On the legitimacy of economic development takings

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

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Abstract

For most governments, facilitating economic growth is a top priority. Sometimes, in their pursuit of this objective, governments interfere with private property. Often, they do so by indirect means, for instance through their power to regulate permitted land uses or by adjusting the tax code. However, many governments are also prepared to use their power of eminent domain in the pursuit of economic development. That is, they sometimes compel private owners to give up their property to make way for a new owner that is expected to put the property to a more economically profitable use.

This thesis asks how the law should respond to government actions of this kind, often referred to as *economic development takings*. The thesis makes two main contributions in this regard. First, in Part I, it proposes a theoretical foundation for reasoning about the legitimacy of economic development takings, including an assessment of possible standards for judicial review. Moreover, the thesis links the legitimacy question to the work done by Elinor Ostrom and others on sustainable management of common pool resources. Specifically, it is argued that using institutions for local self-governance to manage development potentials as common pool resources can potentially undercut arguments in favour of using eminent domain for economic development.

Then, in Part II, the thesis puts the theory to the test by considering takings of property for hydropower development in Norway. It is argued that current eminent domain practices appear illegitimate, according to the normative theory developed in Part I. At the same time, the Norwegian system of land consolidation offers an alternative to eminent domain that is already being used extensively to facilitate community-led hydropower projects. The thesis investigates this as an example of how to design self-governance arrangements to increase the democratic legitimacy of decision-making regarding property and economic development.

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List of Abbreviations

CPO . . . . . Compulsory Purchase Order

CPR . . . . . Common Pool Resource

ECHR . . . . . European Convention of Human Rights

ECtHR . . . . . European Court of Human Rights

EEA . . . . . European Economic Area

EFTA Court . . Court of Justice of the European Free Trade Association States

ICCPR . . . . . International Covenant on Civil and Political Rights

ICESCR . . . . International Covenant on Economic, Social and Cultural Rights

LAD . . . . . Land Assembly District

NVE . . . . . Norges Vassdrags- og Energidirektorat (Norwegian Water and Energy Directorate)

P1(1) . . . . . Article 1 of the First Protocol to the European Convention of Human Rights

UDHR . . . . . Universal Declaration of Human Rights

1 Conclusion

> Proudhon got it all wrong. Property is not theft – it is fraud.[1]
>
> That's what makes it ours – being born on it, working on it, dying on it. That makes ownership, not a paper with numbers on it.[2]

This has been a thesis in two parts, each of which have approached the issue of economic development takings. The first part took a theoretical approach, starting from the notion of property itself, to answer the question of *why* it should be protected. This, in turn, gave rise to a framework for assessing the legitimacy of economic development takings, and for formulating alternatives to it that could obviate the need for dispossessing current owners.

The second part of the thesis approached the issue of legitimacy concretely, by giving a case study of takings of waterfalls for hydropower development in Norway. The political, social and economic context was also analysed, leading to an application of the Gray test formulated in the first part of the thesis. Moreover, the case study considered the possibility of alternatives to expropriation, by assessing the Norwegian institution of land consolidation, which is now used extensively by local owners who wish to undertake hydropower development themselves.

In the following, I offer a brief summary of the main points discussed in each chapter. While doing so, I also hope to shed further light on two broader threads that run through the work done

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1 **gray91**

2 **steinbeck39**

in this thesis, pertaining to the nature of property and how to ensure that it functions as a force for good in democratic societies.

1.1 Property theory and the social obligations of ownership

In the first part of the thesis, I presented a number of ways of looking at private property.

1.1.0.1 Chapter 1

To illustrate the subtleties that this approach helps shed light on, I considered 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 his neighbours.

This turn of events did not make the example less relevant to this thesis. Rather, it served to highlight that the question of economic development takings is not a black-and-white balancing act between property privileges on one side and the good intentions of the regulatory state on the other. Specifically, the example of Trump coming to Scotland allowed me to emphasise the importance of context when assessing both the nature of property, the many ways of taking, and the meaning of protecting owners against predation.

The protection sought by those who opposed Trump's golf course did not target their entitlements as individuals. Rather, it targeted the community, as the owners felt it would be detrimental to the community, and to their lives, if Trump was allowed to redefine the social functions of local property. 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 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, focusing on the social function theory, which emphasises how property structures, and is structured by, social and political relations within a society.

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 we should aim to decouple descriptive insights from normative aspects of the theory, to allow the social function theory to serve as a common ground for further value-driven 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. This theory is based on the premise that property *should* enable – and even compel – individuals and their communities to participate in social and political processes. I argued that property's purpose in this regard is fundamental to its proper role in a democratic society, as an anchor for participatory decision-making.

Moreover, I noted that the human flourishing theory 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.

I then applied the theoretical framework developed in preceding sections to a preliminary investigation of economic development takings, to bring out the overarching question of legitimacy, which will occupy a central place in this thesis.

1.1.0.2 Chapter 2

1.2 On the legitimacy of interference in property, and the social structures it helps sustain

1.3 Substance and procedure – protecting the social functions of property by reviewing decision-making processes leading to interference

1.4 Norwegian waterfalls – properties, assets, and common goods

1.5 Property taken by default

1.6 Property given following participation

1.7 Conclusion

According to many legal scholars, the law is an instrument of order, grounded in social facts, not an arbiter of justice, grounded in moral theory.[3] Building on this, a pragmatist might be tempted to think that the law should be sceptical of embracing the complexities of equity when goals such as efficiency, certainty, and control appear to be better served by simplification.[4] This way of thinking appears to have played a significant role in shaping the traditional approach to the legitimacy issue in the law of takings.

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[3] This is a terse formulation of a position typically associated with legal positivism; it can be elaborated and restated in a multitude of ways, giving rise to many theoretical variations. The merits of the positivist account of the relationship between morality and law is a contested issue in the so-called Hart-Dworkin debate in legal philosophy, see **hart12**; **dworkin86**; **shapiro07**

[4] For a theory that emphasises pragmatism and chides moral theory, see **posner99** ("Holmes warned long ago of the pitfalls of misunderstanding law by taking its moral vocabulary too seriously. A big part of legal education consists of showing students how to skirt those pitfalls." (citations omitted)).

It is clear that by focusing on individual owners and their losses, the law makes things easier for those called to administer it. Moreover, by assuming that all losses can be quantified in financial terms, the law's standard can be at least partly automated. The potentially broad question of legitimacy has been reduced to the question of when and how to award compensation, for which the ostensibly neutral idea of "fair market value" appears to provide a practical starting point, well suited for maintaining order in a capitalist society.[5] A large chunk of the remaining work, in turn, can be delegated to the appraisers, allowing the courts to get on with other business. In addition to being effective, this comes with the added bonus of allowing the courts to distance themselves very clearly from the political overtones of the legitimacy question.

This approach to legitimacy is prevalent, but I believe it needs to be rejected. The reason, as argued in the first part of this thesis, is that property itself cannot be drawn up as narrowly as the compensation approach presupposes.[6] The legitimacy of property interference cannot be understood in mechanical terms, as a matter for the appraises, regardless of how much weight we want to place on the value of efficiency and the ideal of deference to political decision-making. Specifically, unless the issue of legitimacy is recognised as being far more complex than pertaining solely to the question of when and how to calculate market values, there will be a significant mismatch between what property is and what the law pretends it to be.[7] This is harmful at a structural level, especially if the idea of property as a fundamental right is to have a future. If the law continues to insist that property is nothing more than a form of entitlement protection, there

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5 See, e.g., **acres79** ("In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.' However, this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." (citations omitted).)

6 See the discussion in chapter **??**, section **??**.

7 As contended in Part I of this thesis, this much appears to be a descriptive insight, which does not seem to depend on one's moral philosophy, see the discussion in chapter **??**, section **??**.

might even be a case to be made that the notion should just be done away with in its entirety.[8]

In the first part of this thesis, I presented a theory of property which suggests that this would be a tragedy, particularly for marginalised groups who are in need of protection against economic and social elites. Importantly, while international law and human rights conventions offer important clarifications and protections at the level of principles, what property provides is an imperfect, yet very powerful, framework for implementing such principles at the local level. This is property's promise, which it can only keep if it is recognised as having social functions going well beyond the protection of individual entitlements.

Arguably, principles of human rights should even be recognised as inhering in property as such, not only as mediated by the power of states.[9] A worry often voiced as a counterargument for direct horizontal application of human rights is that it can serve as an excuse for the state to do nothing.[10] For this reason, it might well be worth emphasising that if the owners fail to deliver on basic rights, the state is still responsible. However, the converse is equally true: if states fail, then owners still have obligations.

If there is no distinction between owners and states, by contrast, failure in one is also failure in the other. This seems dangerous, particularly if proprietary power is exercised only by a small group of people, regardless of whether they are commercial leaders or powerful government officials. Property should therefore be widely distributed among the population, to be rendered as a provider of basic rights and an anchor of democracy.

The first chapter of this thesis explored this idea in depth and argued that a broader notion of property needs to be acknowledged also by the law, particularly in the law of takings. If property serves a broad social function by sustaining a community and aiding in the delivery of basic rights to

8 See generally **grey80**

9 See chapter **??**, section **??**.

10 See **manisuli07**

all its members, transferring that property to a non-local commercial owner is not merely a highly dubious redistribution of entitlements. In the end, it will also be the destruction of property, as it undermines property's most significant functions in relation to the overarching goal of human flourishing. In such cases, therefore, property is not only taken, it is lost.

Arguably, takings of this kind are currently being carried out in Norway, to the benefit of large energy companies. Waterfalls are still nominally considered private property, belonging to members of the rural communities in which the water resources are found. However, as shown in Part II of this thesis, the practice of taking waterfalls from local communities has become so insensitive to the plight of owners that the law itself is ambiguous about whether private ownership of water resources has much content at all.

But this does not mean that proprietary power is no longer exercised over the power of water. Quite the contrary. The commercial companies that acquire waterfalls are quick to turn them into commodities whose primary purpose is to turn a profit. At the same time, water resources have now been encapsulated in development licenses; today, licenses from the government, not waterfalls as such, are the key assets in the hydropower production sector. The nature of property has thus transformed; ownership of hydropower has become a legal fiction, arising from a bundle of papers with numbers on them, not from physical and social proximity to the underlying resource.

The result is that the notion of property backing up this regime is now so thin that it arguably cannot be distinguished at all from the political and economic power that backs it up. As such, it is also no wonder that narratives of egalitarian property give way to narratives based on thinking about water resources as though they belong to the "public".[11] This is a politically defensible way of talking, to mask the reality that water resources are managed according to the will of dominating market players and powerful interest groups, both striving to protect their dominion over the fruits

[11] See the **ica17 ica17**

of the land.[12]

Due to this dynamic, the case of Norwegian waterfalls appears to be an example of how illegitimate takings can do more harm than to deprive owners of valued resources. Specifically, the case study shows how a lack of legitimacy can effectively deprive property of its meaning, as the sticks of the bundle are bent to suit the interests of the commercial and political elites. Such a system might well give us the impression that property is little more than theft, maintained in the law only as a fraud.

1.8 Property Regained – Giving and Participating

The converse of a taking is a *giving*. In the US, this term is sometimes used to refer to situations when private property owners benefit from state actions involving property.[13] For instance, it might be characterised as a giving if the state allows someone to purchase property cheaply, or if regulation makes some properties appreciate in value. Arguably, and analogously to the case of takings, there is a case to be made that the state should sometimes charge people for disproportionate givings.[14]

The issue of when this is appropriate, if at all, will not be discussed here. Instead, I wish to direct attention at the terminology itself, and its subtle conceptual commitment to a top-down way of thinking about both takings and givings. Indeed, consider what happens if we turn the terminology on its head. This is not an implausible conceptual shift. After all, if the state takes

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[12] I mention that state-owned companies are currently extending their dominion elsewhere as well, with potentially deleterious consequences. In Nepal, for instance, Norwegian hydropower companies generate large profits from their aid-funded cooperation with the Nepali government, apparently at the expense of local populations and the rights of the poor. See **gaarder15** (report from one of the largest environmental organisations in Norway, discussing how the Nepali government entered into an agreement where the price of electricity would be set at an extortionate level, denominated in US dollars, and adjusted upwards proportionally to US consumer prices; apparently, the project involves a transfer of money from Nepal to Norway that far exceeds the flow of money going the other way); **peris12** (mentioning the presence of Norwegian actors, discussing the marginalisation of local people, and arguing that conventions on indigenous rights are unable to deliver social justice due to the "democratic deficit" of decision-making regarding hydropower development in Nepal).

[13] See generally **bell01**

[14] See **bell01**

property, the current owners will have to give it up.

The owners' act of giving, however, is rarely given much recognition or attention when we approach takings. Plainly, the owners' active participation as a giver – not merely an injured party – is typically considered irrelevant. Why is that? The obvious answer is that since the giving takes place under compulsion, it does not express any intention to give. However, there are many situations in life where actions are compelled, but where the person taking that action still gets some credit for it.[15] Moreover, the owners can clearly decide to be more or less cooperative when faced with the government's wishes for their property.

By shifting attention towards the choices that the owners have in this regard, we can hope to find a path towards increased legitimacy by recognising the owners as active participants. Indeed, even a purely symbolic recognition of the owners' role and the importance of their choices in dealing with a takings request, can serve to enhance subjective legitimacy. However, quite apart from recognising the constructive role that owners can play in the existing system, thinking about takings as givings also suggests the possibility that owners should be granted more choices and asked to take part more actively in the proceedings.

In cases involving economic development, this way of thinking seems particularly appropriate. As they contribute to the project by giving their property, it seems only fair that the owners should have a stake also in the planning and the continued use of their property for economic gain. For instance, it might be appropriate to offer owners shares in the development company, and to make sure that the property is taken under a leasehold rather than by a full transfer of title. Better yet, one could allow the owners themselves to deliberate on how they wish to honour their commitment to the public, to formulate their own plans and implement their own solutions, based on continued interaction both among themselves and with representatives from the relevant bodies of government.

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[15] Paying taxes, for instance, is typically associated with being a good citizen.

Interestingly, as shown in chapter **??** of this thesis, such an abstract and highly idealistic idea is in fact (partly) implemented through the system of land consolidation found in Norway. As noted, this institution is even equipped with the power to compel owners to come together and participate in specific endeavours. If a proposed development is judged as being beneficial to the properties in question, the owners may be stripped of their holdout power, not only as individuals but even as a group, without any property having to be condemned. The owners will retain their ownership even after their properties have been put to new and more productive uses.

In light of this, land consolidation can indeed replace expropriation, provided our understanding of what property is, and should be, is broad enough to say that the purpose we wish to pursue is also in the interest of the properties involved. This limitation, expressly encoded in the law of consolidation in Norway, is interesting also on the theoretical level, because it makes the *purpose* of property directly relevant to determining the extent of the government's power to interfere with it. At the same time, in the context of economic development, the restriction is rarely going to prevent consolidation from going ahead. If development is both economically beneficial and represents a sustainable use of resources, the land consolidation courts should have no difficulty justifying consolidation measures on the basis that development is also in the interest of the properties involved. At the same time, the context of land consolidation, with its emphasis on problem solving and owner participation, means that the process will usually be far more inclusive towards owners than traditional expropriation proceedings.

If property is in the hands of the few, while many property dependants are without formal ownership rights, the consolidation model might be less appropriate. However, in these cases, it might be possible to adapt it by allowing a larger group of local people to partake in the proceedings. In complex cases, most of them might find themselves unable to participate effectively in the process. However, a consolidation approach will still serve an important function in that it gives marginalised groups new opportunities for engaging with the democratic process.

The system can also serve an empowering and educational role. Local elites might often dominate the process in practice, but the fact that the procedure is judicial in nature means that abuses can be curbed while the disadvantaged may be granted access to more fruitful forms of citizenship. At least, access to the decision-making process should become easier for those who wish to challenge the local leadership.

More generally, the flexible, issue-focused, and transient nature of a consolidation court might have significant advantages. Specifically, concentrations of power and participatory fatigue are unlikely to become entrenched, given the context of decision-making; the group of people involved, the area covered, and the agenda to be deliberated on, will all change from situation to situation. This keeps participants engaged while diffusing power, thereby minimising the risk of elite tyranny and expert rule, otherwise easily enabled by rigid institutions and apathetic majorities.[16]

Further exploration of the transferability of the consolidation framework to other contexts will have to be left for future work. What this thesis has hopefully shown is that fully fledged institutional alternatives to expropriation for economic development already exist and that they can work in practice. Hence, my research can hopefully inspire more work in this direction both at the theoretical and empirical level. In my opinion, the ideas underlying the land consolidation system found in Norway are worth exploring further, also in other jurisdictions that rely on expropriation as a tool to facilitate economic development. In this context, it would be a great victory for both property and equity if public and private interests could come together in a way that will give rise to givings in the future, clearly distinguished from the takings of the past.

[16] This also relates closely to the worry that "rational ignorance" can thwart attempts at meaningful eminent domain reform, see chapter **??**, section **??**. See also **somin09**

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