commercial entity to acquire waterfalls compulsorily for hydropower.[57]

In light of this, the vast majority of cases dealing with waterfall expropriation under Norwegian law can not be looked at as takings for profit, even though they increasingly became economic development takings. Certainly, the desire for economic development played a crucial part in motivating state and municipality development projects in post-war Norway. But their activities in this regard were not themselves commercial in nature. Rather, supplying electricity was regarded

[57] Moreover, this outcome was achieved by an executive directive, not an explicit act of the legislature, as discussed in Section 5.5.

as a public service, one that would in turn stimulate commercial activity in other areas of the economy.[58]

In the following subsection, I present the case law that developed during this time. In light of how the courts have chosen to approach recent controversies, this body of case law is still highly relevant, even though the context of interference has changed.

5.4.1 Case Law from before 1990

The period before liberalisation was not free from conflict regarding the legitimacy of measures undertaken to facilitate hydropower development in Norway. Indeed, the original move by which the state asserted control over the sector in the early 1990s was highly controversial. At this time, there was a general feeling of unease about how far the state could go in regulating and monopolising the hydropower sector without thereby depriving the owners of waterfalls of constitutionally protected rights.

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 sell a waterfall to a private development, the owners and the purchaser had to apply for a license that was only ever granted on the condition that after some number of years, at most 60, the state would acquire the waterfalls without paying compensation. The question that arose was whether this was merely a regulation of the permitted use of waterfalls, or whether it should be regarded as expropriation, so that compensation would have to be paid pursuant to s 105 of the Constitution.

The conflict over this issue became fierce, with some influential legal scholars, attacking the rule of reversion as a ploy to confiscate Norwegian waterfalls without paying compensation to the

[58] See generally Thue and Nilsen (n **??**); Skjold (n **??**).

owners.[59] However, in a 4-3 decision, the Supreme Court held that s 105 did not apply, since reversion was merely a licensing condition, not an act of expropriation.[60] No owner was compelled to hand over his property to the state, or to sell it to a private party so that the state would eventually acquire it.

One of the judges voting with the majority summed up their view by commenting that he would not regard it as expropriation if the state were to forbid sale of waterfalls to private parties altogether. 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 that entitled the owners to compensation. Moreover, as the purpose was clearly to ensure that waterfalls were eventually brought under state ownership, the minority did not think is was appropriate to consider reversion merely as a regulation of use.

After the Supreme Court upheld the rule of reversion, the legal foundation for the hydropower monopoly began to solidify. This monopoly developed gradually, however, and as I have already noted the use expropriation to facilitate hydropower did not become commonplace until after the Second World War. However, following the increased state-led activity in the sector after the war, conflicts surrounding hydropower development began to intensify once again. This time, however, the main objection was based on environmental concerns, not the position of local owners and communities.

After the Second World War, the state pursued very large-scale projects, involving significant levels of regulation of the water flow in large and important river systems. Moreover, it 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. In

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

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

general, the opposition to hydropower grew proportionally to the scale of typical development projects.

While the focus was on environmental effects, the interest of local people also featured strongly in these debates. Moreover, the local interest were often aligned with the environmental interests. Large-scale hydropower projects, in particular, would tend to cause nuisance, or even significant loss, to traditional forms of agriculture. Therefore, in a situation when local owners could not themselves benefit commercially from hydropower, their response was often to oppose it.

5.4.1.1 *Alta*

The patterns of conflict that emerged during this time converged towards the highly controversial case of *Alta*, which came before the Supreme Court in 1982 after a long period of high-intensity conflict going back to the mid-seventies.[61] This case features an added complication, since the affected locals mostly 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.

Norway has a history of discrimination against the Sami, and as their culture is largely nomadic, their land rights were never formalised in the law. As a result, the natural resources in Finnmark are largely owned by the state. However, the Sami have successfully struggled for their rights to use the land, particularly for their nomadic form of reindeer farming, with an extensive additional reliance on fishing and hunting.

The plans to develop large-scale hydropower in a Sami area therefore raised particularly strong criticism, also from environmental groups and groups fighting for aboriginal rights. A broad political mass movement was mobilised in opposition to the plans, eventually resulting in several serious

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[61] See *Alta Laksefiskeri Interessentskap and others v Staten (Norges Vassdrags- og elektrisitetsvesen) and others* Rt-1982-241. For a commentary by a leading legal scholar in Norway, see Torstein Eckhoff, 'Alta-dommen' [1982] Lov og Rett 399.

cases of civil disobedience, including what might today be classified as "terrorism".[62] The case was also dealt with by the court, as the Sami interests claimed, primarily on the basis of administrative law, that the development licenses that had been granted for the development were invalid.

At first sight, the *Alta* case is not particularly relevant to the question of expropriation. However, as the Norwegian regulatory system focuses on the development issue, with little or no separate attention paid to the issue of expropriation, the case has in fact been highly significant to the owners of waterfalls. It effectively serves as the primary measuring stick with which the executive and the courts assess the level of substantive and procedural protection that local people are entitled to, regardless of whether or not they have waterfall interests.[63]

Due to the controversy surrounding the case, it was admitted directly from the district court to the Supreme Court in plenum. 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.[64] In an opinion totalling 138 pages, the Court argues that the decision to grant the license was valid. The opinion deals mostly with procedural rules. The substantive arguments, and arguments relating to international law, were not subjected to much scrutiny, as the Court was clearly quite confident that no objection could be raised against the licenses on such grounds.

However, the opponents of the development had pointed out a very wide range of purported shortcomings of the decision-making process. First, it was already clear that the original licensing application did not meet the requirements stipulated in the Watercourse Regulation Act 1917, s 5. Essentially, the original application contained little more than technical details about the planned development, with hardly any identification or assessment of deleterious effects, neither to private

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62 In particular, there were several instances when local people blew up equipment that was meant to be used to construct the hydropower plant. In one famous episode, the "terrorist" miscalculated, resulting in the loss of his own arm. Apart from a few such episodes, however, the protests were relatively peaceful.

63 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n **??**); *Jørpeland* (n 1).

64 *Alta* (n 60) 254.

nor public interests. This shortcoming had been openly acknowledge by the water authorities themselves, who had nevertheless initiated a public hearing, citing an electricity deficit in the northern part of Norway.

The Supreme Court concluded that this was "clearly unfortunate".[65] 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 argued, the initial mistakes might be irrelevant to the validity question, since it was licensing process as a whole that should be assessed. 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.[66]

The Court then moved on to assess whether the process as a whole fulfilled procedural requirements. This turned largely on the question of whether or not the authorities' assessment of deleterious effects fulfilled the criterion in Watercourse Regulation Act 1917, s 8, c.f., Public Administration Act 1967, s 16 In this regard, those who objected to the license 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, for instance, it was argued that the water authorities had failed to adequately consider the indirect consequences of development. These effects were described as "catastrophic" by an expert testifying before the Court. By contrast, the water authorities had not given much weight to the possibility of indirect consequences, citing the difficulty involved in attempting to quantify such effects.

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 were well aware of the possibility of indirect negative consequences. They simply chose, as a matter

65 *Alta* (n 60) 265.

66 *Alta* (n 60) 265.

of expert discretion, not to place much weight on such consequences. This, according to the Supreme Court, could be regarded as an expression of disagreement with those claiming (later) that the effects would be catastrophic. As a result, the grounds for claiming procedural error disappeared, as the lack of attention directed at indirect consequences was held to reflect a factual assessment, made pursuant to a discretionary power that could not be made subject to judicial review.

More generally, the Court's opinion on this point reflects how hard it is to apply procedural rules in a context where it is assumed that the administrative branch has a wide margin of appreciation. Importantly, the Court makes statements of principle in this regard, that serve to limit the scope of judicial review under procedural rules in hydropower cases. In particular, the Court concludes that many of the relevant procedural rules in such cases by their very nature tend to be largely "discretionary' '. As the licensing decision itself is a discretionary one, the argument goes, it is appropriate to admit to the executive a wide discretionary authority to decide for themselves also how to interpret many of the vague requirements of administrative law. By contrast, the view taken by the appellants, based on the idea that the content and scope of such rules is a purely judicial question, is described by the Court as "overly formalistic".

The Court makes a second statement of principle, namely that the scope of assessment required for the purposes of reaching a licensing decision is not in any event as extensive as the level of assessment that is required in a subsequent appraisement dispute. Hence, the meaning of the obligation to clarify cases to the best possible extent is put into perspective: assessments of deleterious effects may be omitted at the decision-maker's discretion even in circumstances when such assessments are practically relevant to the level of compensation payable and *will* in fact have to be provided at a later stage.

More concretely, in relation to the negative effects on fishing, the *Alta* Court conceded that the assessments could have been better, but pointed out that the purpose of assessment was only to

answer yes or no to development, not to give a detailed presentation of its effects.[67]. Crucially, the Court goes on to note that in so far as mistakes are uncovered as a result of insufficient assessment, this will influence the compensation payments and can also motivate subsequent regulation.[68]

In effect, the risk of error is downplayed by making reference to the compensation right and the regulatory authority 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 in purely monetary terms, while the state is assumed to be the sole protector of social and environmental values attached to property.

In relation to some negative effects of the *Alta* development, it was made apparent that they had not been considered at all. In addition, it was clear that erroneous information had been used in relation to some issues, particularly regarding alternative ways to meet the need for electricity in Finnmark, as well as the extent of this need. The Supreme Court agreed that this was a flaw, but held that it did not imply invalidity of the license. In this regard, a third statement of principle was made. The Court held, in particular, that the duty to consider alternatives – different ways in which the public purpose could be satisfied – was very limited.

It was sufficient to mention some alternatives, but it was not required to give any detailed assessment. This position of principle, in turn, was used by the Court to argue that the errors in the information provided about alternative were unlikely to have affected the outcome of the case.[69] In fact, alternatives *had* been assessed in quite some depth. But since this was regarded as more than what was necessary, the factual errors that had been made were disregarded as insignificant.

Interestingly, this was the conclusion despite the fact that clearly erroneous information had been handed over to parliament, who had approved the plans on three separate occasions, always

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67 *Alta* (n 60) 330.

68 *Alta* (n 60) 330.

69 *Alta* (n 60) 346.

under reference to the precarious electricity situation in Finnmark. Here the Court established a principle whereby the nature of possible alternatives is considered a marginal issue in relation to assessment of licensing applications, regardless of what political decision-makers emphasise when *they* consider the case.

In *Alta*, for instance, the Court's perspective appears to be at odds with how the parliament approached the case. There was little doubt that the favourable political assessment of the plans 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.

In relation to this question, the legal council 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 to question of validity.[70] This line of argument is rather striking, since the decision to grant the license was very much a political one. The information gathered by the water authorities, in particular, was put to use in a largely political decision-making context. In light of this, it seems that the procedural rules were, if anything, *more* important to observe in so far as they pertained to the quality of the factual basis that would be used in subsequent political assessments.

The Supreme Court did not approach the matter from this angle, but how exactly it reasoned in this regard is not clear from its opinion. In fact, it is worth noting how briefly the Court comments on this particular issue compared to other aspects of the case.[71] The Court instead goes into great detail regarding purported weaknesses of the licensing procedure that seem minor, comparatively speaking.

In relation to the duty to assess alternatives, the Court says nothing expect that the duty is very limited. For the details, which demonstrate factual inadequacies in the material given to the political decision-makers, the Court only refers briefly to the state's arguments. These arguments,

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70 *Alta* (n 60) 341.

71 See also the surprise expressed in Eckhoff (n 61) 349-351.

based on the contention that the inadequacies were not significant, is accepted with no further discussion.[72]

The dismissive attitude towards the duty to correctly assess alternatives is a controversial aspect of the *Alta*-decision which has been criticised by legal scholars.[73] Today, maintaining such a dismissive attitude becomes particularly problematic also with respect to owners' rights. Indeed, alternatives are no longer limited to other public projects that can potentially provide the same public service at a smaller environmental and social cost. In addition, it is very natural to consider the possibility of owner-led projects proposed in commercial competition to the applicant's project. In so far as the duty to assess these alternatives is construed as loosely as the duty to assess alternatives was construed in *Alta*, it will hardly be reassuring for those owners of waterfalls that oppose commercial development projects based on their own hydropower plans.

In the next two sections, I will argue that no significant adjustments have been made to the way the water authorities approach their assessment of alternatives. Moreover, the dismissive attitude to this question in *Alta* was upheld in the case of *Jørpeland*, in a situation when the NVE had provided manifestly erroneous information to the Ministry.

5.5 Taking Waterfalls for Profit

As I mentioned in the previous section, private companies could not expropriate waterfalls in Norway prior to the passage of the Water Resources Act 2000. Moreover, the public purpose requirement was formulated quite strictly, particularly in cases when the development was undertaken by municipality companies. I also mentioned how the hydropower sector developed after the Second World War from a sector dominated by private and municipality companies, to a sector dominated by the state. This, in turn, was accompanied by increased conflicts and doubts regarding the

[72] *Alta* (n 60) 346.

[73] See, e.g., Inge Lorange Backer, *Naturvern og Naturinngrep* (Universitetsforlaget 1986) 580-584.

legitimacy of the established licensing procedures, particularly the highly centralised nature of the decision-making process.

Even so, the debate at this time was still very much anchored in a system that presupposed political management of the hydropower sector as a public service provider. Importantly, the conflicts rarely, if ever, involved significant commercial interests on the part of the local waterfall owners. Many critics argued that the fiscal interest of the state could not be used to justify destruction of nature and local patterns of land use. But in financial terms, the value of what was destroyed was typically negligible compared to the value of the hydropower development.

As a result, controversies relating to the legitimacy of interference involved only the waterfall rights at their periphery. More focused conflicts involving waterfalls specifically arose in relation to the question of compensation, but the issues typically discussed in this regard were also of relatively minor structural importance, although they could of course be important enough for the individuals directly affected.

In Chapter 4, I presented the reform of the energy sector of the early 1990s, after which hydropower development has been regarded as a commercial pursuit. Following the regulatory reform, a new general statute dealing with water resources was also proposed, eventually leading to the passage of the Water Resources Act 2000. This Act provided the first every authority for the state to allow developers to take waterfalls compulsorily for profit. Moreover, it made possible the later executive directive by which waterfalls could be expropriated and handed over to *any* legal person, including private companies.

After the legal and regulatory reforms of the 1990s, takings of waterfalls for hydropower have become takings for profit. But 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 increased scope of expropriation was not singled out for political consideration when the Ministry presented their proposal to parliament. The new expropriation authority for waterfalls is

described merely as a "simplification" of the law.[74]

This is hardly accurate. However, the commission appointed by the Ministry to prepare the Act also adopted a very low-key approach to expropriation. The commission mentioned that its proposals would imply increased scope for expropriation, but it did not discuss the desirability of this in any depth.[75]

The report from the commission, which totalled almost 500 pages, devotes only three pages to 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.[76] 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".[77]

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 in so far as they regard expropriation as undesirable.[78] 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 very brief presentation of the rationale behind dropping the local supply restriction for municipal expropriation. Here they remark simply that these rules complicate the law and might

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

75 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.

76 Lov om vassdrag og grunnvann (n 74) 235.

77 Lov om vassdrag og grunnvann (n 74) 235-236.

78 Lov om vassdrag og grunnvann (n 74) 235.

make desirable expropriations impossible.[79] No clarification is offered as to what kind of desirable expropriations the committee think might be left out.

Importantly, the committee do not relate their proposals to the recent market-based reform of the energy sector. Hence, the obvious practical consequences of their proposal, namely that expropriation will be made available as a profit-making mechanism for commercial companies, 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 structures 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.[80] 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 meeting such a demand 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-

79 Lov om vassdrag og grunnvann (n 74) 235.

80 Lov om vassdrag og grunnvann (n 74) 236.

fashioned.[81] No discussion is offered regarding the consequences for local waterfall 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. During the last 14 years, an unprecedented number of cases has raised the issue of legitimacy of expropriation of waterfalls. Today, practically all cases of expropriation imply that local owners are deprived of a development potential in favour of a commercial actor seeking development of broadly the same kind. According to the law before the Water Resources Act 2000, expropriation in such circumstances would be hard to justify in general, and impossible for private companies.

In *Sauda*, a case before the court of appeal, this came into focus, as the waterfall owners protested a license that granted a private company the right to expropriate their waterfalls.[82] The owner's principal argument was that the executive directive granting such rights to private parties was in fact invalid, since it had not been sanctioned by parliament. Formally, this argument was rather weak, since the Expropriation Act 1959 had been amended in such a way that the executive was explicitly authorised to determine the class of legal persons that could be granted a license to expropriate for hydropower development. 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 backed up their case by pointing to interviews with two of the members of the parliamentary committee that had prepared the case. Neither of them could recollect that they had been aware that a right to expropriate for private developers would result from the Act they had passed. 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

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81 Lov om vassdrag og grunnvann (n 74) 236.

82 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n **??**).

separate Acts. In the entire collection of preparatory documents, the change was discussed only once, in the report from the committee to the Ministry. This, the owners argued, meant that the purported authority was not in fact constitutionally valid, since parliament had not intended that it should be introduced in Norwegian law.

Unsurprisingly, this argument was rejected. 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 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 from a similar angle in the paradigmatic case of *Uleberg*.[83] 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. In these cases, 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 purely theoretical estimation of the value of the waterfall to the taker.[84]

In addition to raising the compensation issue and the issue of constitutional legitimacy, *Sauda* also raised several procedural questions regarding how the water authorities prepare cases involving expropriation of waterfalls. The owners were unsuccessful also in this regard. However, their procedural arguments foreshadow the later case of *Jørpeland*, where the owners were successful in the district court, which held that the procedures developed in the takings for progress era were no

[83] See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

[84] For a more in-depth presentation of this, I refer to 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) 71-76.

longer appropriate.[85]

This decision was overturned on appeal, however, a decision that was in turn upheld by the Supreme Court, in a decision relying on the precedent set by *Alta*.[86] I will now consider this case in some depth, since this will help bring out how administrative practices relating to expropriation for hydropower actually function in the context of commercial development. In particular, it will help shed light on the situation that arises when the owners oppose the expropriation because they have competing development plans.

5.6 *Ola Måland v Jørpeland Kraft AS*

The expropriating party in this case was a public-private commercial partnership, Jørpeland Kraft AS. This is a limited liability company which is jointly owned by Scana Steel Stavanger AS, with 1/3 of the shares, and Lyse Kraft AS, who is the majority shareholder, 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 has always been 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 see near Jørpeland itself. Moreover, the water from this river is supplemented by water from other rivers in the area that are diverted so that they can be exploited along with the water from the Jørpeland river.

Recently, Norwegian steel companies have become less profitable, due in great part to increased foreign competition and a significant increase in cost of operation associated with this type of

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

86 See the decision by Gulating Lagmannsrett in *Jørpeland Kraft AS v Ola Måland and others* LG-2009-138108. See also the Supreme Court decision in *Jørpeland* (n 1) (*Jørpeland*).

industry in Norway.[87] 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, and the role played by Lyse Kraft AS is an important one.

As I discussed in Chapter 4, Norwegian law favours companies where the majority of the shares are held by public bodies. Lyse Kraft AS is publicly owned, with the city of Stavanger as the main shareholder. Hence, it is a very valuable partner. Moreover, Lyse Kraft AS is also responsible for the electricity grid in the region, so is well-positioned to provide easy access to the electricity market.

Lyse Kraft AS was established as a merger between several local monopoly companies in the Stavanger region which were reorganised following liberalisation of the sector in the early 1990's. As discussed in Chapter 4, there is little doubt that old monopolists still enjoy considerable power and influence, particularly in relation to the state agencies that regulate the industry.[88] This is another reason why they can serve as valuable partners for private companies wishing to make a profit from Norwegian 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), the main variables that determines the profitability of the undertaking also changes. On the cost side, what matters the 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.

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87 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.

88 In fact, Lyse Kraft AS is good example, particularly since their power appears to have *increased*, as the restraints imposed both by the non-commercial nature of former monopolists, and the local, political, anchoring of such companies, have disappeared.

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 waterfalls into dams that were already built to collect the water from the Jørpeland river.

One relatively small waterfall 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 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. Far from 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 stems from the *Brokavatn*, located 646 meters above sea level, where altitude soon drops rapidly, making the waterfall 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, at 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.[89] This is about five times more than the

[89] See *Jørpeland Kraft AS v Ola Måland and others* (n 84).

water from Brokavatn would contribute to the project proposed by Jørpeland Kraft AS.[90]

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.[91] Ola Måland and the other owners of the waterfall were not identified as significant stakeholders in this regard and they 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.[92]

Rather, the approach to the case was the traditional one, with an assessment directed at the environmental impact. Many interests groups were called on to comment on consequences in this regard, 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 owners, Arne Ritland, 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 regarding this, stating only that such 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 and was directed at local supply of electricity. It has since been shut down, in keeping with the general trend mentioned in Chapter 4.[93]

Arne Ritland received a reply from Scana Steel Stavanger AS, in which it said that more

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90 See *Jørpeland Kraft AS v Ola Måland and others* (n 84).

91 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).

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

93 See *Jørpeland Kraft AS v Ola Måland and others* (n 84).

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 as part of the hearing. 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 original owners were not informed, and they were not asked to comment, or even told that such an investigation of the commercial potential in their waterfalls was being conducted by the expropriating party, as a response to Ritland's letter.

Despite being presented with the issue, the water authorities did not take steps to investigate the commercial potential of local hydro power on their own accord. Moreover, the conclusion presented by Jørpeland Kraft AS did not go into details, but merely stated 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 loose, 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 profitable 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 it was dismissed by the NVE, who stated 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 Arne Ritland's statement in this regard. 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 the 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 in

their own project, 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 plans had already been offered to the Ministry. This communication took place in late November 2006, summarised in minutes from meetings between local owners, dated 21 and 29 of November. On 15 of 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 for hydropower. In light of this, the owners decided to question the legality of the concession (with the corresponding permission to expropriate). They argued, in particular, that the administrative decision was invalid.

According to the owners, the expropriation was materially unjustified. Moreover, they contended that the administrative process had not fulfilled procedural requirements. The district court, Stavanger tingrett, held in favour of the owners.[94] The court emphasised that the authorities were obliged to properly take into consideration the fact that the waterfalls could have been exploited commercially by the original owners themselves. Moreover, the court noted that in order to ensure a proper assessment, the authorities should have ensured that the owners were kept informed about the progress of the case, so that they would have an opportunity to comment in a timely fashion. The court also noted that the administrative decision was based on factual mistakes, regarding the owner's opinion of the plans, as well as the energy potential of Jørpeland Kraft's plans compared to an owner-led project in "Sagåna". This, the court held, meant that the concession had to be declared invalid.

This view was rejected by the court of appeal, Gulating lagmannsrett, which held that sufficient

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[94] See *Jørpeland Kraft AS v Ola Måland and others* (n 84).

steps had been taken to clarify the commercial interests of the owners.[95] Moreover, the court held that established practices regarding the preparation and evaluation of such cases – dating from a time when it was not feasible for original owners to undertake hydropower schemes – still provided adequate protection. The owners appealed the decision to the Supreme Court, who decided to hear the case. However, the appeal was eventually rejected, and the Supreme Court went even further than the court of appeal when they declared that established practices were beyond reproach.[96]

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.

5.6.1 The Legal Argument

First, they owners argued that procedural mistakes had been made in preparing the case. Second, they argued that according to Norwegian expropriation law, it was not permissible to expropriate in a situation such as this, when the loss of energy and commercial potential would outweigh the gain to those same interests. Moreover, it seemed to the original owners that allowing expropriation would only serve to benefit the commercial interests of Jørpeland Kraft AS, and that it would do so to the detriment of both local and public interests.

For this reason, the owners also contended that the concession should be regarded as an abuse of power, a manifestly ill-founded decision which could not be upheld.[97]

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

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95 See *Jørpeland Kraft AS v Ola Måland and others* (n 85).

96 See *Jørpeland* (n 1).

97 There are at least two different ways in which to argue such a point under Norwegian law. One is with respect to water law and general administrative law, whereby clearly ill-founded decisions can be overturned by the courts, even when they involve discretion on part of the executive, which is otherwise not subject to review by the courts. Secondly, an argument can be made with respect to the Norwegian Constitution, s 105, which gives property a protected status. The former is usually more effective, but in both cases, quite a severe transgression will have to be established before courts consider it within their competence to overturn discretionary decisions.

at Hjelmeland, and the local owners residing there, was not adequate. 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, or asked to comment on, those preparatory steps that explicitly sought to assess their interests.

Fourth, the owners argued that irrespectively 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 all these objections to the expropriation, 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, should be attributed to the fact that original 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 government to decide.

Indeed, according to Norwegian national law, it is traditionally held that unless the exercise of power it clearly unjustified, the courts do not have the authority to overturn decisions based on discretion, unless it can be demonstrated that the government has made procedural mistakes. While this view has become somewhat more relaxed in recent years, with a standard of *reasonableness* becoming increasingly important, the inadmissibility of court interference in administrative discretionary decisions is still very much a part of Norwegian national law.[98]

Finally, Jørpeland Kraft AS argued that there was no issue of human rights at stake in the case. They argued for this by simply pointing to the fact that the procedural rules had been followed and that the material decision was beyond reproach. Hence, no human rights issues seemed to arise.

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[98] See Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014), in particular, Chapters 24 and 29.

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 Stavanger Tingrett who decided in favour of the owners on 20 May 2009.[99] 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.

5.6.1.1 Stavanger Tingrett

Stavanger tingrett agreed with the original owners that the decision to grant concession 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 it was a procedural error that the NVE had not considered the assessment of hydropower potential contained herein.

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 Stavanger tingrett (my translation):

> 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

[99] See *Jørpeland Kraft AS v Ola Måland and others* (n 84).

> 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.

Stavanger tingrett 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. Summing up, the court offered the following assessment of the case (my translation):

> 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. This is not provided for explicitly in statue, but it is one of the core unwritten legal principles of administrative law.[100]

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 hydropower project suggested by original owners 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 it was based on factual mistakes, there was no need to consider claims regarding the legitimacy of the

[100] See Eckhoff and Smith (n **??**).

decision with respect to human rights law. Stavanger tingrett did conclude, however, by making a more overarching assessment of the case. Here they state that the procedure followed in preparing the case had not taken sufficient regard of owners' interests and that this 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 local hydropower was an option available to original owners.

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

5.6.1.2 Gulating Lagmannsrett

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 waterfall 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, on property owned by persons that 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 a manifestly ill-founded interpretation. But the regional court adopted it, without further comment.

The court of appeal seems to have assumed, quite generally, that the practices traditionally adopted by the water authorities in hydropower cases would still provide adequate protection for original owners. In this regard, the court of appeal seem to base their stance on an overarching appeal to the need for efficient procedures.

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.[101]

5.6.1.3 The Supreme Court

The Supreme Court ruled in favour of Jørpeland Kraft AS.[102] In their decision, they comment on the relevant facts on p 9 of their decision. There, they mention 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 loose

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[101] 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.

[102] See *Jørpeland* (n 1).

when the water from Brokavatn disappeared, and the Supreme Court also remains 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. But 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 Hjelmeland Kommune, and also all subsequent assessments made both on behalf of the applicants and on behalf of Jørpeland Kraft AS. I mention that all of the above were presented to all national courts, including 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 practice with respect to the provisions in this Act. Moreover, the main reason they the Court gives 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.[103] 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 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.[104] Hence, it remains to be seen if cases involving explicit expropriation of the waterfalls themselves will be treated differently by the courts. Is the conclusion regarding the admissibility of current administrative practices supposed to apply only to those cases when water is subject to diversion? If it is, then it leads to the peculiar situation that the level of protection for owners depend solely on the way in which the developer propose to gain control over the water.

The difference appears arbitrary from the point of view of owners. But of course, it will soon

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[103] 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.

[104] See Flatby (n 173).

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 appears that it is not possible, in cases involving expropriation of waterfalls, to solicit any kind of judicial review, not even in circumstances when the factual basis of the decision is manifestly erroneous, and local owners are not informed of assessments that the expropriating party makes regarding their interests.

To illustrate that a lack of consultation is a general problem, and 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, who submitted written evidence to the Supreme Court regarding the practices followed in cases involving expropriation of waterfalls. Below, I give one of several exchanges that seem to indicate that under current practices, local owners are left in a rather precarious position.

> Q: In cases such as this, should owners affected by a loss of small scale hydro-power 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 reflection of correct national law, as decided 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 not be made with respect to human rights, by arguing that the protection awarded is insufficient in this regard. This point, while it was raised by the original owners in *Jørpeland*, did not receive any separate treatment in the Supreme Court. In the following section, I briefly describe some further questions raised by the case.

5.6.1.4 Assessment

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 waterfalls. At least, this 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* itself 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 well 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 a traditional process, 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 hydro-power would be a better way of harnessing the water in question, even in the sense that it would be more efficient, and would provide 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.[105] 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 perverse. However, whether her pessimism is warranted by empirical fact seems less clear. In this context, I believe the case of Norwegian waterfalls serves an important broader purpose, since it sheds light on the hypothesis that a loose interpretation of the public interest requirement will indeed lead to a transfer of property from those with fewer resources to those with more.

I believe the *Jørpeland* case illustrates that her concern must be taken seriously. More generally, the Norwegian case of hydropower seems to show that we 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

[105] As discussed in Chapter 1.

question.

Another perspective, which I will pursue in more detail in the next chapter, is the question of how property rights relate to the overreaching goal of sustainable development of natural resources. Rather than seeing property rights as a means towards securing sustainable development, it is presently very common, particularly in a social-democratic context, to see it as an impediment. This, indeed, has shaped much of the Norwegian discourse regarding environmental law and policy, including the law relating to waterfalls.[106]

Moreover, a typical justification given for interference in property is that an equitable and responsible management of natural resources requires it. It seems to me, however, that an egalitarian system of private ownership of resources – as we find in Norway for the case of waterfalls – could itself serve as a sustainable basis for management of these resources. In particular, I believe that private property rights are one of the most robust ways in which local communities can be given a degree of self-determination concerning how to manage local resources.

This is in itself considered desirable from the point of view of sustainability, but often, it appears that the favoured approach to securing it is through administrative arrangements that is supposed to empower local people. The voice that locals get, under such an arrangement, is heard at the discretion of the administrative branch. Hence, it is easily drowned in the context of large-scale commercial development, particularly when a narrative is established whereby this development is carried out for the "common good". I believe the case of Norwegian hydropower illustrates this point, and also shows that there is every reason to remain sceptical when commercial interests claim that they embody the public interest.

If property becomes a privilege for the few, rather than an obligation for the many, there is reason to expect that the level of vigilance will be diminished in this regard. In this way, takings

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[106] For example, such a sceptical view of property rights appear to provide an overarching perspective on the law of sustainability in Inge Lorange Backer, *Innføring i naturressurs- og miljørett* (5th edn, Gyldendal 2012) (a widely used textbook on environmental law in Norway, by one of the most influential jurists over the past 25 years).

for profit serve a double purpose in that they establish a culture of property which threatens to transform it from an egalitarian institution focused on virtue, to an elitist institution focused on entitlement. The repercussions of this, I believe, extend well beyond the local communities that are adversely affected in the first instance. For example, it seems to me that an egalitarian property regime is one of the paramount guarantees we have that the state will be able to effectively and rationally exercise its regulatory powers, without bias.

In a system where property no longer acts as an equaliser, but rather as a marker of political and commercial power, one must expect that the government itself will be more easily intimidated by commercial interests. This becomes particularly likely if such interests permeate the political system itself. The case of hydropower in Norway illustrates how this can happen, as a result of naive policies of state-ownership, aiming to protect the public interest, but effectively serving to render the public will subservient to the imperatives of the market.

Moreover, a capitalist elite which commands significant regulatory power may not take lightly to what they perceive as undue political interference in their business practices. A company which is partly owned by the state, operates the electricity grid on behalf of the public, and is accustomed to expropriating property without meeting with much resistance, is likely to act with great confidence and boldness also when it faces political opposition. Much more so, one would presume, than a group of peasants, the original owners of waterfalls.

I think the case of *Jørpeland* suggests that these perspectives are all relevant when considering takings for profits and their consequences. In the next chapter, I will turn to the question of how to ensure commercial development via compulsion by a different route, *without* incurring the negative effects associated with expropriation in such circumstances. Here I believe the fundamental challenge is one of setting up a decision-making structure that can ensure a balance between the various stakeholders. Importantly, the decision-making structure itself should recognise that local owners are those who have the most to loose, and gain, from undertakings involving their property.

Indeed, I believe that the appropriate form of democratic decision-making involving property interests needs to reflect both the obligations and rights associated with those interests. The owners must not be conceptualised as an impediment to development, but as a potential driving force. Moreover, they cannot be conceived of merely as interested bystanders, but must be recognised as *the* primary actor in any collective action that seeks to transform their property so that it may serve a more valuable social function. No doubt, to achieve such a transformation may require compulsion. But it need not require outright expropriation, as I will attempt to demonstrate in the next chapter. The overriding concern is to develop strategies whereby the state can impose new property uses without undermining existing distributions of property rights and obligations among its citizens.

5.7 Conclusion

In this Chapter, I have argued that the law relating to expropriation of waterfalls in Norway is based on a tradition that sees owners as profit-maximising and the state as welfare-seeking. Hence, 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 observed 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, while severe, largely failed to make an impact on the law relating to hydropower, as long as the sector was organised as a public service. In particular, the perceived level of political control over the sector meant that courts shunned away from adopting a strict view on legitimacy.

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 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 went on to note that this perspective has been maintained by the courts and the executive even after the market-reform, when the sector lost its characteristics as a public service. I argued that today, expropriation of waterfalls for hydropower development must be regarded as takings for profit, typical 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 in a 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, it 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 believe it has great potential. However, as demonstrated in the present chapter, Norwegian courts do not seem 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 partnerships as arbiters of the common good.

6 Compulsory Participation in Hydropower Development

6.1 Introduction

In this Chapter, I will consider an *alternative* to expropriation in the context of economic development. This is also where I ended my theoretical discussion in Part I, by presenting and analysing the land assembly proposals put forth by Heller and Hills in US. Here, I return to this point in the context of my case study, by exploring the Norwegian institution of *land consolidation*.

In recent years, this institution has been used extensively to facilitate hydropower projects. So far, however, it is used almost exclusively in situations when owners themselves organise such projects. In these situations, expropriation orders are rarely sought and rarely authorised, even if some owners object to the plans. Instead, various consolidation measures are used, including the practically important "use directives", which can be used to set up organisational frameworks for compulsory implementation of a development plan, possibly against the owners' own wishes, but in a way that presupposes their continued involvement. Essentially, a use directive can be used to compel owners to cooperate and participate in a decision-making process that has economic development as an overarching, binding, aim.

In addition to the growing importance of consolidation in the context of hydropower development, there have been recent legislative developments in Norway that have caused the consolidation

alternative to gain importance also in relation to other forms of development. This includes urban and non-agrarian development projects, something that represents a departure from the tradition of land consolidation as a purely agricultural institution. Some argue that novel uses of land consolidation leave the owners in a precarious position, and that it weakens private property rights.[1] In this Chapter, I explore the opposite hypothesis, namely that the use of consolidation for economic development can strengthen property as an institution, when it replaces traditional expropriation proceedings. In particular, I argue that the Norwegian system of land consolidation can be used to address the democratic deficit of economic development takings in an elegant way.

However, I note how this vision presupposes that the land consolidation process continues to function as a service to owners and local communities, as a means for helping them, possibly by nudging them, to implement development projects in accordance with public interests. Land consolidation must not be turned into a tool for powerful commercial interests that seek cheap and effective access to property rights held by weaker parties. Here, it seems that the current system in Norway is likely to be put under strain, if the consolidation alternative to expropriation gains further practical relevance. In this regard, I believe it is important to remain vigilant and to consider what safeguards should be put in place to protect the integrity of the traditional process, as new and powerful actors enter the consolidation scene.

The structure of the Chapter is as follows. I begin in Section 6.2, by presenting the basic idea of using land consolidation as an alternative to expropriation. I discuss broad notions of land consolidation in general, relating them also to the discussing found in Heller and Hills' article. Then I point out some special features of the Norwegian system, which I believe make this system particularly natural to consider in the context of economic development cases.

Then, in Section 6.3, I present the Norwegian system of land consolidation in more depth,

[1] See, e.g., Geir Stenseth, 'Utmarksstrekninger med Mange Rettighetshavere. Noen Linjer mellom Historiske Forhold og Gjeldende Rett' in Øyvind Ravna (ed), *Areal og Eiendomsrett* (Universitetsforlaget 2007).

focusing on the procedural rules and the rules in place to protect property rights against disproportionate interference. I focus particularly on the so-called "no-loss" guarantee, which states that a consolidation measure can only be implemented when the benefits will make up for the harms, for all affected properties individually. Hence, in general, land consolidation is quite distinct from expropriation. However, in the context of commercial development, the no-loss criterion can be satisfied, through appropriate forms of benefit sharing. In this way, land consolidation becomes a legitimate alternative to expropriation in such cases, in a manner that also underscores the current owners' right to participate in, and profit from, the undertaking.

In Section 6.4, I discuss land consolidation specifically in the context of hydropower development. I consider several cases in detail, based on court documents and recent work done in a master thesis on consolidation, for which the author carried out interviews with affected owners. Then, in Section 6.5, I offer a assessment and discuss some future challenges. I also note some shortcomings of the current system, while arguing that these do not detract from the great potential of using consolidation to facilitate economic development, particularly in commercial settings. In Section 6.6, I offer a short summary and a conclusion.

6.2 Land Consolidation as an Alternative to Expropriation

The notion of land consolidation is somewhat ambiguous. At its core, it refers to mechanisms whereby boundaries in real property are redrawn to reduce fragmentation, without affecting the relative value of the different owners' holdings.[2] However, it is also common to use consolidation to refer to mechanisms for pooling together small parcels of land to create larger units.[3] There is a tension between these two notions of consolidation, with some claiming that consolidation in the

[2] See, e.g., the entry on *land consolidation* in Susan Mayhew, *A Dictionary of Geography* (Oxford University Press 2009).

[3] See, e.g., Zvi Lerman and Dragoş Cimpoieş, 'Land Consolidation as a Factor for Rural Development in Moldova' (2006) 58(3) Europe-Asia Studies 439.

latter sense is sometimes used to surreptitiously bestow benefits on powerful property owners, at the expense of weaker groups.[4]

In light of this, I should stress at the outset that I will use the term land consolidation in a very broad sense in this chapter, much wider than *both* of the interpretations mentioned above. Land consolidation, as I use the term, refers to any mechanism by which the state intervenes, at the request of some interested party, to (re)organise property rights in a given local area. Hence, a consolidation measure might as well involve *increased* fragmentation of property, if this is deemed a rational form of consolidation of the property *values* of the affected area. Importantly, I also use land consolidation to refer to efforts directed at organising the *use* of property, not just redrawing boundaries.

Some might argue that this terminology is strained, but I adopt it for a reason. It is motivated by the fact that in Norway, the institution known as "jordskifte", officially translated as land consolidation, has a very broad meaning.[5] Norway is not unique in this regard. Land consolidation has a similarly broad scope in many jurisdictions of continental Europe, as well as in Japan and in parts of the developing world.[6] Moreover, in Heller and Hills' work on land assembly districts, a comparison with land consolidation is presented, based on the same broad notion that I use here.[7] One of my main aims in this chapter is to pick up on this, by offering a more detailed comparison and assessment, specifically anchored in the Norwegian system and its application in the context of hydropower development.

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4 Michael Lipton, *Land Reform in Developing Countries: property rights and property wrongs* (Routledge 2009) 237-239.

5 See, e.g.,Magne Reiten, 'Avgjerd om fremme av jordskiftesak' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009); Jørn Rognes and Per Kåre Sky, 'Intervention methods in land disputes' (2003) 11(8) European Planning Studies 965.

6 See Per Kåre Sky, 'Internasjonalt perspektiv på jordskifte' in Øyvind Ravna (ed), *Areal og eiendomsrett* (Universitetsforlaget 2007); Arvo Vitikainen, 'An overview of land consolidation in Europe' (2004) 1(1) Nordic journal of surveying and real estate research.

7 Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465.

6.2. LAND CONSOLIDATION AS AN ALTERNATIVE TO EXPROPRIATION

As land consolidation tends to involve interference in property rights, one may ask about the legitimacy of various consolidation measures, held against rules that protect private property owners.[8] Such legitimacy issues have been raised before the ECtHR on a few occasions, resulting in the Court finding fault with the Austrian system of land consolidation in particular.[9] Moreover, one may sometimes argue that a land consolidation measure *is* a form of expropriation, even if it is not recognised as such by the legislature. In the US, for instance, a land consolidation provision ordering escheat (to Indian tribes) of fractional property interests in Indian reservations was struck down as an uncompensated taking by the Supreme Court.[10]

In relation to the legitimacy issue, the Norwegian system stands out in two important regards. First, the consolidation procedure is managed by judicial bodies, namely the *land consolidation courts*.[11] Second, land consolidation is largely seen as a service to owners, not a tool for increased state control and top-down management.[12] In particular, a case before the land consolidation courts is almost always initiated by (some of) the affected owners themselves and the court often acts as a "problem-solver", aiming to facilitate dialogue and cooperation among owners.[13] Moreover, it is a core principle of law that no land consolidation measure may be undertaken unless the benefits

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8 For an analysis of the Norwegian land consolidation process held against the provisions of the ECHR, I refer to Karl Arne Utgård, 'Jordskiftedomstolane og Den europeiske menneskerettskonvensjonen' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (2009).

9 These decisions must be understood in light of the potentially excessive duration of consolidation proceedings under Austrian law, during which restrictions are also imposed on the owners, limiting their opportunities to enjoy their properties while awaiting a final outcome. See, e.g, *Erkner and Hofauer v Austria* (1987) Series A no 61; *Poiss v Austria* (1987) Series A no 103.

10 See *Hodel v Irving* 481 US 704 (1987).

11 See generally Tor Langbach, 'Jordskiftedomstolene og de alminnelige domstoler – likheter og ulikheter' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009). The fact that the land consolidation process is administered by a judicial body appears to be unique to Norway, see Per Kåre Sky, 'Jordskifte i andre land – organisering og prosess' [2001] Kart og Plan 43, 45.

12 See generally Per Kåre Sky, 'Jordskiftets ulike effekter' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009).

13 See generally Jørn Rognes and Per Kåre Sky, *Mediation in the Norwegian Land Consolidation Courts* (Working Papers, 12808, University of Wisconsin-Madison, Land Tenure Center 1998) ⟨http://EconPapers.repec.org/RePEc:ags:uwltwp:12808⟩; Rognes and Sky, 'Intervention methods in land disputes' (n 5); Kjell Jørn Rognes and Per Kåre Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' [2007] (Øyvind Ravna ed 511.

make up for the harms, for all the properties involved.[14] This is known as the "no-loss" criterion and it is one of the key principles of land consolidation in Norway.[15] The combination of a judicial procedure that emphasises owner-participation and a no-loss criterion means that, arguably, land consolidation in Norway *strengthens* property as an institution.

In particular, I believe that land consolidation can serve as an effective countermeasure against two of the most widely discussed challenges to any property regime. First, consolidation can serve to protect an egalitarian distribution of property rights against the deleterious effect of inefficiency and underdevelopment that might otherwise arise from fragmentation. Importantly, it can do so without disturbing the underlying property structure and without necessarily resulting in disproportionate benefits or harms to owners and other private parties. In particular, land consolidation can ensure commercial development without pooling together property rights and without handing property over to powerful market actors. Second, land consolidation can serve to ensure sustainable and rational management of jointly owned land, without necessarily forcing an enclosure process (enclosure *can* be the result of land consolidation, but it is only one of many measures in the consolidation toolbox).

In short, land consolidation can be used to address both commons[16] and anti-commons[17] problems, in a way that protects, and possibly enhances, desirable social functions of property, through a judicial system of participatory/adversarial decision-making. Hence, land consolidation in Norway is based on a conceptual premise that – potentially – offers protection to owners and their properties, by recognising them as members of a community that are mutually dependent on each other. In this way, the form of property protection offered in the context of land consolidation is

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14 See the Land Consolidation Act 1979, s 3 a).

15 See generally Ola Rygg, 'Jordskiftelova § 3 a)' [1998] Kart og Plan 179.

16 Garrett Hardin, 'The Tragedy of the Commons' 162(3859) Science 1243.

17 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) Harvard Law Review 621.

distinct from the protection offered in the context of expropriation. This in itself is interesting, particularly from the perspective of property's social functions, as discussed in Part I.

The vision of land consolidation at work here is one that sees it as a means for setting up a mini-democracy on demand, to organise decision-making processes in a way that grants those most intimately affected – the owners and other rights holders – a say that is proportional to their stake in the matter at hand. As discussed in Part I, this is something that it often seems hard or impossible to achieve through the standard administrative/political route, particularly when powerful commercial actors engage in extensive lobbying and are allowed to assume the position of primary stakeholders in projects involving the property of others.

Importantly, since land consolidation can be used to facilitate or impose specific uses of property, it can also be an *effective* alternative to expropriation, a compulsory measure that can obviate the need for depriving owners of their property rights. Clearly, consolidation as an alternative to expropriation is particularly natural for economic development projects. Importantly, the no-loss criterion will generally be possible to fulfil in these cases, through benefit sharing. Moreover, it then falls on the land consolidation court to *ensure* that benefit sharing results, so that consolidation measures may be applied in accordance with the law.

Interestingly, it is usually also required that the benefits resulting from consolidation must be distributed among the affected properties in accordance with their relative value prior to the consolidation measure[18] So the principle of benefit sharing at work is not compensatory at all, but rather one that sees the owners as active participants in the development, possibly against their own will. I find this highly interesting, particularly from the point of view of the human flourishing conceptions of property that I discussed in Part I.

More pragmatically, the emphasis on benefit sharing in land consolidation reveals a concrete

[18] This principle is not as strictly encoded as the no-loss criterion, but is formulated as an "ought"-rule. See the Land Consolidation Act 1979, s 31. For the special case of consolidation to implement a zoning plan, the rule is absolute, see Land Consolidation Act 1979, s 3 b).

potential advantage of land consolidation over expropriation, from the owners' point of view. In particular, while benefit sharing is required by consolidation law, it is much less commonly achieved through compensation in the context of expropriation.[19] This means that the use of land consolidation in place of expropriation has considerable potential also in relation to the problem of the "uncompensated increment" in economic development takings, as discussed in Part I.

On the other hand, it also means that commercially motivated developers may have an *incentive* to favour expropriation over consolidation. This raises the question of whether or not owners can use land consolidation as a *defence* against expropriation. Can an expropriation threat be countered by bringing a case before the consolidation court, whereby the court is asked to organise the development in question on behalf of the owners themselves?

As long as an expropriation order has not been granted, such a move would be possible in theory. However, whether the land consolidation court would take on such a case is unclear. It would probably depend on the nature of the development in question. In addition, it seems unclear how the expropriation authorities would react; an ongoing consolidation case might not detract them from issuing an expropriation order to an external developer. After such an order has been granted, the law as it stands leaves no room for a consolidation defence. Quite the contrary, in these situations, the land consolidation courts may themselves be called on to implement the expropriation order (by awarding compensation) as part of a consolidation procedure.[20]

In the future, if the consolidation alternative to expropriation is to develop successfully, it seems that the owners' right to request consolidation in place of expropriation needs to be strengthened. So far, the Norwegian system is moving along a trajectory where land consolidation as an alternat-

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19 This is largely due to the so-called *no scheme* principle, which states that compensation to the owner following expropriation should not reflect changes in value that are due to the expropriation scheme. I am not aware of a single jurisdiction that does not include a variant of this principle. For a detailed investigation into the question of whether or not it stands in the way of benefit sharing in economic development cases, I point to 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).

20 See Land Consolidation Act 1979 s 6.

ive to expropriation is primarily seen as a service to developers and the public, not as a means for empowering owners. It is noteworthy, in particular, that following a change in the law that takes effect in 2016, the *developers* will be granted a new right, namely that of bringing a case before the land consolidation courts, to seek help in implementing their project. Developers might well be motivated to do so, because of the potential for reduced administrative costs, a more effective and flexible procedure, and a chance of limiting compensation claims by imposing (cheaper) compensatory consolidation measures (e.g., by providing owners with replacement property).

One question that arises in relation to this is the following: will land consolidation remain a service to owners, or will it become a service to developers who seek cheap access to property owned by others? This question is about to become pressing in Norway, as the scope of land consolidation continually broadens, making it intersect with expropriation law to a greater extent than before. In addition to the new rules granting developers a formal standing in certain consolidation disputes, this development is also strongly felt in the move to apply land consolidation also in the context of urban development, outside the traditional scope of agricultural pursuits.[21]

The idea that consolidation can serve as an alternative to expropriation also raises practical questions concerning how exactly it would work. Here there is already some interesting empirical data available, arising mainly from situations when owners themselves undertake economic development, but make use of consolidation measures instead of seeking permission to expropriate property from uncooperative neighbours.

Interestingly, in the context of hydropower development, this use of land consolidation has become very important in recent years. In 2009, the Court Administration estimated that land consolidation had helped realise small-scale hydropower projects with a total annual energy output of about 2 TWh/year. Moreover, in a recent Supreme Court case, the importance of land

[21] See generally Stenseth, 'Utmarksstrekninger med Mange Rettighetshavere. Noen Linjer mellom Historiske Forhold og Gjeldende Rett' (n **??**).

consolidation was stressed specifically, as a justification for requiring a commercial taker to pay additional compensation to the owners of waterfalls that were to be used for hydropower generation.[22]

In the next section, I give further details on the Norwegian system, focusing on the "use directive" that have proven particularly important in relation to hydropower. Then, in Section 6.4, I consider land consolidation to facilitate small-scale hydropower specifically. I approach this as a test case for the more general proposition that land consolidation can be a legitimacy-enhancing alternative to expropriation for economic development.

6.3 Land Consolidation in Norway

Rules regarding land consolidation have a long history in Norwegian law. The first consolidation rules were included already in King Magnus Lagabøte's *landslov* (law of the land) from 1274, the first piece of written legislation known to have been introduced at the national level in Norway.[23] The earliest rules targeted jointly held rights in farming land, giving owners and rights holders on that land an opportunity to demand apportionment that would give them exclusive rights on a parcel of land corresponding to their share of the joint rights.[24]

Many of the rules still in place were developed during the 19th century. At this time, the main use of land consolidation was to divide jointly owned and fragmented property rights into parcels in order to facilitate higher intensity farming and better resource management. However, it was

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22 See *BKK Produksjon AS v Austgulen and others* Rt-2011-1683.

23 See Chapter 4, Section 2 in Jordskifterettens stilling og funksjoner, 'NOU 2002:9' (Report to the Ministry of Agriculture from special committee appointed by the King in Council 10 October 2000,).

24 The share in joint rights belonging to each individual farm was historically determined based on the amount of rent ("skyld") that each farmer paid to the land owner (a figure that was also used to determine the level of taxation). However, following the union with Denmark and especially after the advent of enlightened absolutism, tenant farmers in Norway increasingly bought their land from their land owners. Indeed, tenant farming became relatively uncommon in Norway after the 18th Century, but the notion of "skyld" was kept as a measure of the share each farm had in the now jointly owned larger estates. The notion is still important, for instance in apportionment proceedings, as discussed in Øyvind Ravna, 'Skiftegrunnlaget i sameier' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009).

noted that individuation of property rights was not necessarily required. Instead, collective-action mechanisms could be used, to facilitate a more dynamic approach that would not fundamentally disturb the established property structure.[25]

The rules regarding use directives must be understood in this context. They were introduced to facilitate a legal framework for implementing or altering specific use patterns without altering the underlying structure of ownership. Nevertheless, the rules would facilitate a considerable pooling of resources and decision-making power, to set the stage for more intensive and coordinated forms of use.

The initial objective was to enable rural communities to adapt to changing economic conditions without fundamentally altering them or leading to displacement or depopulation. Moreover, the scope of use directives were typically limited to the regulation and reorganisation of already established forms of joint use. Hence, use directives were not commonly used to facilitate completely new kinds of development.

Over the last few decades, this has changed. Today, use directives are increasingly applied also to organise development projects that are not agricultural in the traditional sense, even for properties that have no prior connection. Moreover, many additional mechanisms of land consolidation have been introduced, all aiming in various ways to ensure better organisation of land use and ownership. It is helpful to recognise three main categories of consolidation tools, as summarised in the following table:

- *Apportionment of land*: Rules that empower the court to dissolve systems of joint ownership by apportioning to each estate a parcel corresponding to its share, or by reallocating property

[25] This idea was behind a range of provisions introduced during the 19th century, not all pertaining to land consolidation. For instance, a special management structure was set up to govern forestry on common land, to avoid overexploitation and ensure rational management, without necessitating enclosure. See generally Geir Stenseth, 'Bygdeallmenningenes rettshistorie og dens møte med fremtidens landbruk' in Kirsti Strøm Bull (ed), *Natur, Rett, Historie* (Oslo Studies in Legal History 5, Akademisk Publisering 2010).

through exchange of land.[26]

- *Delimitation of boundaries:* Rules that empower the court to determine, mark and describe boundaries between properties and the content and extent of different rights of use attached to the land.[27]

- *Directives for use*: Rules that empower the court to prescribe rules for the use of jointly held land, and to organise such use, including setting up organisational units for carrying out specific development projects.[28]

In all cases, the consolidation court can only employ these tools when they are called on to do so by someone with a recognised legal interest.[29] This includes the owners, and while other actors have been allowed to enter the consolidation scene in recent years, most cases are still brought before the courts by owners themselves.

An additional requirement on the consolidation court is that it can only implement consolidation measures in so far as they are needed to alleviate problems and difficulties.[30] To determine whether or not this requirement has been met, the court will look to the prevailing economic and social situation, as well as predictions for the future.[31] In this regard, the court is also influenced by what it regards as the prevailing public interests in property use. Today, the role of the perceived public interest is growing in importance, and recent reforms have sought to strengthen it.[32]

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26 This is the traditional form of land consolidation in Norway and the main legislative basis for it is provided in the Land Consolidation Act 1979 s 2 a)-b).

27 The main legislative basis for this form of consolidation is found in the Land Consolidation Act 1979, s 88.

28 These rules are found in the Land Consolidation Act 1979, s 2 c).

29 See Land Consolidation Act 1979, s 5.

30 See the Land Consolidation Act 1979, s 1.

31 See generally Reiten, 'Avgjerd om fremme av jordskiftesak' (n 4).

32 See for instance Prop. 101 L (2012-2013) (proposal from the Ministry of Agriculture to the parliament regarding the Consolidation Act 2013).

But the contextual nature of land consolidation has always been clear. Indeed, the basic building blocks of the current system can be traced back to the influence of technological advances in farming and the modernisation processes that Norwegian society underwent in the 19th century. The law responded to these changes and consolidation became an increasingly important instrument for change and development in this period. It was also at this time that it was decided to establish a tribunal system for administering the process, first in the Land Consolidation Act from 1857, which was revised and developed further in 1882 and 1950.[33] The procedural rules closely mimics those that pertain to the regular civil courts. This ensures that consolidation tools are only put to use if a court orders it, and only after a public hearing where all involved parties are given an opportunity to present their case, give supporting evidence, and to contradict each others' testimony. For a more detailed description of the consolidation court, I refer the reader to Section 6.3.1 below.

The current system for land consolidation is based on the Land Consolidation Act 1979, which will be replaced in 2016 when the new Land Consolidation Act 2013 takes effect.[34] The new act does not introduce any dramatic changes to the law, but it further widens the scope of consolidation, particularly with regards to directives for joint use. The new act also contains the following explicit description of the purpose of land consolidation, which provides a interesting bird's eye view on the legislature's perspective:

> Section 1-1 The purpose of the Act
>
> The purpose of the Act is to facilitate efficient and rational use of real property in the best interests of the owners, the rights holders and society. This objective will be pursued by the land consolidation courts which will implement remedies for impractical structures concerning ownership and use of property, ascertain and determine property

[33] An overview of the history of consolidation law is given in Chapter 3 of Prop. 101 L (2012-2013) (n **??**).

[34] Act no 97 of 10 June 2013 relating to the determination and change of structures of ownership- and rights to real property etc.

> boundaries, as well as decide appraisal disputes and other cases pursuant to this and other acts.
>
> The Act also seeks to facilitate fair, responsible, quick and effective processing of cases in independent and impartial public courts that will operate in such a way as to enhance confidence in the consolidation process.[35]

This statement of purpose highlights how the new act incorporates and extends the trend towards giving the consolidation process wider scope. I also note how it reiterates and emphasises that the process is to be tribunal in nature. More generally, the quote illustrates that land consolidation is likely to become more important in the future, increasingly also outside the traditional agricultural setting within which this body of law has hitherto developed.[36]

It is now explicitly stated that the purpose of land consolidation is to make conditions of property use more favourable for all the affected owners and rights holders. Hence, the new act underscores how consolidation represents a form of interference that is fundamentally different from expropriation. As before, the consolidation court is not empowered to take action unless it is called on to do so by one of the stakeholders in the property.[37] However, according to the new Act, a developer who has obtained permission to expropriate is to be counted as a stakeholder in that land for the purposes of consolidation.[38] This further reflects how it is becoming increasingly natural to see land consolidation as an alternative to expropriation. It also flags how the relationship between expropriation and consolidation is now becoming an important topic in Norwegian land law.

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35 Land Consolidation Act 2013 s 1.

36 For instance, following a change in the Land Consolidation Act 1979 in 2006, land consolidation may now also be called on in order to manage restructuring of ownership in urban areas, in connection with specific development schemes. This rule has been extended further in the new Act, and it will be interesting to see how the division of labour will be in the future, between planning authorities, regular courts and the land consolidation courts.

37 See Land Consolidation Act 2013, s 1-5.

38 Previously, a developer was only regarded as a stakeholder in consolidation in some cases of public projects, c.f., Land Consolidation Act 1979, s 5.

In 2005, the Ministry of Agriculture made some comments in this regard, in connection with a revision of the Land Consolidation Act 1979 that gave consolidation greater applicability in urban areas and with respect to implementing public plans.[39] Some members of the preparatory committee had raised the concern that giving consolidation extended scope in this way would be problematic since it would encroach on expropriation law and effectively render consolidation a form of expropriation. The Ministry disagreed, commenting as follows.

> The Ministry would like to point out that one of the main preconditions for consolidation is that a net profit is created for the land in question. This profit is then divided among the parties in an orderly fashion. Individually, the law also guarantees that no one suffers a loss, see s 3 a). [...] In the Ministry's opinion, expropriation takes place on a different factual and legal basis. In cases of expropriation the public makes decisions that deprives the parties of economic value. The purpose then becomes to compensated them in accordance with s 105 of the Constitution, not to increase the value of their land or the annual income they may derive from it.[40]

When preparing the new Act, the Ministry of Agriculture reiterated this position, but they did not reflect further on the question of the exact relationship between consolidation and expropriation. They observed, however, that changing the law so that expropriating parties could appear in consolidation cases was *reasonable*, since it would then be left up to the developer whether to make use of their permission to expropriate or to rely on consolidation.[41]

The choice made by the expropriating party in this regard will be of great importance to the affected owners and rights holders. In particular, as the Ministry themselves makes clear, it is

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39 See, in particular, Land Consolidation Act 1979, s 2 h-i).

40 See Chapter 3.3 of Ot.prp. nr. 78 (2004-2005) (report to parliament from the Ministry regarding changes in the Land Consolidation Act 1979.

41 See Prop. 101 L (2012-2013) (n **??**) 84.

an absolute precondition for the implementation of a rights-altering consolidation measure that it serves to make the structure of ownership and use more favourable. This requirement, moreover, refers explicitly to the *area within which consolidation takes place*.[42] No similar rule is in place to protect the affected local community following expropriation. Moreover, the practices that have developed for dealing with consolidation cases are centred on the interests of the local owners and their communities to an extent that is quite different from any procedure that is currently in place to facilitate development by use of expropriation.

For instance, the rule regarding expropriation that corresponds most closely to the no-loss rule requires merely that the benefit to private and public interest exceeds the disadvantages *overall*, not locally and certainly not individually.[43] At the same time, consolidation rules do not place any restrictions on the kinds of development that can be carried out. The consolidation rules pertain instead to *how* it should be organised.

The "what"-question may be left entirely to the planning processes administered by the planning authorities (the municipalities in Norway). Moreover, the consolidation courts must always base their decisions on existing public regulations of the property use.[44]

Hence, if the public interest suggests a particular form of land use, the fact that a planning decision detailing development of such use is implemented through consolidation does not entitle the court to review the plans themselves, going against the public interest. But it does introduce an obligation, emerging at the time of implementation, to turn specifically to the interests of original owners and rights holders and to look for solutions that minimise the burden and maximises the benefit for all the properties involved.

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42 See the Land Consolidation Act 2013, s 3-3.

43 See the Expropriation Act 1959, s 2.

44 In the Land Consolidation Act 2013, s 3-17 it is explicitly stated that the consolidation court cannot prescribe solutions that are not in keeping with such regulation. However, it is also made clear that the consolidation court itself can apply for necessary planning permissions on behalf of the owners and the land in question.

The rules that give the consolidation court authority to give directives of use are particularly relevant in this regard. I return to these rules below, after I have presented some further details on the consolidation process itself. The procedural guarantees resulting from the fact that this process is tribunal in nature are in themselves important to consider when looking at consolidation as an alternative to expropriation.

6.3.1 The Consolidation Process

A consolidation case is usually initiated by an owner or a permanent rights holder.[45] The request for consolidation measures is to be directed at the relevant district consolidation court, one of the 34 district courts for land consolidation that have been set up by the King in accordance with s 7 of the Land Consolidation Act 1979. The request is meant to include further details about the affected properties, the owners and rights holder involved, as well as the specific issues that consolidation should address. But the requirements in this regard are not usually interpreted very strictly and the consolidation court will often take it upon itself to further clarify what the case should encompass, more so than in regular civil disputes.[46] However, the court may still reject the consolidation request if it finds that it suffers from formal shortcomings, pursuant to the same rules as those that apply to civil disputes.[47]

If the court decides that the request is well-formed and that it includes sufficient detail to permit material consideration, they go on to prepare public hearings, following the rules set out in Chapter 3 of the Land Consolidation Act 1979. These rules mirror those that are in place for civil hearings in general, including the duty to inform affected parties, the parties' right to present their

45 See s 5, para 1 of the Land Consolidation Act 1979.

46 Langbach (n 10) 39.

47 See s 12, para 2 of the Land Consolidation Act 1979, which refers to s 16-5 of the Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes.

claims, as well as their duty and right to give testimony and provide evidence supporting it.[48] As in civil cases, the decision is usually only reached after at least one oral hearing where the parties may present and comment on the evidence and the issues raised by the case.

But unlike in civil cases, the main hearing typically takes place on the disputed land itself and often revolves around practical rather than legal issues. Moreover, a consolidation case will usually not take the form of a two-party adversarial process, but rather as a multi-party discussion where the court interacts with a large number of interested parties who may have a range of common as well as conflicting interests. The typical case involves 5-10 people, but in some cases there can be hundreds of parties involved.[49] In addition, it is quite common that the parties are not represented by legal council.[50] And even if they are, they are typically expected to take an active part in the proceedings themselves.[51]

The request for consolidation will be the court's point of departure when assessing the case, but the court is not bound by the claims put forth in it, or by the claims put forth by the other parties. This again marks a differences with most cases of civil dispute. With a few exceptions explicitly listed in statute, the consolidation court may decided to use any measure that it deems suitable to ensure a favourable structure of rights and ownership for the future. However, there is some restriction placed on the court in that the measures taken must be regarded as *necessary* in light of considerations based on the original request.[52] So the court should remain focused on the issues raised by the parties, but is free to address these issues using the tools they deem most suited for the job. The consolidation court, in particular, is meant to be a general "problem solver", much

48 See the Land Consolidation Act 1979, s 13.

49 Langbach (n 10) 39.

50 Kjell Jørn Rognes and Per Kåre Sky, 'Megling i domstolene, særlig i jordskifteretten' [2000] Lov og Rett 101, 109-111.

51 See generally Rognes and Sky, 'Megling i domstolene, særlig i jordskifteretten' (n **??**).

52 See s 26 and 29 of the Land Consolidation Act 1979.

more so than an ordinary civil court.[53]

When a decision is reached, the parties are notified and the decision is presented and argued for in keeping with the rules of the Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes.[54] The appropriate format for the decision depends on its content. A regular civil ruling is the form used for decisions that only involve ascertaining the boundaries between properties, while a special "consolidation decision" is used to implement apportionment and directives of use. The difference in form affects the appeals procedure; while civil rulings are dealt with by the regular courts of appeal, the consolidation decisions can only be appealed to one of 4 designated consolidation courts of appeal.[55]

The procedural rules remain largely the same in the consolidation court of appeal and there is a new assessment of all aspects of the case.[56] The decision of the consolidation court of appeal can only be appealed on the grounds that it is based on an incorrect understanding of the law, or that procedural mistakes were made. In this case, the ordinary appeal courts have authority, with the Supreme Court being the last instance of possible appeal.[57]

In general, consolidation cases are different from other civil cases mainly in that they have fundamentally different scope. A consolidation case is not primarily concerned with deciding the merits of individual claims, but focuses on introducing structures of ownership and rights that will prove favourable in general. In this respect, the process has an administrative character. However, the fact that it is organised similarly to a civil dispute means that the affected parties play a more prominent role in the decision-making process than they do when decisions are made by regular administrative bodies.

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53 See generally, Rognes and Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' (n **??**).

54 See the Land Consolidation Act 1979 s 7.

55 See the Land Consolidation Act 1979, s 61.

56 See s 69 of the Land Consolidation Act 1979.

57 See s 71 of the Land Consolidation Act 1979.

Given the special context of arbitration, it is not surprising that the judges appointed to the consolidation courts are required to have a special skill set, different from that of regular civil law judges. In fact, consolidation judges are required to have successfully completed a special master level degree in consolidation, which is not a law degree, but a separate form of education.[58]

The consolidation court also relies on the participation of lay people who sit alongside the specialist judge.[59] These lay judges are appointed by the specialist judge from a committee of laymen that are elected by the local municipalities.[60] To the extent possible, the appointed laymen should have special knowledge of the issues raised by the case. But they are drawn from the general population.[61]

Summing up, the consolidation process has both administrative and adversarial characteristics. While the content and scope of the court's decision will often have an administrative flavour and is not primarily directed at settling any specific dispute, the process is judicial. Hence everyone is entitled, and to some extent even *obliged*, to have his voice heard and to partake in the process. Moreover, while the process is guided and overseen by the court, it is fundamentally based on considerations arising from the interests of the parties.

However, this interest is always interpreted in light of prevailing notions of what counts as favourable and rational property use. Importantly, in relation to this latter assessment, the court will look beyond the interests of the individual owners. The court will pose the question with regards to the use of the land as such, drawing on its understanding of the relevant economic, social and political conditions.[62] At the same time, the decisions are made on the basis of information

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58 See s 7, para 5 of the Land Consolidation Act 1979. The degree in question is currently offered only at the Norwegian College of Life Sciences and Agriculture.

59 See s 8 of the Land Consolidation Act 1979.

60 See s 8 of the Land Consolidation Act 1979 (the appointment itself is regulated in the Courts Act 1915, ... S 64).

61 See s 9, para 5 of the Land Consolidation Act 1979.

62 See generally Reiten, 'Avgjerd om fremme av jordskiftesak' (n 4); Sky, 'Jordskiftets ulike effekter' (n 11).

that presented and discussed in public hearings. Moreover, the affected parties will take part in discussions that may also address more overarching concerns about the form of land use that should be regarded as favourable for the area in question.[63]

To flag the dual nature of the consolidation process it is tempting to designate it as a process of judicially structured *deliberation*. The final decision-making authority is granted to the court, but the court is required to act on behalf of the rights holders, on the basis of their wishes, bu always in the best interest of their properties and their community. This form of decision-making based on multi-party deliberation is interesting in its own right, as it provides a template for management of land that caters to the idea of public oversight and control as well as to the idea of local participation and self-governance. At any rate, it is a form of land management that seems especially suitable as a means to implement concrete projects undertaken in the public interest, particularly when these would otherwise appear to adversely affect individual land owners and local communities.

Moreover, the notion of land consolidation can serve as an additional conceptual layer between the planning stage and the implementation step of a development plan, a layer of management devoted to translating public interests and private plans into concrete action on private property. This, I believe, is a layer of administration that deserves more attention and more fine-grained tools than those currently offered in systems relying on expropriation. Clearly identifying a consolidation layer in property management for economic development can also make for a cleaner delineation between commercial implementation on the one hand, governed by the market, and public planning on the other, governed by administrative law and political bodies, avoiding unhealthy coalescence between the two.

In the next section, I argue that Norwegian consolidation law already include tools that make it possible to rely on the consolidation courts to provide such a service. The rules that I believe

63 See also Rognes and Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' (n **??**).

warrant this conclusion are the rules relating to joint use directives, which I now present in more detail.

6.3.2 Joint use, Joint action and Joint investment

Traditionally, use directives would target property rights that were owned jointly or for which some form of shared use had already been established.[64] However, in the 1979 Act, the power of the courts to issue use directives was extended, so that directives could also be issued when there was no prior connection between the rights and properties in question, provided *special reasons* made this desirable.[65] Traditional examples include directives for the shared use of a private road which crosses several different properties, or regulation of hunting that takes place across property boundaries.

The joint use rules emerged as an alternative to apportionment of jointly owned property, a more subtle and less invasive measure that could often give rise to the same positive effect as a full division of ownership, but without leading to unwanted fragmentation of control and use of property. Hence, in the now repealed Land Consolidation Act 1950 it was stated that use directives should be the *primary* mechanism of consolidation, such that apportionment could only take place if such directives were deemed insufficient to reach the goal of creating more favourable conditions for the use of the land.[66] In the 1979 Act, the two mechanisms were formally put side by side, but the intention behind this was to ensure greater flexibility of the system, not to reduce the scope of use directives. Quite the contrary, the 1979 Act explicitly intended to promote the increased use of such directives, also in conjunction with other measures.[67]

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64 In accordance with s 2 c) of the Land Consolidation Act 1979 .

65 See s 2 c), para 2 of the Land Consolidation Act 1979.

66 See s 3 no 3 and 4 of the Land Consolidation Act 1950 and the discussion in Revisjon av jordskifteloven, 'NOU 1976:50' (Report to the Ministry of Agriculture from a special committee appointed by the King in Council 12 May 1972,) 30-37.

67 See the discussion in Revisjon av jordskifteloven (n **??**) 35-37 and Ot.prp. nr. 56 (1978-1979) , 47-48.

Since the Act was introduced, there has been a gradual increase in the willingness of the court to rely on use directives to facilitate *new development* on the land, not just as a means to regulate an existing activity. In parallel with this development, the consolidation court has gradually come to take on cases that pertain to organisation of land use that was previously thought to lie outside its area of competence.

The Land Consolidation Act 1979 lists a range of different concrete circumstances in which such directives can be applied.[68] The list is not understood to be exhaustive however, and as the notion of agriculture has broadened, so has the scope of use directives in land consolidation.[69]

In the Land Consolidation Act 2013, the list is replaced by an explicit general rule which makes it clear that the consolidation courts have the authority to give directives whenever they regard this to be favourable to the properties involved.[70] In addition to this, the new Act also introduces a general rule which gives the court authority to *set up* systems of joint ownership when a joint use directive is deemed insufficient.[71] Hence, apportionment and pooling of property is now on equal footing, although a priority rule is introduced for the latter; pooling will only be considered if directives of joint use are regarded as an insufficient means to ensure more favourable conditions. Moreover, the new Act maintains the principle that directives regarding the joint use of land for which there are no existing joint rights can only be given if there are special reasons.

This requirement is not intended to be very strict and the Ministry of Agriculture was initially inclined to remove it.[72] However, it was eventually decided that it should be kept in order to flag that two distinct questions arise in such cases. The court must always consider the question of whether or not joint use is in fact desirable, in addition to the question of how it should be

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68 See s 35 of the Land Consolidation Act 1979.

69 Ot.prp. nr. 57 (1997-1998) , 103.

70 See s 3-8 of the Land Consolidation Act 2013.

71 See s 3-5 of the Land Consolidation Act 2013.

72 For a discussion on this see Prop. 101 L (2012-2013) (n **??**) 140-141.

organised.

In addition to giving directives prescribing how joint use is to be organised, the consolidation court may also give rules compelling owners to take joint action to realise potentials inherent in their land. Rules to this effect were novel to the Land Consolidation Act 1979, and made contingent on special circumstances.[73] Currently, joint action can only be prescribed to property owners, not other parties.[74] Following the new Land Consolidation Act 2013, however, the consolidation courts will be authorised to prescribe joint action also to right holders. In addition, the list of circumstances that warrant joint action prescriptions will be replaced by a general joint action rule.[75]

When commenting on this change in the law, the Ministry noted that the joint action rules currently in place have been widely used, and that applying them is now one of the core responsibilities of the consolidation courts.[76] Joint action directives can include prescriptions for joint investments.[77] On the one hand, this means that such directives can be used to facilitate capital-intensive new development, making consolidation a more effective tool to implement economic development. On the other hand, questions arise regarding the extent to which it is legitimate to rely on compulsion in this regard.

The magnitude of the joint actions and investments required to undertake projects can easily become quite burdensome for individual owners, a worry that is particularly likely to arise in case of large-scale commercial development. The Land Consolidation Act 1979 attempts to resolve this by a rule stating that if joint actions or investments may come to involve"great risk", the court must set up two *distinct* organisational units to undertake it.[78] First, the rights needed to undertake the

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73 The rules are given in the Land Consolidation Act 1979, s 2 e).

74 See the Land Consolidation Act 1979, s 34 a).

75 See s 3-9 of the Land Consolidation Act 2013.

76 See Prop. 101 L (2012-2013) (n **??**) 146.

77 See s 3-9 of the Land Consolidation Act 2013.

78 See the Land Consolidation Act 1979, s 34 b).

scheme will be pooled together and managed by an owners' association, and then, to undertake the scheme itself, a cooperative company structure will be set up on behalf of the owners.

Hence, the risk is diverted away from the individual owners onto a company controlled by them. This company will be entitled to any potential profit from the scheme, but it will also be required to pay rent to the owners' association on terms established by the parties themselves, with the help of the court.[79] Moreover, the owners are entitled to shares in this company proportional to their share of the relevant rights in the land, as determined by the consolidation court. The owners are not obliged to take part in the undertaking by acquiring such shares, and will benefit from membership in the owners' association regardless of whether or not they choose to do so.

This two-tier system seems like it provides just the mechanism that is required to allow owners to engage actively also with large-scale projects that involve external commercial actors. In particular, the owners' association may strike a deal with such a developer, if the owners themselves do not desire to undertake the actual development. However, new conflicts may arise between the owners in this regard, if some desire to undertake development themselves, while others wish to strike a deal with an external developer. Should the owners that wish to undertake their own development be prioritised by the owners' association, and should the land consolidation be empowered to order such a prioritisation? This question has arisen with quite some force in several cases concerning hydropower, discussed in the next Section.

Leaving aside the issue of how to deal with disagreement among owners, I conclude that the system currently in place already provide tools that allow the consolidation courts to organise large-scale development on behalf of owners, even when it this requires considerable property (re)organisation and diversification of risk. Importantly, I note that the consolidation rules also point to a form of implementation that is likely to allow the public to exercise more extensive oversight and control. This, I believe, is a natural consequence of the fact that the system *curbs* the

[79] See s 34 b) of the Land Consolidation Act 1979.

power and influence of commercial forces. From this fact alone, it must be expected that the consolidation procedure is well suited for pursuing also the social, economic and political aims which motivates the underlying planning decisions. Moreover, commercial development through consolidation gives the public a greater say during the implementation stage. After all, the organisational structure and the implementation plans are formulated by courts, and the courts themselves are explicitly obliged to consider also the public and societal interests in the development.

In addition to this, both planning authorities and commercial developers may take up a role as formally recognised parties in the consolidation process. This seems particularly useful in connection with large-scale industrial development, as it might otherwise be hard to implement such projects successfully. In these cases, then, the consolidation system sets up an arena for interaction and deliberation between the three main groups of stakeholders: the public, the local owners and the commercially motivated developers. Such an arena is so far missing at the implementation stage of big development projects, where owners and their communities in particular tend to become completely marginalised, particularly when expropriation is used.

It remains unclear to what extent the Norwegian consolidation rules will actually be used to give property owners a leading voice in development projects involving their properties. The tension between expropriation and consolidation has yet to arise in case law from this angle. However, consolidation is beginning to receive much attention as a "practical" alternative to expropriation. Hence, I believe it is only a matter of time before deeper questions of participation rights and benefit sharing will arise.

To sum up, directives of use rules are highly versatile and may be used to organise extensive projects of land development on behalf of original owners. This form of development makes it possible for original owners to maintain their interest in the land, it can prevent the need for expropriation, and it may give the public a greater opportunity to exert influence and control over how their planning decisions are implemented in practice. In the next section, I consider in depth

the particular case of hydropower, where the consolidation courts have recently started to make use of a wide arsenal of its tools to ensure that development can be carried out in this way.

6.4 Compulsory Participation in Hydropower Development

In this section, I look at four recent cases in detail, all of which involved directives of use for hydropower development by original owners. The waterfalls dealt with in these cases are all located in the county of *Hordaland*, in south-western Norway. Three of the cases involved small-scale hydropower which some of the owners wanted to develop themselves, while the fourth was a case when the owners were also considering a development plan which would involve cooperation with an external energy company. The cases are particularly interesting because we have access to data on how the process of consolidation, and the outcome, was perceived by the owners themselves. This material is due to Sæmund Stokstad, who conducted interviews for his master thesis on land consolidation, which was devoted to the study of how consolidation measures is now increasingly being used to facilitate hydropower development.[80].

In the following, I first present each case separately, focusing on those issues that were raised regarding how to organise development, the solutions prescribed by the court, and the subsequent reception among the parties. I then assess this from the point of view of developing a better understanding of compulsory cooperation as an alternative to expropriation. I conclude with some unresolved questions, particularly regarding those situations when the court is called on to resolve concrete questions regarding how the development should be organised. These are the cases when the relationship between consolidation law and other legal frameworks, such as company law, planning law, and water law, becomes pressing, and there are many unresolved questions.

[80] Sæmund Stokstad, 'Bruksordning ved Jordskifte i Samband med Utbygging av Småskalakraftverk' (Master Thesis, 2011).

6.4.1 *Vika*

The case was brought before the consolidation court in 2005, by owners who all agreed that hydropower development should be pursued.[81] The owners disagreed on how to organise the owners' association, and on how the shares in this association were to be divided among the different properties involved, 15 in total. The main principle was agreed upon from the start, however, namely that the owners would rent out their waterfall to a separate development company which every owner would have a right (but not a duty) to take part in.

The parties in *Vika* were highly involved in the consolidation process, and the statutes for the owners' association were based on suggestions made by the owners themselves. The main point of disagreement concerned how the shares in this association should be allotted, a question that was made more difficult by the fact that some owners benefited from old water-mill rights in the river. In the end, the consolidation court held that these rights were tied to the form of use relevant at the time they were established. Hence, the rights were not regarded as having any financial value and could therefore be extinguished without compensation.[82]

There was also some disagreement about whether the voting rights in the owners' association should be tied to the number of shares belonging to each owner, or if the owners should simply be allotted one vote each, irrespectively of their share in the waterfall. The consolidation court went for the first option. However, the way in which they allotted shares in the owners' association deserves special mention. In particular, the court decided to take into account that some additional water entered the waterfall from smaller rivers where only a sub-group of the owners had waterfall rights. These owners' share in the association was increased accordingly, and this is surprising in light of Norwegian water law, as water rights are otherwise not tied to where the water comes from,

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81 *Vika* 1210-2005-0014, [2005] Haugalandet og Sunnhordland jordskifterett.

82 As provided for in the Land Consolidation Act 1979, s 2.

but arises solely from the rights one has in the waterfall itself.[83]

The statutes of the owners' association also contain a second interesting provision, based on a suggestion made by the owners. This provision states that all rights in the association are to be tied to the underlying agricultural properties and that they can not be partitioned off from these properties to be sold separately. In Norway, such division of agricultural land would in any event require permission from the local municipality.[84] In recent years, however, this protection of farming communities has grown weaker in practice, and it was the view of the owners in *Vika* that a dissociation of water rights from the underlying agricultural properties should be forbidden altogether.

According to Stokstad, a general consensus had developed among the parties whereby the land consolidation procedure was seen as a success. It allowed for an orderly and fair decision-making process regarding the conflicts that had arisen, and it was based on continuous interaction between the owners and the court, where everyone felt they had been given an opportunity to have their voice heard. Initially, tensions among the owners had been high, but the consolidation process had served to alleviate them. Some owners also pointed to the fact that the main hearing had been physically conducted in the local community, in a meeting hall that was familiar to the owners. This also gave them a feeling that they were meant to actively partake in the decision-making process.

When the interviews were conducted, some 5 years after the case was concluded, the owners also appeared to agree that the association was working as intended and that the climate of cooperation among the owners was good. The hydropower scheme itself had been completed in 2008, yielding an annual production of around 15 GWh/year, providing enough energy for around 700 households. Moreover, following the experience of land consolidation, a culture of deliberation

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83 See the Water Resources Act 2000, s 13.

84 See s 12 of the Land Act 1995.

towards consensus had developed among the owners, and great emphasis had subsequently been placed on attempting to find common ground and to reach agreement on important issues. This was reflected, for instance, in the fact that the owner who contributed the land for the power station was given a generous annual fee, in addition to his compensation as a waterfall owner. According to Stokstad, this fee exceeds what he would likely get if this decision had been left to the discretion of the consolidation court. Hence, it reflects a premium that the owners were now willing to pay to ensure agreement and a continued good climate for cooperation.

I agree with Stokstad that the case of *Vika* serves as an example of how land consolidation can empower local communities and enable them to embark on substantial development projects.

6.4.2 *Oma*

The second case I consider is *Oma*, which was brought before the courts in 2006.[85] In this case there were four involved properties. The owners of three of them, A, B and C, wanted to develop hydropower, while the fourth, owner D, was opposed to the development. Rather than attempting to expropriate the necessary rights from owner D, owners A, B and C took the case to the consolidation court. They argued that development would benefit all the properties involved, and also pointed out that an alternative project, which would not make use of owner D's rights, would be less economical. Hence, in their view, the consolidation court should compel D to cooperate in a joint scheme. Owner D protested, arguing that the project would not economically benefit him, and that it would also be to the detriment of his plans to build cottages for holiday dwellers in the same area.

The case of *Oma* differs from that of *Vika* in that the question of whether it was appropriate to use compulsion was more prominent. In particular, this aspect came up already in relation to the question of whether or not hydropower development should be pursued at all. As I discussed in

[85] *Oma* 1200-2006-0015, [2006] Nord- og Midthordaland jordskifterett.

Section 6.3, the fact that some owners do not desire development does not prevent the consolidation court from putting directives in place to facilitate it. However, the courts often exercise restraint in such cases. In *Oma*, however, the court agreed with the majority that an owners' association with compulsory membership should be set up.[86]

To justify the use of compulsion against D, the court first observed that joint development of hydropower would benefit all the properties in question, including D. Then they commented specifically on owner D's plans for building cottage homes, noting first that he was unlikely to be given planning permission, and secondly that hydro-power would not in any event adversely affect such plans in any significant way. Moreover, the court noted that while owner D's rights were relatively minor, they were quite crucial for the profitability of the project, particularly because owner D controlled the best location for the construction of a dam to collect the water used in the scheme. Overall, the court's conclusion was that a joint hydropower scheme would be a better option for everyone than a project that did not include owner D's property.

The question then arose as to how the shares in the owners' association, and the right to rent that would go with it, should be divided among the owners and their land. In regard to this question, the court departed significantly from one of the basic principles of Norwegian hydropower law. The principle states that no right to hydropower can be derived from being in possession of land suitable for the construction of dams or other facilities necessary to exploit the waterfalls.[87] The land consolidation court broke with this principle in the case of *Oma*, deciding instead to set the value of the land designated for construction of a dam and a power station at 6% of the total value of the rights that went into the owners' association.

The proportion of financial benefit and decision-making power awarded to the unwilling owner

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86 In doing so, the court relied on s 2 c) of the Land Consolidation Act 1979.

87 The principle is well-established in expropriation law, going back to the Supreme Court decision in *Hosanger, Haus og Hamre kommunale kraftverk v Askild Fusesen Vare and others* Rt-1922-489.

D thus increased accordingly, since these rights were all held by him. In fact, his share went from 1.75% to 7.75%, so the consolidation process itself led to a situation where he would have a far greater incentive for supporting the development. In many ways, the decision in *Oma* was more to the benefit of owner *D* than any other among the involved parties. If the rights in question had been expropriated, for instance, owner *D* would be given next to nothing in compensation and would lose his rights forever. Instead, the solution prescribed by the consolidation court gave him a lasting and substantial interest in local hydro-power.

According to Stokstad, interviews with the parties shows how the process and outcome of consolidation in *Oma* served to create a much better climate for further cooperation among the parties. Indeed, when the interviews where conducted, 4 years after the courts' decision, owner *D* had changed his mind and was now in favour of the development. Moreover, he had also decided that he wanted to take part in the development company. He was not obliged to do so, but his right to take part was ensured by the agreement with the development company, regulated by the statutes of the owners' association.[88]

The owners all reported that the consolidation process had been very successful and that the court had listen to them, allowing everyone to have their voices heard. Moreover, some owners reported that the court had cleverly maintained a "birds eye view" on the best way to develop the land in question, ensuring both long terms benefit to all involved properties as well as creating an improved climate for cooperation and mutual understanding. The consensus was that making concessions to owner *D* was appropriate and had been in the interest of all the involved parties. In 2011, the hydropower project was completed and today its output is roughly 3 GWh/year.

I believe *Oma* serves as a good illustration of how consolidation can be an effective instrument for facilitating locally controlled development, also in cases when this requires the use of compulsion

[88] The owners' right to take part in the development company is obligatory in some situations, pursuant to Land Consolidation Act 1979, s 34 b) no 3.

against some owners. Interestingly, in this case the successful outcome appears to be partly due to the fact that the consolidation court actively used its discretionary powers when deciding how to organise joint use. This power allowed them to deviate from established rights-based legal doctrine and adopt a more context-dependent approach, pursuing solutions that suited the situation better. Interesting legal questions arise in this regard, particularly regarding the competence that the consolidation court has in such cases, and the extent to which decisions can be made subject to review by the normal courts on the basis that they do not follow established principles and practices of hydropower law.

For instance, one may ask what would have happened if the majority owners in *Oma* had appealed the decision to the regular courts on the basis that D was awarded too many shares in the owners' association. Would this be regarded as a question of the court's interpretation of the law regarding the owners' *rights*, or would it be regarded as a discretionary decision regarding the best way to organise development? If a rights-based perspective was adopted, the decision would almost certainly be overturned. If not, it would seem beyond reproach, as an exercise of the consolidation courts' discretionary power.[89]

A second interesting question that arises is whether or not consolidation can work as well as it did in *Oma* in cases where conflicts run more deeply, or where the parties favoring development are a minority among the owners. The next two cases I consider shed some light on this issue.

6.4.3 *Djønno*

This case was brought before the courts in 2006, by a local owner A who wanted to develop hydropower in a small river crossing his land, the so called *Kvernhusbekken*.[90] This owner wanted the court to help him implement a hydropower project, by compelling the other owners, B, C and

[89] Recall that consolidation decisions can only be appealed to the regular courts on procedural grounds or on the ground that the law has been applied incorrectly.

[90] *Djønno Indre Kaland* 1230-2006-0010, [2006] Indre Hordaland jordskifterett.

D, to rent out their share of the waterfall on terms dictated by the court. The starting point for the other owners was that they did not want any hydropower development at all, and they were not willing to rent out their rights to owner *A* or any other developer. There was also a dispute regarding the ownership of the waterfall rights, with *A* believing initially that he controlled a large majority. It soon became clear that this was not the case, and before the main hearing, the parties agreed that the waterfall in question was owned jointly with shares divided according to each owners' share of the joint rights still pertaining to the individual properties (rights that had been exempted from previous consolidation measures). Owner *A*'s share in these rights did not amount to more than 5%, so his own financial interest in hydropower was in fact limited compared to the owners who opposed development.

On the other hand, the rights needed for the necessary physical constructions were predominantly held by owner *A* alone, and *A* maintained that the court should use compulsion to allow him to go on with his plans. The court agreed that hydropower would be rational use of the waterfall, and they initially assessed the case against the rules relating to compulsory joint undertakings.[91] This promised to facilitate very concrete directives regarding how the hydropower development should be carried out, down to the level of the needed investments and building steps.

However, the court eventually held that this approach would place too much of a burden on the owners opposing hydropower. Hence, they chose to resolve the case using directives for joint use. By doing so, the court also restricted the scope of their decision to the establishment of an owners' association that would be responsible for renting out the rights. The court would not consider the question of deciding on a concrete scheme.

The model used for the owners' association was similar to the one the court adopted in *Oma*. This included allocating shares in the owners' association in a way that took into account the special importance of land needed for physical constructions. In total, this land was held to correspond

[91] See the Land Consolidation Act 1979, s 2 e).

to 6% of the shares in the association. Since these rights were held by owner A alone, his share in the association doubled. In addition to this, owner A purchased the shares from owner B, so that his total share ended up amounting to 22%. Still, for the majority of stakeholders, membership in the association was imposed by the consolidation court against their will.

The wording of the statutes for the association apparently attempts to take into account that it would be run by a majority of unwilling shareholders. The wording used is different from that used in the other statutes, and it is stated in very clear terms that the association is going to rent out the rights in the waterfall such that hydropower can be developed. In *Oma* and *Vika*, on the other hand, the statutes merely state that this is the *purpose* of the association, leaving the shareholders with the freedom to determine whether or not to go through with development.

In interviews, those who were compelled to take part in the association against their will expressed dissatisfaction and surprise at the result. Moreover, while the association had apparently tried to be loyal to the wording of the statutes, and had looked for partners who might be interested in developing hydropower, there had been no willingness among the majority to engage actively with this work. No deals had been made, no separate development company had been set up, and the conflict among the owners was ongoing. As of 2011, owner A was still pushing for development on terms that were unacceptable to the other owners. Hence, while the case of *Djønno* is an example that consolidation can be used even when it involves compulsion against the majority of owners, it also serves to illustrate that the chance of a successful outcome may then be more limited.

The question arises as to how such cases should be dealt with by courts in the future. According to owner A, the problem was that the directives of use were not specific enough. In his opinion, the directives should not have been restricted to merely setting up an owners' association for renting out the rights. In addition, the court should have actively engaged also with the question of how the development company should be organised, and should at least have given guidance as to *who* should carry it out. Among the majority owners, on the other hand, the prevailing feeling was that

the development in question, which they would be required to partake in against their will, was more or less doomed to fail already from the start.

I believe this reflects an important insight. It seems reasonable to assume that unless one is prepared to see an increase in the use of compulsion, compulsory cooperation will only work when at least a basic agreement that development should take place can be established among the majority of the involved owners.

6.4.4 *Tokheim*

This case was brought before the consolidation court in 2008, by the owners of *Tokheimselva*.[92] The five involved owners all agreed that development should take place, but they disagreed about how it should be done, and about the proportion of each owners' share in waterfall. Some owners argue that development should be organised by the owners themselves, but other owners thought it would be best to rent out the rights to an external developer. The case was further complicated by the fact that the waterfall in question was so big that it would be possible to develop hydropower that would require transferral concession pursuant to the Industrial Licensing Act 1917, a concession that can only be given when the purchaser is a company where the State controls at least $\frac{2}{3}$ of the shares.

Like the precious cases we have considered the consolidation court eventually based its decision on s 2 c) of the Land Consolidation Act 1979, setting up an owners' association such that each owner was allotted a share in accordance to the rights that the court found he had in the waterfall. Unlike the previous cases we have considered, there was no adjustment made for land that would be needed for physical constructions. However, the statutes state that owners will be entitled to a lump sum estimated on the basis of the damages and disadvantages that a concrete hydropower project will bring. This also marks a departure from established practice in expropriation law,

92 *Tokheim* 1230-2008-0020, [2008] Indre Hordaland jordskifterett.

where it has been a long established principle that owners can be compensated on the basis of *either* the value of their waterfalls *or* the damages and disadvantages caused by the project, not both.[93]

In other respects, the statutes for the owners' association follow the same model adopted in the previously considered cases. They do not, however, resolve any of the controversial questions regarding how development should be carried out, and the question of the extent to which interested owners should be given the opportunity to develop the resource themselves. This was the main issue raised by the case, but the consolidation court explicitly decided not to address it. In particular, the statutes of the owners' association explicitly provides separate rules that cover both the case that a group of owners undertake development themselves, and the case that development is carried out by an external company.

In interviews, the owners expressed that they were happy with how the case was dealt with by the court. Everyone was heard, and the owners' association was set up in consultation with the parties. However, the main issues were still unresolved as of 2011, and this was felt by the owners as a major shortcoming of the outcome of consolidation. Some of the owners expressed criticism against the court for not engaging more actively with the most pressing issues.

The case of *Tokheim* serves to illustrate that established practices of consolidation, while being well received and understood by local owners, face some new challenges in relation to hydropower, challenges that consolidation courts might be reluctant to take on. It seems that the court in *Tokheim* felt that they were not in a position to assess the question of what kind of development would be best, and it also seems that they were wary of expressing any opinion about the legal status of a project led by local owners, in relation to concession law. They did not, in particular, form an opinion about whether it would be possible for local owners to carry out their own large scale development, in a waterfall that might otherwise be subject to the provisions set out in the

93 See for instance the case of *Vikfalli*, *Endre Vange and others v Fellesskapet Vikfalli* Rt-1971-1217.

Industrial Licensing Act 1917.

It remains to be seen whether such an agnostic attitude can be maintained by the consolidation courts as local owners increasingly turn to them for help in resolving disputes regarding hydropower. Moreover, it will be interesting to see how the new Land Consolidation Act 2013 will influence case law in this area. It seems that a case like *Tokheim* could benefit from the court taking a broader view, possible even including public bodies as parties in the case, as will become possible when the new Act takes effect.

6.5 Assessment and Future Challenges

The concrete cases that I discussed in the previous section shows, in my opinion, that the system of land consolidation is well suited as an alternative to expropriation in the context of hydropower development. At the same time, the cases suggest that the land consolidation courts may find it hard to deliver effective directives of use in situations when the different stakeholders disagree fundamentally about how the water resources should be managed. In addition, one may question the effectiveness of land consolidation courts in contexts when rules and regulations from other areas of law come into play. It seems, in particular, that the land consolidation courts may be cautious about implementing solutions that they fear will contradict sector-specific provisions that regulate the form of economic development that their directives aim to facilitate.

In so far as sector-specific rules disadvantage owners and benefit external commercial interests, as is the case for hydropower development, one may fear that the land consolidation courts will become impotent as soon as powerful market players enter the scene. It may be considerably easier to strike a fair balance between the interests of local farmers of comparable economic and political standing, then to do the same when one of the stakeholders is a partly state-owned power company that is accustomed to expropriating property rights.

Paradoxically, the potential weaknesses of the land consolidation courts in this regard may be

enhanced by the fact that they are not authorised to make use of appropriate forms of compulsion against owners, on pain of interfering too much in property as an individual right. A lack of power to compel threatens to undermine the effectiveness of the land consolidation court, thereby making it possible to argue that the public interest in development can not be sufficiently accommodated through the use of consolidation measures. Hence, one may decide to fall back on expropriation, to the detriment of owners.

In fact, there is some evidence to suggest that land consolidation law is currently quite vulnurable to this mechanism. One indication of this is the Supreme Court case of *Holen v Holen*, concerning a quarry owned and operated by a local landowner.[94] In order to continue extracting his minerals, the owner of the quarry would have to interfere with the property of a neighbouring owner, who was using his land for more traditional forms of agriculture. The farmer was unwilling to reach an agreement with the quarry owner, so the latter brought a case before the land consolidation court. The court noted that it would be possible to reach an accommodation that would benefit both parties, and issued directives of use that would allow the quarry to continue its operations.

The directives gave the quarry owner access to the farmer's land, who was in turn granted replacement property from the quarry owner. The consolidation court also noted that the quarry would, in the future, be likely to extract minerals that belonged to the farmer. For the minerals as such, awarding replacement property made little sense, so the court decided that the minerals still had to be regarded as the property of the farmer (who had no interest in extracting them). However, a directive of use was issued that gave the quarry owner a right to extract these minerals, provided he paid market value for them.

Hence, not only was the farmer awarded replacement property for agricultural purposes, he was also granted a share of the benefits that would result from the continued operation of his

94 *Holen v Holen* Rt-1995-1474.

neighbour's quarry. This was clearly beneficial to his property, economically speaking. The owner himself, however, objected to the arrangement. The Supreme Court found in his favour. This was not because they sanctioned his right to block the continued operations of the quarry, or because they thought the replacement property or the payment model was inappropriate. Instead, the Court held that the right to extract the farmer's minerals could not be transferred to someone else by a consolidation measure, even if the farmer was ensured payment. This, the Court held, was a form of compulsion that fell outside the scope of use directives in land consolidation.

The perspective underlying this decision is interesting, because it underscores a reluctance to use land consolidation in what would otherwise be a fairly typical economic development scenario. As such, it also becomes a possible objection to the proposal that land consolidation is a practical alternative to expropriation in such scenarios. However, *Holen v Holen* was decided in 1995, and as I have already discussed at length, the law has developed in recent years, so that the use of land consolidation as an alternative to expropriation is now explicitly endorsed by the legislature in certain circumstances. However, I think *Holen v Holen* reminds us that we should take critics seriously, also because they may be able to raise convincing formal objections against compulsion in land consolidation, on the basis of earlier case law. More generally, the exact relationship between land consolidation and expropriation law, including the constitutional property clause, appears to be an increasingly relevant open question that awaits further clarification.

However, I would like to reiterate that I do not agree with those who argue that land consolidation offers less protection to owners than administrative expropriation. In my opinion, the property protection offered in the context of land consolidation has a different flavour, but is not necessarily weaker. I acknowledge, however, that how one judges this depends on one's vision of property. In particular, it depends on which one of property's functions one deems most worthy of protection.

Granted, an administrative expropriation procedure can offer more extensive *formal* safeguards.

A range of procedural rules must be observed, pertaining to notification to the owners, impact assessments, a duty to provide guidance and reasons for the decision, and a possibility (sometimes several) for administrative appeal. Then, after an expropriation order has been granted, the owner can still challenge it before the appraisal courts, in principle at the expropriating party's expense.

In practice, however, the administrative expropriation procedure often leaves the owners marginalised, as they are overshadowed by other more powerful stakeholders. This is particularly clear in situations when expropriation arises as a result of more comprehensive planning or licensing procedures. As discussed in Chapter 4, this as is the case, for instance, in the context of hydropower development. In addition to this, the possibility of raising validity objections before the courts is mostly a theoretical one. It is very unusual for such objections to be made successfully, as the courts typically defer to the discretion of the administrative decision-maker in expropriation cases.

More generally, the narrative of expropriation is one where the owners may have to endure a loss in the public interest, for which they must be compensated as individuals. By contrast, the narrative of consolidation is one where the owners themselves are tasked with making a *contribution* to the development project, in the best interest of both the local community and society in general. In particular, the owner's role is no longer than of a passive *obstacle* to development, but is transformed to that of an active *participant*, one who might have to be nudged to fulfil their potential. In addition, the properties as such receives recognition as important units of assessment, independently of the interests of their current owners. Moreover, the owners as a *group* come into focus, as the process is meant to facilitate rational *collective* action.

This is achieved by placing owners in a partly deliberative, partly adversarial, context, which presupposes their active input to the decision-making process. In addition, the *grounds* for imposing compulsory measures that interfere with property rights need to be anchored explicitly in the social functions of the affected properties. A measure is warranted only when it enhances property values, in the sense of improving conditions for the communities that takes their livelihoods from

the affected properties. Clearly, this principle offers a kind of *material* protection that is largely absent in administrative expropriation law. In particular, compulsion is only warranted when it is in the interest of a concrete local community, not merely an abstract "public".

In some cases, such a narrative can be hard to maintain, since the local community must in fact yield to the interests of greater society. However, I believe this perspective can often be replaced by something more constructive. This is particularly clear in the context of takings for profit, since these do as a matter of fact intend to increase the (commercial) value of properties that are taken. That is not to say that any commercial development is in the interest of the local community. Far from it, the interest of the local community might be more strongly committed to preserving established use patterns or protecting the environment. But this too is something that will come under a much clearer light when the local community is thought of as an active participant in development rather than an impediment to progress.

For these reasons, I conclude that land consolidation is highly attractive, even if it must involve a significant degree of compulsion in order to effectively replace expropriation measures. In a system based on private property rights it seems only reasonable that the property owners and their local communities remain as the primary stakeholders in development, even if this development is large-scale, takes places in the public interest, and possibly needs to be imposed by compulsory means. This, in itself, does not seem to provide any moral justification for transferring decision-making power and commercial benefits away from the original group of owners, by bestowing it on powerful commercial interests. The imposition of compulsion, in particular, is only tolerable to the extent that it is actually needed to fulfil the objectives that are used to justify it. The system of land consolidation, I believe, demonstrates that current practices surrounding takings for profit fail in this regard. A better option is not only desirable, but also possible, provided there is political will to prescribe it.

However, I would like to finish by raising a concern pertaining to the future development of

the land consolidation procedure itself, it is is relied on to provide a better approach to takings for profit. If land consolidation is used to this end, will it remain a service to owners, or will it gradually be transformed into a service to developers, who seek cheap access to property owned by others? This is an empirical question concerning the robustness of specific land consolidation procedures, and it is about to come into focus in Norway. It is too early to provide answers, however, since there has not yet been any cases where the issue has come to the forefront.

However, as any legal person with a right to expropriate may now act as a party to a consolidation dispute, the question is bound to arise. In particular, what will the role of the new parties be? Will they be embedded in the legal framework in such a way that they become potential partners that owners can rely on to implement projects in the public interest, or will they be regarded as the main stakeholders, whom the land consolidation courts should assist so that they may successfully impose their will on recalcitrant owners? It will be very interesting to follow this development further, to see if the promise of using land consolidation to regain legitimacy for economic development under compulsion can be fulfilled, or if it will lead to a degeneration of the land consolidation process itself.

6.6 Conclusion

In this Chapter, I have addressed land consolidation as an alternative to expropriation for economic development, anchored in a case study of hydropwer. I started by presenting the basic idea of using land consolidation to organise commercial projects and I emphasised that the notion of consolidation at work here is a broad notion that includes measures seeking to compel owners to use their property in the public interest. I briefly presented an overarching vision of this kind of land consolidation, noting also that a broad notion is already at work in many jurisdictions, including in Norway.

I then presented the Norwegian system, which is based on a judicial decision-making framework

that sets the land consolidation procedure apart from that found in many other jurisdictions. I also noted how the procedure is conceptualised as a service to owners, with a no-loss guarantee in place to ensure that consolidation measures are only implemented when the benefits make up for the harms for all the involved properties.

I then went on to present the rules pertaining to compulsory use of property, that empower the consolidation courts to organise specific development projects on behalf of owners, possibly against their will. I noted how recent changes in the law envisions an extended scope for these rules, including in the context of non-agrarian and urban development. I then went on to consider some concrete examples, from the context of hydropower development, where owner-led projects already tend to rely heavily on land consolidation rather than expropriation.

From this case study, I concluded that the land consolidation alternative works well when there is basic agreement among the owners that development is desirable, but can be less effective when there is deep disagreement about whether or not development should proceed at all, or if some owners object to the idea of owner-led development because they prefer to cooperate with an external developer. In these contexts, I argued, it might be necessary to enhance the power of the land consolidation court, also in the direction of extending its authority to compel owners to take part in, or allow the owner-led implementation of, development projects that they fundamentally disagree with. This is already possible, but only to some extent, and the exact boundaries here are now an open question, as recent legislative changes might suggest that the case law on this issue is ripe for review.

I then argued against critics that see this as a threat to property rights. In particular, I suggested that the procedural protection offered by administrative law in the context of traditional expropriation is not as relevant to the *actual* position of owners as the fact that they remain in focus throughout the consolidation process, as the main stakeholders in development. Hence, when land consolidation is used, external commercial interests are not able to dominate the process.

I noted, however, that this could now be set to change, as a recent change in the law grants developers the right to act as parties in consolidation cases and to bring cases before the courts themselves, if they favour it over expropriation. On the one hand, such a change will enhance the power of the land consolidation court, making it more effective in dealing with cases that involve external parties. On the other hand, there is a possibility that the presence of new and powerful stakeholders will change the nature of the land consolidation process itself, so that it transforms from a property-enhancing institution for self-governance into a planning and implementation instrument for developers.

In general, I believe this Chapter has shown that the land consolidation regime in Norway functions in a way that sheds interesting light on collective-action alternatives to expropriation. It is also a dynamic and versatile framework, more so than other suggestions, such as the land assembly districts proposed by Heller and Hills.[95] In my opinion, the institution of land consolidation can provide a useful kind of democracy on demand for compulsory economic development, facilitating a better balance between the interests of the owners, the local community, and society as a whole. In this vision, external commercial actors are at worst going to be partners in crime, at best partners in progress. They will not, however, be allowed to run the show.

[95] Heller and Hills (n 6).

7 Conclusions

In this final section of my thesis, I would like to take a step back to briefly follow two broader threads that I believe run through my thesis. The first concerns the many senses of taking that have been brought into focus throughout the analysis.

7.1 Many Aspects of Taking

The most obvious way to describe a taking is to say that it involves the transfer of property from one legal person to another. However, as I noted in the first Chapter of this thesis, property itself is highly multifaceted, serving a range of social and individual functions. Hence, when we begin to unpack the property bundle, we are confronted with a multitude of different senses in which a taking impacts on owners, their communities, and society as a whole.

The economic consequences of a taking might be the most easily recognisable, particularly in the economic development cases. But as my work in this thesis has shown, other consequences can be just as important, particularly those pertaining to property as an anchor for local democracy. If jointly owned property is taken from a community, with full compensation paid to all individual owners, the community suffers a distinct uncompensated loss, namely the loss of future self-governance opportunities.

It is interesting to note that in the traditional narrative on takings, social and political effects are typically only recognised on one side of the takings equation, namely that of the taker and the

public interest. Such is the conventional narrative; the owner as an individual suffers an economic loss in order for the taker, society as a whole, to achieve democratically determined political goals. But in economic development cases, the picture is quite different. In these cases, it is often the case that local communities are deprived of political capital in order for specific commercial interests to make a profit.

In such cases, it might well be that the balancing of different reasons for and against the taking has taken place prior to the decision to interfere with property. The plans for development themselves may well precede any specific property-oriented implementation steps, such as the use of eminent domain. It might even be that democratically accountable bodies responsible for land use planning have already concluded that some local community interests must give way to other interests.

In these cases, it might be tempting to argue that a narrow takings narrative is appropriate because it pertains only to the final implementation step, which is the only one that involves property rights. But this argument, I believe, rests on a flawed perception of what property is, and should be, in a democratic society. Invariably, property has to do with decision-making and power. If the decision-making process does not grant significant self-determination rights to affected property owners, a taking is already in progress. It might be justified, but it is still a taking.

More worryingly, it is clear that this kind of taking carries with it a great potential for differential treatment, discrimination, and corruption. The traditional takings narrative does a good job of setting up a framework that makes it difficult to simply pay higher compensation to certain kinds of people, without offering any justification. But with respect to the aspects of taking not recognised, e.g., pertaining to what role the owner has during the planning stages, differences in treatment will not even be notices. But if property is owned by the right sorts of people, then invariably it *will* come with considerable decision-making power.

If property is owned by the marginalised, on the other hand, the most severe act of taking will

sometimes have taken place even before the land use planning begins, by the fact that the owners are placed entirely on the sidelines. This, I argued in Part II of this Chapter, is how the Norwegian system for management of hydropower approach riparian owners works.

At the very outset of planning, often decades before any formal decision to expropriate has been made, a considerable portion of the substance of property is taken from the owners, who are completely excluded from the rest of the decision-making process. In Norway, such takings processes, that clearly transcend the traditional financial narrative, have progressed to the point that even the law today provides an ambiguous account of Norwegian water resources as private property belonging to the general public.

Perhaps, then, the nature of property itself has changed, so that there is nothing left except those financial entitlements that Norwegian expropriation law recognised. If so, the change has not come about by any legislative move, nor has it been preceded by any kind of debate. It has simply emerged, gradually and unplanned, as a result of sector-based regulation and administrative practices. The process, therefore, meets neither the requirements of land reform or expropriation. It is an unacknowledged process about which the law in Norway has had nothing much to say at all, for which silence still persists.

This is unfortunate. Even if riparian rights should be stripped of all content except a financial entitlement, this should happen on the basis of debate and democratic decision, not because the law fails to cater to a descriptively accurate notion of property.

not how a taking should be carried out, nor does it meet the standard

the decision-making process *will* normally reflect the power of property, if other contextual factors are not

although to different degrees depending on other contextual factors, most notably the social status of the owner. Hence, property plays a constuti

particularly

Property is not merely a placeholder for transient entitlements. It also both help make up and is shaped by the social and political context.

This was the key point that I argued for in Chapter 1 of the thesis, by looking to the social function theory of property and the notion of human flourishing.

which focuses specifically on property rights only *after* the public interest has been mapped out and formulated by the decision-makers?

individual financial entitlements

However, the property perspective, which is imposed onl

As I have demonstrated in this thesis, the economic development takings turn this narrative completely on xplored in depth in this thesis, the con

Rather, the typical narrative places such aspects

After all, on the taker side, many of the primary concepts used to conceptualise typical takings are neither economic nor individualistic.

on the owner side, do not

The consequence of this can be that former owners and their communities will be marginalised more generally, as their position within society weakens. In turn, it will become easier to take more property from them, under increasingly weaker arguments of public interest. In the end, when egalitarian property rights no longer provide a foundation for decision-making about land use, the risk is high that a corresponding inequality in decision-making power will follow quite generally. Democracy as such might be at risk.

In any event, the land-less will not have a voice unless they can find different means of asserting themselves. The possibility of achieving participatory equality without egalitarian property should not be overlooked, of course. However, it seems safe to say that the track record of alternative ideas, whereby equality is pursued through institutional arrangements alone, is unimpressive.

In almost all countries that score well on parameters such as democracy, living standard, trans-

parency, and the rule of law, we find private property rights as a core legal principles. Moreover, while property might be unequally or unfairly distributed among the population, property rights are typically distributed widely enough to give rise to a natural division of power and a plurality of perspectives. Indeed, even the land-less may sometimes attain a voice, albeit a very limited one, if they are still in possession of their own labour.

The negation of property rights

This, in turn, is the very foundation of both democracy and the rule of law.

as an underlying source of division of power.

7.2 Some Ways of Giving Back

7.2.1 Locating Primary Stakeholders; The importance of Communities

7.2.2 Making Influence Proportional to Stakes; the Closeness-to-Consequences Test

7.2.3 Robust and Flexible Institutions for Collective Action; the Possibility of a Judicial Approach

7.2.4 Beware of Big Units; the Fine Line between Representation and Usurpation

7.2.5 The Importance of Redundancy; Property Regained

It seems that property dislikes being concentrated in the hands of the few.