On the legitimacy of economic development takings

Sjur Kristoffer Dyrkolbotn

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Contents

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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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Lastly, I would like to thank Marijn Visscher. No doubt, coming to Durham was the best decision I ever made.

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 Introduction and Summary of Main Themes

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

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

Property can be an elusive concept, especially to property lawyers.[3] Indeed, in legal language, the word itself often 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.[4] Should we conclude that property as a unifying term is lost to the law? It certainly seems hard to pin it down. In the words of Kevin Gray, when a close scrutiny of property law gets under way, property itself seems like it "vanishes into thin air".[5]

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1 **chesterton08**

2 **bell09**

3 See, e.g., **waring09** ("It is a testament to the elasticity of the concept of property that it is able to represent all things to all people, and to accommodate so many conflicting calls."); **gray91** ("But then, just as the desired object comes finally within reach, just as the notion of property seems reassuringly three-dimensional, the phantom figure dances away through our fingers and dissolves into a formless void.").

4 See generally **grey80**; **klein11**

5 See **gray91** See also **grey80** (arguing that the eventual consequence of the bundle view is that property will cease to be an important category for legal and political reasoning).

Arguably, however, property never truly disappears.[6] Indeed, there is empirical evidence to suggest that humans come to the world with an innate concept of property, one which pre-exists any particular arrangements used to distribute it or mould it as a legal category.[7] Specifically, humans and a seemingly select group of other animals appear to have an intuitive ability to recognise *thievery*, the taking of property (not necessarily one's own) by someone who is not entitled to do so.[8]

Taken in this light, Proudhon's famous dictum, "property is theft", might be more than a seemingly contradictory comment on the origins of inequality.[9] 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.

In this thesis, I will study takings of a special kind, namely those that are sanctioned by a government in the pursuit of some public use or interest. Specifically, the word *taking* will be used to refer to an exercise of the government's power of eminent domain.[10] In legal language, especially in the US, takings by eminent domain 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, taxation, or adverse possession. The US terminology is intuitive and helps bring the issue of legitimacy to the forefront, so I will adopt it throughout this thesis.[11]

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6 See **gray94** ("We are continually prompted by stringent, albeit intuitive, perceptions of 'belonging'.").

7 See **stake06**

8 See **brosnan11** **gray94**

9 For Proudhon's theory of property generally, distinguishing between *de facto* possession and *de jure* property (regarded as theft), see **strong14**

10 See generally **stoebuck72** (clarifying the status of eminent domain from a US perspective, tracing its roots back to early civil law writers such as Grotius and Bynkershoek). Takings will also be referred to as expropriations, especially in the context of Norwegian law. In England and Wales, the corresponding notion is that of compulsory purchase.

11 Sometimes it is convenient to draw up the notion of a taking more widely than I do in this thesis, e.g., to include adverse possession, see **waring09** However, such a broader notion will not be used in this thesis. This choice appears natural in light of how the thesis focuses specifically on takings motivated by a government's desire to facilitate concrete economic development projects.

When guided by eminent domain, the taking of private property without the owners' consent is not theft. But it is not necessarily that far removed from it either; the default assumption is that takings are legitimate, but if they are not, one may well be permitted to call them by a different name.[12]

More generally, the idea that the government's power to take is not unlimited seems fundamental. Indeed, the expectation that an owner might find occasion to resist an act of taking, and may or may not have good grounds for doing so, appears deeply rooted in pre-legal intuitions.[13] This raises the question of how to approach the legitimacy of takings in legal reasoning and what conceptual categories we can benefit from when doing so. This is the key question that is addressed in this thesis, for the special case of so-called *economic development takings*.[14]

Such takings occur when a government uses the power of eminent domain to stimulate economic growth, typically by providing property to for-profit companies for use in a concrete development project. The canonical US example is *Kelo v City of New London*, which resulted in great controversy and a surge of academic work on the legitimacy of takings.[15]

The *Kelo* case concerned several homes that were taken by the government in order to accommodate private enterprise, namely the construction of new research facilities for Pfizer, the multi-national pharmaceutical company. Several home-owners, among them Suzanne Kelo, protested the taking on the basis that it served no public use and was therefore illegitimate under the Fifth Amendment of the US Constitution. The Supreme Court eventually rejected their arguments, but this decision created a backlash that appears to be unique in the history of US jurisprudence.[16]

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12 See **gray11** (discussing case law from the US, with state judges describing illegitimate takings as "plunder", "rapine", and "robbery").

13 See, e.g., **gray94**

14 For a sample of scholarship based on this term, see **cohen06**; **somin07**; **wilt09**; **yellin11**

15 **kelo05**.

16 See generally **somin08**

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.[17] Interestingly, their scepticism lacked a clear foundation in US law at the time, as the *Kelo* decision did not appear particularly controversial in light of established eminent domain doctrines.[18] 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 legitimate.

If the law is meant to deliver justice, widely shared intuitions about legitimacy deserve attention from legal scholars. In the US, legitimacy intuitions pertaining to economic development takings have indeed received plenty of attention after *Kelo*. Despite the outcome of the case, it is now hard to deny that cases such as *Kelo* belong to a separate category of takings that raises special legal questions.[19] As this change in the narrative was largely the result of a popular movement, there is reason to think that the category of economic development takings is in itself a powerful addition to the discourse on legitimacy, potentially relevant also outside of the US.

To explore this further, it should first be acknowledged that there is a *risk* that takings for economic development can be improperly influenced by commercial, rather than public, interests. This risk is clearly higher in economic development situations than in cases when takings take place to benefit a concretely identified public interest, such as the building of a new school or a public road. Hence, it is already intuitively reasonable to single out economic development takings for special attention at the political and normative level. However, should the categorisation also be recognised as a basis for justiciable restrictions on the takings power?

This is not obvious, as it conflicts with the prevalent idea that governments enjoy a "wide

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17 See **bell06** ("Everyone hates *Kelo*", commenting on how criticism was harsh from across the political spectrum).

18 See, e.g., **bell06** ("The most astounding feature of *Kelo*, as even the case's harshest critics agree, is that from a legal standpoint, the ruling broke no new ground.").

19 See, e.g., **cohen06**; **somin07**

margin of appreciation" when it comes to their use of eminent domain.[20] However, as the US debate shows, it might be hard to deny judicial review as soon as the special features of economic development takings are brought into focus. This points to the first main theme of this thesis: an analysis of economic development takings as a conceptual category for legal reasoning about property protection.

1.1 Property Theory and Economic Development Takings

In Part I, this thesis will argue that economic development takings should be recognised as a distinct category of takings at the theoretical level, with respect to fundamental rules that protect private property. This claim will be made on the basis of a theory of property that is broader than typical approaches found in the law and in legal scholarship. Specifically, the thesis rejects the view that private property should be understood as a form of entitlement protection.[21]

Instead, chapter **??** will argue for a social function understanding, with an emphasis on human flourishing as the normative foundation for private property.[22] In short, property should be protected because it can help people flourish, as members of a democratic society.[23] Moreover, property is meant to serve this function not only for the owners themselves, but also for the other members of their communities.[24]

Such an ambitious take on property must necessarily also give rise to a broader assessment of legitimacy when the state interferes with it.[25] This is what inspires my initial discussion on

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[20] This expression has been used by the European Court of Human Rights, see **james86** In the US, the same attitude was clearly a factor motivating the majority in **kelo05**

[21] For a famous entitlements-based view of private property, see **calabresi72**

[22] For human flourishing theories of property generally, see **alexander10**

[23] See also **crawford11**

[24] See generally **gray94**; **alexander09d**; **alexander14**

[25] See also **underkuffler06**

economic development takings in chapter **??**. There I will present the basic definition of the notion and discuss the *Kelo* case in some more detail. Specifically, I will argue that Justice O'Connor's strongly worded dissent – finding that the taking should be rescinded – is consistent with, and subtly conducive to, a social function perspective on property.[26]

It should be emphasised that the focus will be on the question of when a taking is legitimate as such, not the question of how much compensation should be paid to the owners. Of course, the two questions are related; the amount of compensation offered can influence the degree of legitimacy of the interference. Some scholars go further and argue that the legitimacy question is primarily about finding the appropriate mechanism for awarding compensation.[27] With the theoretical approach to property adopted in this thesis, this view must be rejected; the social functions of property are not reducible to financial entitlements. Moreover, the aim of this thesis is to discuss precisely those aspects of legitimacy that *cannot* be addressed through compensation. The link to compensation will be mentioned when it seems relevant, but the compensation issues that arise for economic development takings will not be analysed in any depth.[28]

Chapter **??** builds on the property theory developed in chapter **??** by giving a more in-depth presentation of the legitimacy question, leading to a proposal for a justiciable legitimacy standard that makes judicial intervention possible. To make the discussion concrete, the chapter first offers a brief review and comparison of jurisprudential developments in the US, the UK, and at the European Court of Human Rights. These jurisdictions are chosen specifically for their many close connections with the Norwegian system, making them a natural reference point also for the case study in Part II of the thesis. Moreover, all the countries discussed are in comparable socio-economic situations, with property having a similar social function across the jurisdictions studied.

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[26] See **kelo05**

[27] See generally **fennell04**; **bell07**; **lehavi07**

[28] For such an analysis, see **dyrkolbotn15a**

This permits a comparative discussion that focuses specifically on the issue of takings, reducing the risk that the analysis will be distorted by significant differences in the social and economic context of takings law across different jurisdictions. The broader insights gained from the work done in this thesis might still be highly relevant to jurisdictions that have not been explicitly discussed. But a further treatment of this issue, for instance with respect to jurisdictions from the developing world, raises additional questions that must be left for future work.

Based on the choice of jurisdictions justified above, the thesis reviews several approaches to judicial review, culminating in a recommendation for a perspective based on institutional fairness that I trace to recent developments at the European Court of Human Rights. Specifically, the Court in Strasbourg has begun to look more actively at the systemic reasons why violations of human rights occur, in order to address structural weaknesses at the institutional level in the signatory states.[29] This approach is arguably one that fits very well with the sort of analysis carried out by Justice O'Connor in *Kelo*, perhaps more so than the approach induced by the Fifth Amendment.

Importantly, the institutional perspective appears to be a sensible middle ground between procedural and substantive approaches to legitimacy, directing us to focus on decision-making processes without giving up on substantive fairness assessments. To ensure fairness, in particular, is not just about making good decisions, but also about how those decisions came about, and how likely it is that the system will have disproportionate effects at the societal level. This way of thinking about legitimacy brings me to the second main theme of this thesis, concerning the question of *democratic merit*.

[29] See generally **leach10**

1.2 A Democratic Deficit in Takings Law?

As discussed in chapter **??**, two of the key social functions of property is to promote social justice and to facilitate democratic decision-making.[30] In addition, property is meant to serve as a bridge between individual needs, community interests, and policy making at the national and the international stage. Through the law of property, societal priorities can be communicated to owners and communities without depriving them of their right to self-governance.[31]

These functions of property are easily undermined if there is an excessive concentration of power and wealth among the elites of society. As indicated by Justice O'Connor's dissent in *Kelo*, this is one of the key reasons why economic development takings should be looked at with suspicion. In short, the concern is that economic development takings can both reflect and exacerbate a *democratic deficit*.

There are many symptoms that can suggest a lack of democratic legitimacy, and to make the discussion more concrete, chapter **??** proposes a legitimacy test consisting of nine indicators of eminent domain abuse. The first six points are due to Kevin Gray, while the final three are additions I propose on the basis of the work done in this thesis.[32] I call the resulting list the Gray test, a heuristic for inquiring into the legitimacy of an economic development taking.

Arguably, the most important indicator is the one pertaining to the overall democratic merit of the taking (one of my additions). When taken together with the other points, this indicator should induce an assessment of legitimacy against the decision-making process as a whole. Hence, it emphasises the institutional fairness perspective. If a taking fails the legitimacy test on this point, it might indicate an existing weakness of the system or a trend towards deterioration of

[30] See also, with further references, **rose96**; **jackson10**

[31] This is discussed in depth in chapter **??**, sections **??** and **??**.

[32] For Gray's original points see **gray11**

the institutional framework surrounding eminent domain. This problem, moreover, might not be noticeable unless one considers an aggregated view of all the indicators of the Gray test, to shed light on what they tell us about the democratic legitimacy of existing practices.

Admittedly, asking courts to test for legitimacy is an incomplete response to the worry that economic development takings might result from, and give rise to, a democratic deficit at the societal level. This point has been argued by some US scholars, who claim that increased judicial scrutiny is neither a necessary nor a sufficient response to concerns about the institutional legitimacy of takings such as *Kelo*.[33] Instead, these scholars try to come up with institutional innovations that can restore legitimacy in cases when the government wishes to ensure economic development on private property.

The most notable work in this direction so far is that of Heller and Hills, proposing what they call Land Assembly Districts (LADs) as possible alternatives to the use of eminent domain.[34] The idea is that LADs will be set up to replace the traditional takings procedure in cases where property rights are fragmented and the potential takers have commercial incentives. The basic mechanism is one of self-governance; the owners themselves should be allowed to decide whether or not development takes place, by some sort of collective choice mechanism (possibly as simple as a majority vote). In this way, the holdout problem can be solved (individual owners cannot threaten to block development to inflate the value of their properties). At the same time, the local community's right to manage its own property is recognised and respected.

The LAD proposal is closely linked to more general ideas about self-governance and sustainable resource management, particularly the theories developed by Elinor Ostrom and others.[35] On the basis of a large body of empirical work, these scholars have formulated and refined a range of design

[33] See generally **lehavi07**; **heller08**

[34] See **heller08**

[35] See **ostrom90** For the connection with property theory generally, see **ostrom10b**; **rose11**; **fennel11**

principles for institutions that can promote good self-governance at the local level.[36]

At the end of chapter **??**, I argue that this work can be used to address the legitimacy of takings in a principled way, to arrive at refinements or alternatives to the proposal made by Heller and Hills. Specifically, it seems that alternatives to expropriation based on self-governance can be a powerful way to address the worry that economic development takings might otherwise be associated with a democratic deficit. At the same time, the context-dependence of solutions along these lines make sweeping reform proposals unlikely to succeed. Rather, it is important that the institutions that are used are appropriately matched to local conditions.[37] This sets the stage for the second part of the thesis, consisting of a case study of takings for Norwegian hydropower development.

1.3 Putting The Theory to the Test

In Norwegian law, the legitimacy questions that arise with respect to takings usually begin and end with the issue of compensation.[38] If an owner has grievances about the act of taking as such, rather than the amount of money they receive, takings law has very little to offer. In fact, it does not appear to offer anything that does not already follow from general administrative law. The owner can argue that the taking decision was in breach of procedural rules, or grossly unreasonably, but the chance of succeeding is slim.[39]

In cases involving hydropower development, the position of property owners is also strongly influenced by sector-specific legislation, as well as special administrative and market practices. Chapter **??** begins the case study by discussing this in more depth, setting the stage for the discussion on expropriation that follows in chapter **??**. A first important observation is that the

[36] For a more recent empirical assessment (and refinement), see **cox10**

[37] See **ostrom90**

[38] See generally **dyrkolbotn15**; **dyrkolbotn15a**

[39] See **dyrkolbotn15b**

hydropower sector in Norway was liberalised in the early 1990s.[40] This means that the energy companies benefiting from eminent domain are now commercial enterprises, not public utilities.

A second important observation is that the right to harness the power of water is considered private property in Norway, typically jointly owned by members of nearby rural communities.[41] This does not mean that freely running water, as a substance, is subject to private property. What it means is that riparian owners have an additional stick in the bundle of rights that the law associates with being the owner of land over which water flows. A useful comparison can be made with fishing rights; the right to the hydropower in a river arises from landownership, but it is conceived of as a separate, transferable, right in property.[42] It is referred to in Norwegian as a "fallrett", which can be translated as a *waterfall right*. This thesis will therefore often refer to waterfalls and owners of waterfalls when discussing the right to harness the power of water in a river.[43]

As discussed in Part II of this thesis, hydroelectric companies in Norway have traditionally had easy access to privately owned waterfalls, made possible through the government's power of eminent domain. However, since deregulation, local owners have begun to resist such takings. This has been motivated by the fact that owners can now undertake their own hydropower projects as a commercial pursuit; unlike the situation before liberalisation, owner-led development projects can demand access to the electricity grid as producers.[44] This has led to heightened tensions between

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40 The crucial legislative reform was the **ea90**

41 See **wra00 wra00** This arrangement has long historical roots and makes intuitive sense in a mountainous country with a very vast number of small and medium sized rivers coming down from steep outfield mountains. For the historical development of the law on this point, see **nordtveit15**

42 Apart from this explicit recognition of water power as a separate right in property, the Norwegian system of riparian rights appears to be historically quite similar to the riparian common law, see generally **howarth15**

43 In some cases, especially historically, a waterfall right would be formally registered as a separate unit of real property to facilitate transfer to someone other than the owner of the surrounding agricultural land. However, waterfall rights can also be formally registered as rights of use attaching to the real properties from which they arise. In relation to Norwegian expropriation law, and for the purposes of this thesis, the distinction between these two ways of registering waterfall rights will not play an important role and will not be discussed further.

44 See, e.g., **uleberg08**

takers and owners, tensions that the water authorities are now forced to grapple with on a regular basis.

Chapter **??** argues that despite their improved position following liberalisation, local owners remain marginalised under the regulatory framework. Specifically, despite political support for locally organised small-scale development, the large energy companies have continued to enjoy a privileged position in their dealings with the water authorities.

Building on this observation, chapter **??** goes on to discuss eminent domain in more depth. The chapter tracks the position of owners under the law and administrative practices that relate to takings of waterfalls. The key finding is that expropriation is usually an *automatic consequence* of a large-scale development license.[45] That is, commercial companies that succeed in obtaining large-scale development licenses will almost always be granted the right to expropriate. This right will be granted, moreover, with little or no prior assessment as to the appropriateness of depriving local communities of their resources.

While the appropriateness of taking property from local people is rarely discussed, the issue of how development will affect the environment has received increased intention in recent decades. In many cases, negative impact assessments will lead to development licenses being denied, also if the applicant is a large energy company. In general, the framework for management of hydropower in Norway has an important conservation dimension, which is also clearly recognised by the government. However, this dimension is often orthogonal to the property dimension. In some cases, local owners of waterfalls might be deprived of a profit-making opportunity due to conservation, but in other cases, the local property owners might themselves oppose development for environmental reasons. Importantly, while the Norwegian system has a rather elaborate framework in place to evaluate the environmental consequences of hydropower, the effect on local owners receives little or

[45] In some cases, this follows explicitly from the water resource legislation, while in other cases it follows from administrative practice. For further details, see below in chapter **??**, section **??**.

no attention. This is true not only in administrative law and practice, but also in terms of previous legal scholarship. For this reason, the present thesis focuses specifically on property, without giving a separate treatment of conservation issues. For instance, the thesis will not discuss the special issues that arise when the property rights of local owners are restricted to conserve the local environment, a relatively common example of property interference in water law, but one that does not qualify as an economic development taking.

Although conservation issues are not dealt with in any depth in this thesis, they will be discussed in so far as they have a direct bearing on the legitimacy questions that arise when large energy companies expropriate waterfalls. For instance, as I will demonstrate in chapter **??**, there are clear indications that centrally organised environmental interests and large-scale development companies are united in opposition against regulatory practices that promote local self-governance. Indeed, the most powerful environmental and commercial organisations presently appear to be positioning themselves to enforce a system whereby they will enjoy shared control over Norwegian water resources, leaving little or no room for attention directed at how their compromises affect local owners and their communities.

Indeed, as chapter **??** will demonstrate, the owners' position during the licensing assessment stage is a weak one, contrasting both with the strong position of the development companies and the similarly influential role played by conservation interests.[46] The fact that expropriation tends to follow automatically from a license to develop has led the water authorities to focus their attention on the licensing question and associated procedures. No distinction appears to be made between cases involving expropriation and cases that do not. This has a significant effect on the level of procedural protection offered to local owners. For instance, according to written testimony during a recent Supreme Court case on legitimacy, the water authorities do not recognise any duty to give individual notice to local owners before processing applications that involve expropriation of their

[46] See especially the discussion in chapter **??**, sections **??** and **??**.

waterfalls.[47]

By contrast, in relation to the compensation issue, the owners' legal position initially grew stronger after liberalisation. Specifically, the lower courts started to compensate local owners for the lost opportunity to profit from hydropower.[48] This led to a dramatic increase in compensation payments compared to earlier practice.[49] However, a recent decision from the Supreme Court appears to largely reverse this development, since a large-scale license may now be considered proof that alternative development by owners is unforeseeable and therefore not compensable.[50]

In light of this and other data discussed in chapter **??**, my conclusion is that recent takings for hydropower do not in fact pass the Gray test. The current practices appear illegitimate with respect to the theory of property developed in Part I of the thesis.

At the same time, Norwegian law offers a promising institutional path towards the restoration of legitimacy in economic development contexts. Specifically, the unique framework for land consolidation found in Norway can serve such a function. This has already been demonstrated in the context of hydropower development, where land consolidation courts have been able to successfully organise development projects on behalf of owners who wish to undertake development but disagree about how it should be done. This brings me to the fourth key theme of this thesis.

1.4 A Judicial Framework for Compulsory Participation

The fourth and final key theme, presented in chapter **??**, consists of an assessment of the Norwegian land consolidation courts. These courts have the power to order owners to undertake or allow development projects (without depriving them of their property), as an alternative to expropriation.

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47 The case in question was **jorpeland11**

48 See **uleberg08** (specifically, it was observed that waterfalls now had a market value, due to the increasing prevalence of owner-led hydropower).

49 See especially the discussion in chapter **??**, section **??**.

50 See **otra13**

Moreover, they are presently used in this way in the context of hydropower development. The large energy companies almost never use consolidation, but local communities often do.[51] In these cases, the land consolidation courts have proved themselves effective in making self-governance work, also in cases when some of the owners do not with to undertake development.

The land consolidation alternative can make a great difference, especially since it strives to ensure legitimacy through participation. The potential democratic deficit associated with economic development takings is dealt with by mechanisms that seek to enable owners to take active part in the management of their property in the public interest. At the same time, the procedure can be quite effective, since participation is compulsory and the consolidation judge may intervene to settle conflicts and establish organisational order. Chapter **??** also addresses possible objections to the procedure, but concludes that the continued development of the land consolidation institution provides the best way forward for addressing problems associated with economic development takings in Norway.

If the integrity and efficiency of the procedure can be preserved, it appears to have great potential as an alternative to eminent domain in general, also in cases involving large-scale development and cooperation with external commercial actors. Moreover, while the system is designed to work in a setting of egalitarian property rights, it is interesting to consider whether key features of the procedure could inspire solutions to the takings problem in other jurisdictions.

It might well be, for instance, that a land consolidation approach coupled with a human flourishing understanding of property can be a good way of including non-owners in the process, in jurisdictions where property rights are not distributed as widely among the population as in Norway. This might make the procedure more complex and give rise to new risks of abuse by local elites, but it seems like an interesting idea to explore in future work.

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[51] According to the Court Administration, as of 2009, land consolidation proceedings had facilitated a total of 164 small-scale hydropower projects with a total annual energy output of about 2 TWh per year (enough electricity to supply a city of about 250 000 people), see **dom09**

In short, the consolidation alternative provides a starting point for an approach to legitimacy that takes a wider view of what property is, and what role it can and should play in a democratic society. In this way, the chapter on consolidation also returns to the conceptual premise discussed in the first chapter of this thesis, whereby the purpose of property is to promote human flourishing.

1.5 Some terminological and conceptual clarifications

Property is a key notion in this thesis. As mentioned in the introduction, it is an elusive legal term, with different decomposable meanings depending on the context of use and the jurisdiction within which we find ourselves. In the first part of this thesis, the notion is explored conceptually, to develop a theory of property's role and purpose within law and society. The exact details of how the notion is used in a given jurisdiction, in a given context, will not be our concern.

It should be noted, however, that the theory we arrive at might well be relevant for property lawyers working within a specific legal framework. Indeed, the theory presented in this thesis can be used to argue normatively that a given jurisdiction relies on notions of property that are too wide, too narrow, or both. The thesis will touch on such issues, but not explore them in any depth. Rather, due to the topic of this thesis, the concrete cases that will be examined will typically pertain to "classic" instances of property, usually pertaining to land and related resources. Other property types will not be explored in any depth, although it would certainly be interesting to do so for future work.

Moreover, since this thesis deals primarily with takings law, the notions of property we will encounter can usually be classified as private property in the sense typically encountered in western Europe and the US. Specifically, the cases I examine will mostly feature recognised private owners who have legal standing as individuals because their property is taken by eminent domain. This does not preclude considering property that is held by several private parties in common, and the takings discussed in this thesis will typically affect local communities as a whole, not just

individuals. However, the cases considered will all be cases where individuals have recognised rights in property, meaning that the cases fall uncontroversially within the ambit of takings law. The margins of takings law, encountered for instance if groups of non-owners make proprietary claims based on customary use rights or the like, will not be considered in any depth. However, the theory of property developed in this thesis might suggest making normative claims to the effect that legal standing in takings proceedings should be extended to cover a larger group of legal persons than those presently recognised. A closer examination of this is left for future work.

In the second part of the thesis, when dealing specifically with Norwegian law, we will encounter a few specific forms of private property that deserve a special mention. In general, we find a uniquely egalitarian distribution of land ownership in Norway, where undeveloped land and the resources found on it are typically owned by groups of local small-holders, not landlords or public bodies. Specifically, Norwegian law is more accommodating of co-ownership arrangements than land law elsewhere, for instance in the UK. Further details on property arrangements found in Norway are provided in chapter **??**.

A second key notion in this thesis is that of *legitimacy*. This notion is used normatively, to describe that an interference in private property appears justified. Moreover, the theory developed in this thesis attempts to answer the question of when an interference in private property should be regarded as legitimate. The notion of legitimacy does not refer to any specific legal term in any of the jurisdictions considered in this thesis. However, all the jurisdictions we consider have their own rules in place to ensure legitimacy in takings law. The most common legal terms that are used to achieve this are the notions of *public use*, *public purpose*, and *public interest*. Specifically, a typical takings provision states that the public must benefit, directly or indirectly, in order for an interference in private property to count as legitimate. Such provisions or their near equivalents can be found in a range of different jurisdictions, including all those studied in this thesis.

Intuitively, the meaning of the terms used here is closely related across different contexts and

legal systems. Still, since these are formal legal terms, it is worth keeping in mind that their meaning is relative to the jurisdiction under consideration. For instance, while most of the jurisdictions considered in this thesis do not recognise any substantial difference between public use, public interest and public purpose, some jurisdictions maintain such distinctions and attach important legal consequences to them. In some cases, the correct way to understand terms like public use and public interest is a highly controversial question. Most famously, in the US, the position that public use literally means use by the public, and is therefore quite distinct from public interest and public purpose, is forcefully advocated by some legal scholars, including a minority at the Supreme Court.

In general, whenever terms such as public use or public interest are used in this thesis, their exact meaning is determined by the jurisdiction under consideration. If the terms occur in theoretical discussions, their meaning should be understood more broadly, according to a natural language interpretation that points to the shared intuition behind using terms like these in the first place. Clearly, the reason why notions such as public interest and public use are important in takings law is that they encode the natural idea that interferences in private property should only occur for the good of the people. However, how this idea is implemented in specific legal systems varies quite considerably. To account for this, the thesis will provide an account of how the terms are used in each of the main jurisdictions considered in this thesis, to clarify the meaning of the terms whenever they appear in the context of a concrete jurisdiction.

At a more general level, the thesis will present an argument against relying on formal terms such as these to ensure legitimacy. Rather, the thesis will argue that the core of legitimacy is that decision-making needs to take place in an equitable and inclusive manner, where the owners and those who depend most on the land in question has a say commensurate with what is at stake for them. This perspective, combining procedural and substantive ideals of fairness, will not rely on finer distinctions between notions such as public purpose and public interest. In my opinion, this

is a strength of the theory developed in this thesis, helping prevent what Gregory Alexander calls the formalism trap, the idea that a seemingly strong literal protection of certain aspects of private property is capable of protecting those broader social and economic values that private property are meant to promote.

2 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 hope to shed further light on a broader thread that runs through the work done in this

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1 **gray91**

2 **steinbeck39**

thesis, pertaining to the importance of social justice considerations in takings law and the function of private property as an anchor for local self-governance and sustainable resource management in democratic societies.

Property theory

To arrive at a theoretical framework for discussing economic development takings, chapter 2 considered various theories of property. The chapter noted that there are differences between civil law and common law theorising about ownership, but concluded that these differences are not particularly relevant to the questions studied in this thesis. In particular, the chapter observed that neither the bundle theory, dominant in the common law world, nor the dominion theory, taught to many civil law jurists, helps to clarify the distinguishing features of economic development takings. Specifically, traditional thinking both in civil and common law jurisdictions has a tendency to abstract away from the sensitive social and political context of such takings; there is a clear tendency, especially in takings cases, that private property is approached as a set of individual entitlements rather than an interconnected web of social functions. This, in turn, means that the broader societal effects of takings are often not considered when addressing the legitimacy of property interference against general protection principles found in constitutional and human rights law.

The thesis set out to arrive at a theoretical foundation for thinking about property that would support a more comprehensive approach to takings in the context of economic development. The chapter focused especially on property theories that emphasise that property plays a crucial role in many social and political relations within a society. Such social function theories, it was argued, provide us with crucial *descriptive* insights into the workings of property and its role in the legal order. In this regard, the thesis advanced a position different to that adopted by many previous scholars in the social function tradition, by arguing that we should actively try to decouple de-

scriptive insights from normative claims about property. It was argued that it we succeed in doing this, the social function theory could serve as common ground for further value-driven debates that cross ideological divisions.

Following up on this argument, the chapter further clarified the normative starting point adopted in this thesis, by expressing support for the human flourishing theory proposed by Alexander and Peñalver. This theory is based on the premise that property rights *should* be integrated in the legal order in such a way that they enable – possibly even compel – individuals and their communities to participate in social and political processes. Specifically, the chapter argued that property and its associated social functions should be approached as a crucial anchor for democracy, since private property can potentially provide a powerful anchor for participatory decision-making on the basis of mutual obligation and respect, targeting owners and non-owners alike. Specifically, the human flourishing theory rightly emphasises the *duties* associated with private property, especially those duties that are directed at non-owners and which therefore necessitate inclusive institutions for collective decision-making in cases when conflicting interests are at stake.

Importantly, the human flourishing theory emphasises how such institutions can arise from the structure of property itself, rather than as a purely external framework imposed by the authority of the state. For this reason, the human flourishing theory contains a further important insight, concerning the scope of the state's obligation to protect property. In particular, the human flourishing theory asks us to acknowledge that protecting property also implies a commitment to protecting the right to some degree of self-governance for local communities, where the stake an individual has in decision-making processes are reflected in their opportunity to influence those processes. Being an owner, with all the rights and responsibilities this entails, then places an individual right at the center stage of decisions pertaining to the use of property, including in situations involving plans for large-scale economic development. This highlighted the relevance of property theory to the question of legitimacy in economic development takings.

Following up on the theoretical argument, chapter 2 sketched out what a social function perspective could imply in practice by considering *Kelo*, the paradigmatic case of a taking for economic development in the US. It was observed that the disagreement within the Supreme Court seemed to turn, in part, on the willingness of the justices to adopt a social function perspective on the case. Justice O'Connor, who led the dissenting minority, departed from a formalistic, entitlements-based approach, when she argued that takings for economic development should be prohibited because such takings would systematically bestow benefits on powerful commercial interests at the expense of owners from weaker social groups. In addition, both Justice O'Connor and Justice Kennedy, who voted with the majority to uphold the taking, emphasised the danger that the commercial incentives associated with using eminent domain to facilitate economic development could distort decision-making processes, creating a democratic deficit within government institutions endowed with eminent domain powers. These two themes, pertaining to the social fairness and procedural legitimacy of takings for economic development, has remained in focus throughout this thesis.

Testing for legitimacy and looking for alternatives to eminent domain

In chapter 3, I gave a positive-law presentation of the legitimacy question that arises for economic development takings. I considered existing approaches from the UK, the US, and at the ECtHR. As explained in the introduction to the thesis, this choice led me to consider a set of jurisdictions that adopt distinctly different approaches to the legitimacy question, yet remain easily comparable both to each other and to Norway, which was investigated in more depth in the subsequent case study.

In the UK, the debate on legitimacy is traditionally structured around procedural rules, while in the US the traditional starting point, at least in before the higher courts, is a substantive assessment of the merits of takings. In the end, the chapter argued in favour of an approach that combines procedural and substantive standards, with the intention being that the latter should

be used also to assess the fairness and democratic merit of the decision-making procedure, not merely the outcome. Furthermore, it was argued that such an institutional approach to fairness has started developing at the ECtHR in response to the newly introduced framework for pilot judgements applied in cases that might indicate systemic problems at the state level.

The chapter went on to propose a concrete heuristic for assessing the legitimacy of economic development takings against any standard that implies a commitment on the state's part to ensure a "fair balance" between the opposing interests involved. The chapter referred to this heuristic as the Gray test, since it is strongly influenced by previous work done by Kevin Gray, a leading UK scholar who specialises in land law. Indeed, the proposed heuristic includes a list of legitimacy indicators provided by Gray in his work on the legitimacy of takings. In addition to these original indicators, the thesis went on to add three additional points, based on the work done in this thesis. The resulting heuristic should be able to identify many, if not most, cases of eminent domain abuse, especially those that occur in the context of economic development. Furthermore, the Gray test incorporates several aspects of the social function theory of property, looking at the legitimacy issue from a broad vantage point of how the interference in property will affect communities and local democracies, not merely individual owners. This makes the Gray test stand out in the literature on takings so far, especially in the UK and the US, where individualistic perceptions of what property is have tended to dominate.

Following up on the discussion of legitimacy testing, chapter 3 considered the question of how to increase legitimacy without giving up on the idea that the collective should be entitled to push adamantly for economic development on private land. It was argued that the work done by Elinor Ostrom and others on common pool resources provides a suitable starting point for making institutional proposals to achieve a better framework for making decisions about economic development on privately owned land. Specifically, the chapter briefly presented Ostrom's design principles for local self-governance of natural resources, which can be used as a starting point also

for designing procedures to replace eminent domain for economic development.

The chapter went on to consider a proposal that has already been made along these lines, namely the idea of Land Assembly Districts, due to Heller and Hills. This proposal was analysed in depth, and the chapter pointed out some potential problems with it, including a tension between the overarching goal of self-governance and the perceived danger of tyranny by local elites and abuse of local minorities. In the end, the chapter concluded that a single institutional framework is unlikely to work in all settings; institutions for self-governance need to be attuned to local conditions, so they cannot be made too general or justified in overly theoretical terms. Indeed, sensitivity to local conditions is one of the key design principles proposed by Ostrom, and should influence also the proposals we come up with for institutional reform in the law of takings.

This observation marked the end of the first part of the thesis. In the second part, the thesis considered the case of Norwegian hydropower. This led to an analysis of legitimacy of takings for this purpose along the lines of the Gray test, as well as a case study of the land consolidation courts and their power to set up local institutions for self-governance that can obviate the need for eminent domain. In this way, the second part went on to apply key aspects of the theory developed in the first part, while exploring further the idea that social functions run as a common thread through individual property rights.

Norwegian waterfalls and their social functions

Chapter 4 introduced the case study and provided background information that placed it in a broader context with respect to Norwegian law. The legal and regulatory framework surrounding hydropower development was discussed, and its history was traced back to pre-industrial times. The chapter emphasised that local rights to hydropower have a long tradition in Norway, with communities of smallholders typically holding the rights to harness power from local rivers in common, as incidents of their shared ownership of the surrounding outfields. This arrangement

dates from a time when grist mills and saw mills were important to many local communities, whose proprietary rights provided them with an opportunity to benefit from local resources.[3]

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 for industrial development in the interest of the general public. This resulted in a tension between local self-governance, rooted in private property, and central management, rooted in the authority of the state, that now permeates the law of hydropower. This tension became particularly severe after the liberalisation of the electricity sector in the early 1990s. This reform reorganised hydropower development as a commercial pursuit, meaning that when the state uses its regulatory power, it often bestows benefits on commercial companies at the expense of local resource owners. At the same time, local owners themselves were empowered by the liberalisation reform, since they could now themselves engage in commercial hydropower development. 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 electricity grid on non-discriminatory terms.

Chapter 4 discussed the resulting system in some depth, addressing also the question of whether or not the liberal market functions as intended. It was argued that the energy reform has marginalised the municipality governments, who used to play an important role because they were in charge of public utilities for the supply of electricity in their own local district. The result, it was argued, has been a dramatic concentration of power in the hands of commercial companies partly owned by the state, a centralisation effect that threatens to undermine the market-stimulating intentions behind the reform. Specifically, the chapter provided a critical assessment of the extent to which the regulatory framework is able to accommodate new actors and facilitate competition

[3] As noted in chapter 4, Norwegian tenant farmers also enjoyed such rights before they started buying back their farms in the 17th and 18th century. In particular, tenants would typically have quite extensive rights to natural resources found in the outfields. This highlights that private ownership of land was always imbued with egalitarian social functions in Norway, not simply an encapsulation of individual entitlements for the privileged classes.

on non-discriminatory terms. Special attention was directed at the position of waterfall owners and the companies that specialise in cooperating with them. It was argued that owners and small-scale development companies currently suffer under a regime that tolerates, and sometimes encourages, discrimination against less dominant market actors.

The chapter went on to present how smaller market actors now tend to organise themselves. First, the chapter presented an early organisational model that emphasised respect for property rights, local communities, and the environment. According to this model, owners and local communities would typically retain controlling stakes in development projects, with external partners providing capital and technical expertise either as a paid service or in return for a minority stake in the enterprise. Many owner-led hydropower plants have since been built according to this model, demonstrating its commercial viability.

However, later developments have led to an increased concentration of power and ownership also in the small-scale segment of the electricity production sector. Specifically, external partners now typically demand controlling stakes in development projects and do not concede to organisational provisions meant to protect local communities and environmental interests. Effectively, the owners and their communities are increasingly asked to remain on the sideline. In many cases, local people have agreed to this in return for a promise of higher compensation in the future, calculated as a percentage of income from the generation of electricity. However, it has turned out that such promises have often been made with little realism. Indeed, as shown in chapter 4, there have been some high-profile cases of speculation in this market, where upstart energy companies have entered into a large number of agreements with local owners without carrying out much actual development.

In general, chapter 4 argued that recent developments in the small-scale sector marks a sharp departure from initial visions of this sector, visions that emphasised values such as local self-governance and environmental sustainability. Instead, the values and practices of leading small-

scale actors have become increasingly similar to those that dominate among more established market actors. The chapter went on to argue that this might be a contributing reason why small-scale development now appears to be falling out of political favour. Today, critical voices claim that large-scale development is better, not only because it is more commercially optimal, but also because it is more environmentally friendly. The specific argument provided for this claim is that small-scale projects affect a greater number of square meters per energy unit they produce. As noted in chapter 4, this is no doubt true, since many small-scale plants will typically be required to match the energy output of a single large-scale plant. Unfortunately, issues relating to more substantive notions of sustainability, as well as issues relating to property rights, benefit sharing, and local participation in decision-making, appear only at the fringes of the present debate. Hence, policies are now at risk of being formulated on the basis of an incomplete picture of what is at stake. As suggested in chapter 4, this makes the present thesis a timely scholarly contribution that could also inform policy making on hydropower in Norway.

Expropriation as an automatic consequence of a development license

In chapter 5, the legal framework surrounding expropriation of waterfalls was studied in depth. In addition to presenting the law, the chapter also discussed administrative practices developed by the water authorities. The chapter argued that the present system is based on the presumption that private property embodies private values, while public values are to be pursued through regulation, if necessary also by redistributing or negating property rights. In effect, chapter 5 tracks how this perspective has shaped the law of expropriation of waterfalls. In particular, the chapter made clear that the notion of property presupposed by Norwegian expropriation law is not based on a social function understanding of what property is and why it should be protected against interference.

At the same time, the traditional view on public values implied a sharp distinction between commercial and public uses of property. Hence, the law of expropriation initially tended to restrict

the takings power to narrowly defined purposes that clearly served the common good. This was the case also in the context of water law, where the government did not initial have any authority to expropriate waterfalls for the purpose of developing hydropower. However, as noted in chapter 5, the increasing focus on electricity production as a public service resulted in the introduction of new authorities to expropriate waterfalls for public utilities. Still, expropriation could not take place for commercial purposes or in favour of private companies.

The restrictions placed on the power to expropriate waterfalls gave legitimacy to the legal framework. Still, the increasing centralisation of the energy sector and the increasing scale of projects seen after the Second World War led to increased tension surrounding new hydropower projects. Tensions came to a high-point in the case of *Alta*, when the indigenous Sami population from the north of Norway objected to a project that would have detrimental effects on their livelihoods and, as they argued, their very way of life. In collaboration with environmental groups, they launched a legal challenge directed at the development license, resulting in one of the most comprehensive cases ever dealt with by the Supreme Court. In the end, the development interests triumphed, and the regulatory framework surrounding hydropower and expropriation was given a stamp of approval.

Even though the development license was upheld, the *Alta* conflict contributed to increased awareness of indigenous rights in Norway, starting a development that has since resulted in better protection of Sami rights within the legal order. No similar effect was observed with respect to the law of hydropower; the precedent set by *Alta* remains leading in disputes over the legitimacy of licensing decisions and expropriation orders. However, as noted in chapter 5, the context of waterfall expropriation has changed dramatically since the liberalisation of the electricity sector. Unlike before, expropriation is now regularly ordered for commercial purposes, to the benefit of limited liability companies.[4]

[4] For a discussion of how the law was changed to make this kind of expropriation possible, see chapter 5, section ....

This change of context has failed to make any discernible impact on the administrative practices adopted by the waer authorities. Rather, the traditional approach, which evolved when electricity generation was still organised as a public service, remains in force. As discussed in chapter 5, the key feature of these practices is that they render expropriation a *de facto* automatic consequence of obtaining a development license; if an energy company manges to obtain a development license for a large-scale project, the right to expropriate waterfalls is granted to it by default. As shown in chapter 5, this leaves the owners and their local communities in a precarious position in such cases. Essentially, they enjoy very limited protection under administrative law, not substantially more than arbitrary members of the public, and in some cases far less than the members of organised interest groups.

Chapter 5 discussed the practical fallout from this in depth when considering the case of *Jørpeland*. This case served to illustrate that administrative practices currently in place serve to make expropriation available as an effective tool for powerful market players that wish to gain the upper hand in competition for resources owned by weaker groups. Hence, the current state of expropriation law in Norway adds weight to Justice O'Connor's prediction in *Kelo*, where she predicted permitting economic development takings would give powerful commercial interests the opportunity to take property from weaker members of society.

Chapter 5 also noted that in the case of *Jørpeland*, the Supreme Court explicitly denied that established practices were in need of revision. Moreover, the Court refused to reconsider the established interpretation of the scope of procedural rules in hydropower cases. Effectively, a range of general rules of administrative law do not apply in hydropower cases, since the special legislation used to regulate licensing of hydropower take precedence. In a dramatic departure from the situation as it had been before commercial expropriation was permitted, this hydropower-specific legislation is now also understood to cover the expropriation proceedings, which are not considered separate from the licensing proceedings at all.

Land consolidation as an institutional framework for local self-governance and sustainable resource management

In chapter 6, the Norwegian system of land consolidation was presented. It was shown to be a unique institution that combines a property-based approach to land management with a broad authority for the courts to intervene in order to organise collective decision-making and promote sustainable resource management at the local level. The chapter went on to show that the system of use directive has become widely used in recent years to facilitate hydropower projects organised by local owners. In some cases, it is also used to deprive some owners of their holdout power by compelling them to participate in a development project that they oppose.

In consolidation cases, interference in property does not take place because property rights must give way to public interests. Rather, consolidation relies on proof that benefits will outweigh harms at the local level, with respect to each affected property. However, this requirement targets the property as a functional unit, irrespective (in principle) of the specific interests of its current owner. Hence, depending on what functions are regarded as more important, the stated desires of the owner might have to give way to other priorities. At the same time, the compensatory perspective is abandoned; the owners' financial entitlements are subordinated to the interests found to be inherent in their properties. If the property as a functional unit does not suffer a loss, no compensation is payable to the owner as an individual.

As demonstrated in chapter 6, this perspective diverges from a perspective that sees private property as a way to encapsulate the financial entitlements of individuals. Instead, the perspective on property inherent in the land consolidation model is much closer to that postulated by the social function theorists discussed in chapter 2, especially those that focus on human flourishing as the underlying purpose of private property rights. Indeed, land consolidation relies on a highly functional perspective on property: beneficial resource uses, not individual entitlements, take center stage throughout the process. This might limit the power of the owners to do as they please, but it

does not marginalise them. After all, it is hard to deny that one of the primary functions of private property is to bestow rights and obligations on its owners. Moreover, in normal circumstances, it would be safe to assume that when a property benefits, then so does its owner.

For this reason, it also seems that consolidation can be used to address the democratic deficit of economic development takings in an elegant way. Chapter 6 addressed this possibility in depth and argued that the land consolidation courts can be seen as providing an institution authorised to design and implement self-governance arrangements that approach private property in land as a common pool resource. This connected the case study of Norwegian hydropower with the discussion provided at the end of chapter **??**, regarding institutional alternatives to eminent domain for economic development. In particular, it connects the system of land consolidation courts with theories about self-governance and common pool resource management.

Because it combines great flexibility with a well-structured judicial procedure including many safeguards, the land consolidation option appears attractive as a vehicle for sustainable self-governance of local resources found in a local community. Moreover, it provides the public with a means to impose their will on owners and communities, without having to resort to the use of expropriation. While ensuring that legitimacy policy goals can be pursued more effectively, this also raises the worry that consolidation abuse will emerge to replace eminent domain abuse. Chapter 6 argued that in order to address this worry, the land consolidation alternative needs to function as a service to owners and local communities, as a means of helping them to manage their properties in accordance with public interests. Arguably, this requires a clear commitment on part of the state to prevent abuse of consolidation measures by commercial interests and public-private partnerships that seek access to property rights held by weaker parties.

Assuming that such a commitment is made, chapter 6 argued that use directives issued by a land consolidation court can be empowering to local owners, who are presented with a direct sense in which their property rights contributes to collective decision-making with a democracy

guided by the rule of law. Specifically, chapter 6 argued that land consolidation can be used to deal with many of the challenges that arise at the intersection between private property, local community, and economic development in the public interest. The Norwegian model might also inspire similar solutions elsewhere, particularly in jurisdictions that are committed to an egalitarian ideal of property ownership.

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