# On the legitimacy of economic development takings

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by

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# 1 Introduction and Summary of Main Themes

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

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

## 1.1 Property Lost; Takings and Legitimacy

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

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

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

2 Abraham Bell, Private Takings, p. 583.

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

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

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

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

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

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

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

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

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

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

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

In particular, the critical response to *Kelo* did not appear to have been primed by the prevailing

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

legal order. It may have been a reflection of widely shared political sentiments, but as such it arguably also involved pre-legal notions pertaining to legitimacy. Simply stated, people from across the political spectrum simply found the outcome *unfair*.

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

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

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

The question becomes to what extent one may appropriately speak of economic development takings in this way. Here I believe the first important step is to acknowledge that there is at least a *risk* that takings for economic development can be improperly influenced by commercial interests. The risk of capture, moreover, is clearly higher in such cases than in cases when takings take place to benefit a concretely identified public interest, such as the building of a new school or a

public road. Hence, the presence of strong commercial interests on the side of the taker in economic development cases deserves to be singled out as a relevant additional dimension along which to asses legitimacy.

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

## 1.2 Economic Development Takings as a Conceptual Category

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

First, speaking of a private taking already carries with it an implicit pointer to a lack of legitimacy, at least in jurisdictions that explicitly single out *public* interests as the only permissible justification for a taking. By contrast, the category of economic development takings does not carry with it any such implicit critique. If economic development takings are in need of special scrutiny, the reason cannot be simply that they can also involve private interests. After all, economic development is typically perceived to be in the public interest, regardless of whether a public or

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

private body is tasked with carrying it out.

A second difference between private takings and economic development takings is that the former notion is easier to define. In fact, I think it is *too* easy. It is very tempting, in particular, to simply say that a private taking occurs whenever the legal person taking title to the property in question is a private company or individual. But this gives rise to a perspective that is overly simplistic. It might well be that a private organisation, say a tightly regulated charity, functionally mimics a quintessential "public" taker. A public body, on the other hand, can well be functionally equivalent to a private enterprise, particularly if there is a lack of political oversight and democratic accountability. Moreover, imagine a case involving a publicly owned limited liability company. According to the simple definition of a private taking, a taking by such a company would not meet the definition. This would be the conclusion even if the company's interests are completely or predominantly of a private-law nature, directed at maximising profit for the shareholders, not at providing a public service.[8]

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

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[8] Some might argue that the distinction between private and public ownership is still significant. However, such an argument seems difficult to make convincingly, particularly if the company operates for profit and is insulated both from political decision-making and principles of administrative law. For such a company, it is hard to see why takings to benefit the company should be regarded as *a priori* different from other kinds of economic development takings merely because of public ownership. In particular, it is hard to see why it should matter in such cases whether the associated public benefit is ensured through the payment of dividends, taxes, or some other mechanism. In any event, the public benefit will be indirect in these cases, arising from ordinary commercial activity.

This concern might be relevant also when the economic incentives in question are of a non-commercial nature. However, cases when the taker acts as a profit-maximiser on a competitive market are certainly likely to be of special concern. Hence, I will argue for an additional qualification that designated *takings for profit* as a special sub-class of economic development takings that should receive particular scrutiny. Making this qualification should prove particularly useful in economic systems such as those seen in the west, where the steadily increasing influence of public-private partnerships cause a generally blurring of lines between private and public sectors.

In such societies, economic development takings will often, but not always, be characterised by a strong commercial incentive. It seems appropriate, therefore, to devote special attention to cases when a commercial interested party, often private, stands to gain a significant financial benefit from a taking. The financial motivation for the taker might contrast with the public spirited motivation of the executive or legislative body that grants permission to use compulsion; the (stated) intention of economic development takings is typically to promote public interests, not to bestow commercial benefits on particular parties. The importance of economic development as a category of takings is that it helps us flag those cases when this contrast is so strong as to suggest that we should further scrutinize the legitimacy of the undertaking as a whole.

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

Later in this thesis, I will devote much attention to this question. First I will do so from a

theoretical point of view, by first arguing that the category of economic development takings arises naturally already at the theoretical level, provided one chooses a suitable theoretical framework for reasoning about takings and property. Following up on this, I set out to distil some general lessons from the US debate and its history. In addition, I briefly assess the status of economic development takings in Europe, where takings that benefit commercial interests are often allowed to pass without raising special questions, and where the legal relevance of the category of economic development takings may still be called into doubt.

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

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

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

In this thesis, I challenge this perspective. I do so by first reconsidering the history of the public use debate itself, as documented by case law in the US. I argue, in particular, that more attention should be paid to the fact that the state courts that originally set out to develop public use tests

in the 19th century adopted a highly contextualised approach. Importantly, these courts where largely not bothered by the fact that they could not pin down any definite and consistent meaning of "public use" as a general concept.

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

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

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

## 1.3 A Democratic Deficit in Takings Law?

I am not the first to challenge the traditional narrative that surrounds economic development takings. Indeed, some US scholars have now begun to argue forcefully that increased judicial scrutiny of the public use requirement is neither a necessary nor a sufficient response to concerns about the legitimacy of commercially motivated takings. Instead, these authors point out that the takings procedure as such does not seem able to appropriately deal with commercial incentives on the taker side.

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

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

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

This idea is the second key focus point of my thesis. First, I approach it from a theoretical point of view, by exploring the notion of *participation* and its importance to the issue of legitimacy, particularly in the context of economic development. It seems, in particular, that *exclusion* could

be a particular worrying consequence of certain kinds of economic development takings, namely those that lack democratic legitimacy in the local community where the direct effects of the taking are most clearly felt.

I believe this to be a promising hypothesis, and I back it up by considering the social function theory of property and the notion of human flourishing which has recently been proposed as a normative guide for reasoning about property interests. I pay particular attention to the importance of communities that has been highlighted in recent work, as a way to bridge the gap between individualistic and collectivist ideas about fairness in relation to property.

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

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

I also believe, however, that it is hard to get very far with this sub-theme through theoretical arguments alone. Hence, to explore it in more depth, I go on to assess it from an empirical angle,

by offering a detailed case study of takings of Norwegian waterfalls for the purpose of hydropower development. This case study, in turn, will allow me to cast light on two further key themes, that I now introduce.

## 1.4 Putting The Traditional Narrative to the Test

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

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

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

what counts as a public interest.

Through my case study, I present a detailed analysis of how this traditional narrative actually plays out in Norway, in relation to takings for hydropower development. Such takings form an interesting sub-class because they are clearly economic development takings, in the most interesting sense of the word. Since the early 1990s, the hydropower sector in Norway has been deregulated, so the hydropower companies, to which the government may grant permission to expropriate, are now predominantly commercial entities. Moreover, the property that they seek to takes is not merely some ancillary rights that they need to develop the country's resources. In Norway, the right to harness the power of water is a private right, under a riparian system that is otherwise quite similar to that found in the UK.

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

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

In their approach to these cases, the courts rely heavily on the traditional narrative, by reconsidering how compensation is calculated when water rights are taken for hydropower. Compensation

practices have already changed dramatically. However, there has also been cases when the local owners of these rights have protested the taking as such, claiming that they should be given the opportunity to develop their own resources. These protests have been entirely unsuccessful, as the courts in Norway adopts a stance on legitimacy that is extremely deferential to the executive, provided adequate compensation is paid.

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

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

## 1.5 A Judicial Framework for Compulsory Participation

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

parliament".

The Norwegian farmers were often little more than small-holders, and had few privileges to protect. Hence, they became liberals of sorts (although also known for their fiscal conservatism). The farmers as a class were responsible for pushing through important early reforms, such as the establishment of semi-autonomous, elected, municipality governments.[9]

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

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

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

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

I explore this framework in some depth, focusing on its potential as an alternative to expropriation. This is especially interesting since land consolidation is presently being put to use in order to organise hydropower development. Hence, my case study provides an excellent opportunity for comparing the land consolidation and the takings process, with respect to the overall aim of ensuring development of hydropower on equitable terms.

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

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

## 1.6 Structure of the Thesis

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

The proponents of the social function theory often make strongly normative claims about

property, but here I argue that it is fruitful to take a step back and examine the descriptive content of the theory separately. This, I believe, can help us locate a theoretical template that is less conceptually impoverished than many other descriptive theories of property as a legal concept. This, in turn, can hopefully render the theory suitable as a common ground that can facilitate meaningful discussion among theorists with very different normative ideas and commitments.

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

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

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

the interference.

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

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

This preliminary conclusion leads to the second part of my thesis, where I apply the insights gained from the first half to analyse and distil lessons from the Norwegian framework for expropriation in the context of hydropower development. In Chapter 4, I begin by offering a brief introduction to the Norwegian legal system, before presenting in more detail the rules regulating the right to harness the power of water. I follow up on this by presenting empirical data on the

hydropower sector, aiming to shed light on how the regulatory frameworks work in practice. I emphasise the current tension between hydropower projects controlled by local owners and their communities and competing projects controlled by large commercial, partly state-owned, companies, that rely on expropriation. I emphasise the positive effect local hydropower initiatives can have on the communities in which development takes place, and I present an early vision of the social function of such development in some depth. I conclude by a cautionary assessment of current developments in the owner-led industry itself, where commercial forces appear to be gaining ground at the expense of more rounded perspectives on the purpose of development.

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

regulators and commercial companies. In this way, my analysis of the Norwegian case culminates in the same conclusion as my theoretical work, pointing to the need for institutional reforms that can give local owners and their communities a stronger voice in decision-making processes concerning their natural resources.

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

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

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

# Part I

# Towards a Theory of Economic Development Takings

# 2 Property, Protection and Privilege

It's nice to own land.[1]

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

## 2.1 Introduction

This chapter will present a template for analysing economic development takings, based on legal theory.[3] It will be argued that the category of economic development takings is relevant to legal reasoning about certain situations when private property is taken by the state. Clearly, this cat-

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

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

3 I will not provide an extensive presentation of concepts or theoretical approaches developed in other fields, such as political science, sociology, economy, or psychology. However, all these fields engage in interesting ways with the notion of takings and property. Hence, while I focus on legal and – to some extent – philosophical theories, I will make a special note of relevant research questions that are also analysed in other academic disciplines. For some examples of relevant work from economics, psychology and political science respectively, see, generally, Thomas J Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (Cambridge University Press 2011); Janice Nadler and Shari Seidman Diamond, 'Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity' (2008) 5(4) Journal of Empirical Legal Studies 713; Claudio J Katz, 'Private Property versus Markets: Democratic and Communitarian Critiques of Capitalism' (1997) 91(2) The American Political Science Review 277; Bruce G Carruthers and Laura Ariovich, 'The Sociology of Property Rights' English (2004) 30 Annual Review of Sociology 23.

egory makes intuitive sense; it targets situations when property is, quite literally, taken for economic development. In most cases considered in this thesis, economic development is even the explicitly stated aim used to justify the exercise of eminent domain. Hence, the factual basis for the categorization is beyond doubt.

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

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

The reason for this difference is not that US law contains special rules that directly point to distinguishing features of economic development takings.[6] Rather, the difference is largely due

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

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

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

to the fact that economic development takings have resulted in political controversy in the US, a controversy that has influenced both the law and legal scholars.[7] Hence, in the absence of a similar political climate in Europe, a conceptual investigation into the very idea of an economic development taking is warranted.

This chapter argues that in order to make progress in this regard, we must broaden our theoretical outlook compared to traditional forms of legal reasoning about property. Interestingly, a suitable conceptual reconfiguration appears to be implicit in recent strands of property theory, particularly those that focus on the *social function* of property.[8] Indeed, the crux of the main argument presented in this chapter is that the social function view compels us to pay attention to the special dynamics of power that tend to manifest in cases when private property is taken by the state for economic development, especially in the context of commercial exploitation.

To make clear why such takings are special, this chapter abandons the traditional entitlements-based perspective on property in favour of a perspective that emphasises the function of property as a building block of democracy and participatory decision-making, particularly at the local level. This will allow us to shift attention away from the individual effect on owners, towards the question of whether the purpose of the taking, and its broader societal effect, merits interfering with private property. The social function theory strongly encourages such a change of perspective, by compelling us to recognise the importance of property in regulating social and political relations. Moreover, the social function theory emphasises the social *obligations* attached to property, particularly with respect to communities of property dependants.

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

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

On this basis, I will argue that private property is important because it gives owners a right to take part in decision-making processes concerning economic development, a right that also typically gives owners a duty to participate, not only on their own behalf, but also on behalf of local community interests. This highlights that property rights can empower local communities in their interactions with powerful commercial and central government interests. Moreover, the use of eminent domain can undermine this crucial function of property, thereby threatening the democratic legitimacy of the decision-making process, by depriving local communities of a potentially robust source of participatory competence. Indeed, when property interests are transferred away from the local community on a permanent basis, this threatens to leave a lasting democratic deficit in the wake of economic development. This, I argue, is the key reason why we need to recognise economic development takings as a separate conceptual category.

To motivate the theoretical work, I will begin in Section 2.2 by considering the Balmedie controversy, pertaining to Donald Trump's plans for a golf resort in Balmedie, a village on the east coast of Scotland. I use this concrete example to highlight tensions between property's different functions in the context of economic development. Then, in Section 2.3, I go on to discuss theories of property, to locate a suitable starting point for further analysis. I argue that neither of the two dominant property theories of the last century, the bundle theory and the dominion theory respectively, provide such a starting point. In Section 2.4, I move on to consider the social function theory in more depth, to arrive at a more useful theoretical template. Moreover, I argue that the descriptive part of this theory can provide a valuable conceptual tool even if one does not agree with the normative assertions that are typically associated with it. In particular, I argue that normative considerations should be addressed separately from conceptual foundations.

I do so in Section 2.5, by building on the human flourishing account of the purpose of property. I argue that the human flourishing theory provides us with a possible path towards answers to the normative questions that arise from the social function perspective on property. In Section 2.6, I

make the discussion more concrete by applying the social function theory to a preliminary investigation of economic development takings. The human flourishing theory is then used to formulate some overriding normative constraints that will rely on for the concrete policy assessments I offer in this thesis. In Section 2.7, I offer a conclusion.

## 2.2 Donald Trump in Scotland

On the 10th of July 2010, the property magnate Donald Trump opened his first golf-course in Scotland, proudly announcing that it would be the "best golf-course in the world".[9] Impressed with the unspoilt and dramatic seaside landscape of Scotland's east coast, the New Yorker, who made his fortune as a real estate entrepreneur, had decided he wanted to develop a golf course in the village of Balmedie, close to Aberdeen.

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

Trump was not deterred, and in the end he was able to convince Scottish ministers that he should be given the go-ahead on the prospect of boosting the economy by creating some 6000 new

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

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

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

jobs.[12] Activists continued to fight the development, launching the "Tripping up Trump" campaign to back up local residents who refused to sell their properties.[13] One of these, the farmer and quarry worker Michael Forbes, expressed his opposition in particularly clear terms, declaring at one point that Trump could "shove his money up his arse".[14] Trump, on his part, had described Forbes as a "village idiot" that lived in a "slum".[15] Moreover, he had suggested that Forbes was keeping his property in a state of disrepair on purpose, to coerce Trump to pay more for the land, to remove the blight.[16] Forbes was offended. He proudly declared that he would never consider selling, as the issue had become personal.[17]

At the height of the tensions, Trump asked the local council to consider issuing compulsory purchase orders (CPOs) that would allow him to take property from Forbes and other recalcitrant locals against their will.[18] These plans were met with widespread outrage. The media coverage

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

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

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

15 See 'Trump may pursue housing laws over golf 'slum'' *BBC News* (London, 1st June 2010) ⟨http://www.bbc.com/news/10205781⟩ accessed 16th April 2015.

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

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

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

was wide, mostly negative, and an award-winning documentary was made which painted Trump's activities in Balmedie in a highly negative light.[19] The controversy also found its way into UK property scholarship. Kevin Gray, in particular, a leading expert in property law, expressed his opposition by making clear that he thought the proposed taking would be an act of "predation".[20]

In fact, the case prompted Gray to formulate a number of key features that could be used to identify situations where compulsory purchase would be likely to represent an abuse of power. Gray noted, moreover, that Trump's proposed takings would fall in line with a general tendency in the UK towards using compulsory purchase to benefit private enterprise, even in the absence of a clear and direct benefit to the public. In light of this, it seemed realistic that CPOs might be used in Balmedie.[21] It would not be hard to argue that the public would benefit indirectly in terms of job-creation and increased tax revenues. Moreover, Scottish ministers had already gone far in expressing their support for the plans.

But then, in a surprise move, Trump announced he would not seek CPOs, claiming also, to the consternation of local residents, that it had never been his intention to do so.[22] Instead, Trump decided to pursue a different strategy, namely that of containment. He erected large fences, planted trees and created artificial sand dunes, all serving to prevent the properties he did not control from becoming a nuisance to his golfing guests. One local owner, Susan Monroe, was fenced in by a wall of sand some 8 meters high. "I used to be able to see all the way to the other side of Aberdeen",

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//reason.com/archives/2008/03/03/litigating-for-liberty/4⟩ accessed 16th April 2015. For the decision itself, consult *Casino Reinvestment DevAuth v Banin* 727 A2d 102 (NJ Super Ct Law Div 1998).

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

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

21 Moreover, a statutory authority is found in section 189 of the Town and Country Planning (Scotland) Act 1997, stating that local authorities have a general power to acquire land compulsorily in order to "secure the carrying out of development, redevelopment or improvement".

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

she said, "but now I just look into that mound of sand".[23] She also lamented the lack of support from the Scottish government, expressing surprise that nothing could be done to stop Trump.

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

In the end, then, it was not by taking the land of others that Trump triumphed in Scotland. Rather, he succeeded by exercising "despotic dominion" over his own.[25] This proved highly effective. After he fenced them in, his neighbours were hard to see and hard to hear. The Balmedie controversy went quiet, the golfers came, Trump got his way. As he declared during the grand opening: "Nothing will ever be built around this course because I own all the land around it. [...] It's nice to own land."[26]

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The tale of Trump coming to Scotland serves to illustrate the kind of scenario that I will be looking at in this thesis. In addition, it puts my work into perspective. For a while, it looked like Balmedie was about to become a canonical case of an economic development taking. But in the end, it became an illustration of something more subtle, namely that what it means to protect property depends on value judgements regarding opposing property interests. In particular, while Trump achieved his ends in Scotland by relying on his own property rights, he did so by undermining the

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23 See Booth (n 1).

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

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

26 See Booth (n 1).

property rights of others, even if he did not formally condemn those rights.

This was made possible by an exercise of regulatory and financial power. Hence, we are reminded that the function of property as such is deeply shaped by social, political and economic structures. For the powerful owner, property can be used offensively to oppress weaker parties. For the marginalised, it might well be the last line of defence against oppression. Indeed, Donald Trump's ownership of the Menie estate has a vastly different meaning than does Michael Forbes' ownership of his small farm. To many observers, the former kind of ownership will represent some combination of power, privilege and profit, while the latter will be regarded as imbued with a mix of defiance, community and sustenance. Very different values are inherent in these two forms of ownership, and after Trump came to Balmedie, they clashed in a way that required the legal order to prioritise between them.

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

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

Regardless of who we support, in the case of Balmedie, we are forced to recognise that protection implies interference and vice versa. This shows the conceptual inadequacy of the idea that property protection is all about weighing private and public interests against each other, to strike a balance

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

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

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

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

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

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

system, is not actually all that egalitarian.[30] In this way, we are confronted with the danger of a dissociation of values, reality and the law.

In Scotland, a similar story unfolds. Here, the traditional concern is that land rights are mainly held by the elites.[31] As a result, Scottish property activists tend to focus on values such as equality and fairness, calling also on the state to regulate and implement measures to achieve more egalitarian control over the land. Indeed, reforms have been passed that sanction interference in established property rights on behalf of local communities.[32] At the same time, cases like Balmedie illustrate that the Scottish government, now with enhanced powers of land administration, may well choose to align themselves with the large landowners. Moreover, research indicates that recent reforms in Scottish planning law, which serve to enhance the power of the central government, have the effect of undermining local communities and their capacity for self-governance.[33] Again, the danger of a disconnect between influential property narratives and reality is brought into focus.

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

I think the example of Balmedie suggests a possible first step. It illustrates, in particular, the

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

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

32 See generally John A Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89(4) Nebraska Law Review 739; Matthew Hoffman, 'Why community ownership? Understanding land reform in Scotland' (2013) 31 Land Use Policy 289.

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

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

In general, I think it is hard to make sense of many contemporary disputes over property if we do not have the conceptual acumen to distinguish between (1) egalitarian property held under a stewardship obligation by members of a local community, and (2) "feudal" property held by large enterprises for investment. Moreover, there is no contradiction between promoting the value of autonomy for one of these, while emphasising the need for state control and redistribution when it comes to the other. The broader theme is the contextual nature of property and its implications for protection of property rights. In the coming sections, I will propose a theoretical basis that integrates this viewpoint into legal reasoning about interference in property rights.

## 2.3 Theories of Property

What is property? In common law jurisdictions, the standard answer is that property is a collection of individual rights, or more abstractly, *entitlements*.[34] Being an owner, it is often said, amounts to being entitled to one or more among a bundle of "sticks", streams of protected benefits associated with, and thereby serving to legally define, the property in question.[35] This point of view was first developed by legal realists in response to the natural law tradition, which conceptualised property

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

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

in terms of the owner's dominion over the owned thing, particularly his right to exclude others from accessing it.[36] In civil law jurisdictions, rooted in Roman law, a dominion perspective is still often taken as the theoretical foundation of property, although it is of course recognised that the owner's dominion is never absolute in practice.[37]

In modern society, the extent to which an owner may freely enjoy his property is highly sensitive to government's willingness to protect, as well as its desire to regulate. To dominion theorists, this sensitivity is typically thought of as giving rise to various restrictions on property, but for bundle theorists it is rather thought of as *constitutive* of property itself.[38]

The bundle of rights theory has long historical roots in common law. Arguably, it was distilled from the traditional estates system for real property, which was turned into a theoretical foundation for thinking about property in the abstract.[39] However, during the 18th and 19th century, natural law and dominion theorising was also influential in common law. This is evidenced, for instance, by the works of William Blackstone and James Kent.[40] Towards the end of the 19th century, it became increasingly hard to reconcile such an approach to property with the reality of increasing state regulation. Hence, the bundle metaphor that gained prominence in the early 1900s can be seen as a return to a more modest perspective.[41]

On the bundle account, property rights are thought to be directed primarily towards other

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

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

38 Chang and Smih (n 37) 7.

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

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

41 See Klein and Robinson (n 36) 195.

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

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

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

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

[43] It has been argued that this way of thinking about property, as a web of (legal and social) normative relations between persons, does not entail the bundle of sticks idea, see Avihay Dorfman, 'Private Ownership' (2010) 16(1) Legal Theory 1, 23-25. I agree, and I also believe that endorsing the property-as-relations perspective is largely appropriate, even if one does not otherwise agree with the bundle perspective. Historically, however, the two ideas have in fact been closely associated with one another, so presenting them together seems appropriate. Moreover, I will not actively enter into the theoretical debate on this point, since I believe that the *social function* account of property, discussed in more detail in Section 2.4, takes us further than both bundle and dominion perspectives. However, as will hopefully become clear, the social function theory itself may be seen as a continuation of the property-as-relations idea, catering also to a more holistic perspective on social structures (although it otherwise manages to remain largely neutral on the bundle v dominion issue).

[44] Chang and Smih (n 37) 25.

their relevant rights and duties in relation to property.[45]

In addition, some scholars point out that the bundle theory does not adequately reflect the sense in which property is a right to a *thing*, serving to create an attachment that is not easily reducible to a set of interpersonal legal relationships.[46] In the US, where the bundle theory has traditionally been dominant, this critique seems to be gaining ground.[47]

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

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45 Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101(4) Columbia Law Review 773, 793 ("The unique advantage of in rem rights – the strategy of exclusion – is that they conserve on information costs relative to in personam rights in situations where the number of potential claimants to resources is large, and the resource in question can be defined at relatively low cost."); Merrill and Smith, 'What Happened to Property in Law and Economics?' (n 35) 389 ("The right to exclude allows the owner to control, plan, and invest, and permits this to happen with a minimum of information costs to others."). See also RC Ellickson, 'Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith' (2011) 8(3) 215 (arguing that Merrill and Smith's analysis nicely complements and improves upon the bundle theory).

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

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

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

### 2.3.1 Takings under Bundle and Dominion Accounts of Property

Bundle theorists might be expected to have a relaxed attitude towards state interference in property rights. Indeed, thinking about property as sticks in a bundle may lead one to think that property rights are intrinsically limited, so that subsequent changes to their content, made by a competent body, are reflections of their nature, not a cause for complaint. In particular, the theory conveys the impression that property is highly malleable.

For the theorists that developed the bundle of sticks metaphor in the late 19th and early 20th century, this aspect was undoubtedly very important. By providing a highly flexible concept of property, they helped the state gain conceptual authority to control and regulate.[49] The early bundle theorists not only developed a theory to fit the law as they saw it, they also contributed to change.

In takings law, the bundle narrative has been particularly important in relation to the contentious issue of so-called regulatory takings. Such takings occur when governmental control over the use of property, limiting the freedom of the owner, becomes so severe that it is classified as a taking in relation to the law of eminent domain. In the US, the question of when regulation amounts to a regulatory taking is highly controversial. The stakes are high because takings have to be compensated in accordance with the Fifth Amendment of the US constitution. At the same time, the law is unclear; the lack of statutory rules means that regulatory takings cases are often adjudicated directly against constitutional property clauses (often the relevant state constitution, in the first instance).

If property is thought of as a malleable bundle of entitlements that exists only because it is recognised by the law, it becomes natural to argue that when government regulates the use of property, it does not deprive anyone of property rights. It merely restructures the bundle. In the

[49] Klein and Robinson (n 36) 195.

case of *Andrus v Allard*, the Supreme Court adopted such an argument when it declared that "where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety".[50]

Hence, with regards to the issue of regulatory takings, the bundle theory was actively used by those who favour a less restrictive approach to interference with private property rights. However, it is wrong to conclude that the bundle theory *necessarily* implies a less restrictive stance on takings. Epstein, for instance, argues that as every stick in the property bundle represents a property right, government should not be permitted to remove any of them without paying compensation.[51]

More generally, Epstein does not believe that the bundle theory is responsible for what he regards as a weakening of property rights in the US during the 20th century. Instead, he thinks this weakening resulted from a tendency among modern property scholars to adopt a "top-down" approach to property. According to Epstein, too many scholars view property rights as vested in, and arising from, the power of the state, not the possessions of individuals.[52]

Epstein successfully shows that as a rhetorical device, the bundle of rights theory may be turned on its head compared to how it was used in *Andrus v Allard*. Moreover, his arguments illustrate that the bundle theory itself does not appear to dictate any particular position on the degree of protection that private property should enjoy against state interference.[53]

In the civil law world, the relationship between property theorising and property values is

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

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

52 Epstein, 'Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property' (n 51) 227-228 ("In my view, the nub of the difficulty with modern property law does not stem from the bundle-of-rights conception, but from the top-down view of property that treats all property as being granted by the state and therefore subject to whatever terms and conditions the state wishes to impose on its grantees").

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

similarly hard to pin down at the conceptual level. Again, the issue of regulatory takings illustrates this. In some civil law countries, like Germany and the Netherlands, the right to compensation is strong, while in other civil law countries, such as France and Greece, it is very weak.[54] In particular, the exclusive dominion understanding of property does not appear to commit one to any particular kind of policy on this point.

On the one hand, it cannot be denied that property rights are enforced, and limited, by the power of government. Hanging on to the idea of dominion, then, necessarily forces us to embrace also the idea that dominion is never absolute. In this way, the theory may serve as a conceptual basis for arguing in favour of a relaxed approach to state interference. If property rights are not absolute to start with, why worry about interfering in them for the common good? But, of course, this story too may be turned on its head. Indeed, a libertarian can use the image of limited dominion to argue that property is being ripped apart at its seams. If we want to maintain our grasp of what property is, such a person might argue, we had better enhance the level of protection offered to property owners, to restore true dominion.

To me, the upshot is that the differences between common law and civil law theorising about property are not very relevant to the question of legitimacy in the context of state interference. As such, these differences also seem comparatively unimportant to my thesis. In particular, the differences between the bundle theory and the dominion idea do not appear to speak decisively in favour of any particular approach to economic development takings.

In terms of descriptive content, both theories appear oversimplified. They provide a manner of speech, but they do not really get us very far towards uncovering the reality of property rights in modern society. In particular, they do not provide a functional account of what role property plays in relation to the social, economic and political structures within which it resides.

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

In terms of normative content, on the other hand, both the bundle theory and the dominion theory appear rather bland. They simply do not offer much clear guidance as to what norms and values the institution of property is meant to promote. They give neat ways of presenting what property looks like, but do not tell us *why* it should be protected.

### 2.3.2 Broader Theories

Based on the discussion so far, it seems that in order to make progress towards a theory of economic development takings we need to start from a property theory with a wider scope than both the bundle account and the dominion theory. There are many candidates that could be considered. In a recent monograph on property, Alexander and Peñalver present five key theoretical branches:

- *Utilitarian* theories, focusing on property's role in helping to maximize utility or welfare with respect to individual preferences and desires.[55]
- *Libertarian* theories, focusing on property's role in furthering individual autonomy and liberty, as well as the importance of protecting property against state interference, particularly attempts at redistribution.[56]
- *Hegelian* theories, focusing on the importance of property to the development of personhood and self-realisation, particularly the expression and embodiment of free will through control and attachment to one's possessions.[57]
- *Kantian* theories, focusing on how property arises to protect freedom and autonomy in a coordinated fashion so that *everyone* may potentially enjoy it, through the development of the state.[58]

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

[56] Alexander and Peñalver, *Community and Property* (n 8) Chapter 2.

[57] Alexander and Peñalver, *Community and Property* (n 8) Chapter 3.

[58] Alexander and Peñalver, *Community and Property* (n 8) Chapter 4.

- *Human flourishing* theories, focusing on property's role in facilitating participation in a community, particularly as a template allowing the individual to develop as a moral agent in a world of normative plurality.[59]

It it beyond the scope of this thesis to give a detailed presentation and assessment of all these theoretical branches. Suffice it to say that the utilitarian approach has been by far the most influential.[60] The basic tenet of this paradigm is that means-end analysis on the basis of exogenous preferences and utility measures provide a sound foundation on which to reason about law and policy.

In this thesis, I will depart from this form of analysis, by regarding property instead as an integral part of social structures. On this view, property can no longer be seen neither as an end in itself nor as a means to maximise some utility measure. Instead, property is understood in light of how it functionally relates to other building blocks of life, such as sustenance, economic activity, social interaction, interpersonal responsibility, preference change, deliberation, and democratic decision-making.

With such a starting point, I believe the human flourishing theory has more to offer than any of the other theoretical branches mentioned above. In Section 2.5 below, I will emphasise how this theory suggests making a range of new policy recommendations regarding how the law *should* approach the question of economic development takings.

Before I get to this, I will explore descriptive aspects of property theory in some more depth. Indeed, a potential objection against all the theories summarised above is that they are overly normative; they are largely used to argue for particular values associated with property, not to clarify the descriptive core of the notion. This is a challenge, since one of my main aims in this

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

60 See Gregory S Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge University Press 2012) 11 (noting also that there are many varieties of utilitarianism, including theories that might dispute the label).

thesis is to argue for a descriptive proposition, namely that economic development takings make sense as a conceptual category for legal reasoning. Hence, before I move on to consider normative aspects, I first need a theoretical framework that allows me to pinpoint what makes economic development takings unique. I would like to do so, moreover, without thereby committing myself to any particular stance on how to normatively assess such takings.

To arrive at a suitable foundation in this regard, I will rely on the so-called *social function theory* of property.[61] This theory is often thought of as a normative theory as well, in some sense a precursor to more overtly normative theories such as the human flourishing theory. However, I will argue that the social function theory has a descriptive core that can serve as a common ground for debate among scholars that do not necessarily share the same normative outlook. Crucially, the descriptive core of the social function theory also point towards a descriptive argument in favour of studying economic development takings.

Before making my specific point about takings, I will present the social function theory of property in some further detail. I will focus on showing that it captures aspects that are already highly relevant – behind the scenes – to how property rules are understood and applied in concrete situations.

## 2.4 The Social Function of Property

There is a growing feeling among property scholars that the notion of property has been drawn too narrowly by many of the traditionally dominant theories of property. Moreover, an increasing number of scholars are turning away from assessing property rules against their effectiveness in

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

maximising utility and social welfare.[62] Instead, some scholars adopt a holistic approach, allowing property's social function to come into focus. One of the main proponents of this conceptual shift is Gregory S. Alexander, professor at Cornell University. In a recent article, he writes:

> Welfarism is no longer the only game in the town of property theory. In the last several years a number of property scholars have begun developing various versions of a general vision of property and ownership that, although consistent with welfarism in some respects, purports to provide an alternative to the still-dominant welfarist account.[...] These scholars emphasize the social obligations that are inherent in ownership, and they seek to develop a non-welfarist theory grounding those inherent social obligations.[63]

As an empirical observation, the fact that property rights tend to come with social obligations is beyond doubt. Hardly anyone would protest that in practical life, what an owner will do with their property is as much constrained by the expectations of others as it is by law. Moreover, the law of nuisance and rules relating to adverse possession both serve as simple examples of how social obligations feature in the the law of property.

Still, many property scholars have surprisingly little regard for social functions when they theorise about ownership. According to Alexander, the classical theories of property convey the impression that "property owners are rights-holders first and foremost; obligations are, with some few exceptions, assigned to non-owners".[64] The social function theorists attempt to redress this conceptual imbalance. As Alexander explains, "social obligation theorists do not reverse this equation so much as they balance it. Of course property owners are rights-holders, but they are also

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62 For a nice early commentary on the limits of the utility-maximizing perspective in property law, focusing on the importance of changes, choices, and narratives, see Carol M Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory' (1990) 2(1) Yale Journal of Law & the Humanities 37.

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

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

duty-holders, and often more than minimally so".[65]

As I discuss in the next subsection, this idea is not new. Moreover, it seems to play an important implicit role in shaping how property is understood, particularly in Europe.

### 2.4.1 Historical Roots and European Influence

The first expression of the social function theory has been attributed to León Duguit, a French jurist active early in the 20th century. In a series of lectures he gave in Buenos Aires in 1911, Duguit challenged the classic liberal idea of property rights by pointing to their context dependence, adopting a line of argument strikingly similar to how recent scholars have criticized utilitarian discourses about property.[66] In particular, Duguit also pointed to the notion of obligation, stressing the fact that individual autonomy only makes sense in a social context where people are dependent on each other as members of communities. Hence, depending on the social circumstances of the owner, their property could entail as many obligations as entitlements. This, according to Duguit, was not only the inescapable reality of property ownership, it was also a normatively sound arrangement that should inspire the law, more so than individualistic, 'liberal', visions of property as entitlement protection.[67]

Similar thoughts have been influential in Europe, particularly during the rebuilding period after the Second World War. For instance, the constitution of Germany – her *Basic Law* – contains a property clause stating explicitly that property entails obligations as well as rights. As argued by Alexander, this has had a significant effect on German property jurisprudence, creating a clear and

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

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

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

interesting contrast with US law.[68]

A social perspective on property was also influential during the debate among the European states that first drafted the property clause in Article 1 of the First Protocol to the European Convention of Human Rights (P1(1) of the ECHR).[69] The article was eventually formulated as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

I will return to this clause in more depth in Section **??** of Chapter 3. Here I note how it emphasises both the private right to peaceful enjoyment of possessions and the state's right to interfere with property in the general/public interest. Moreover, it does not explicitly introduce an absolute compensation requirement in case of expropriation by the state, setting it apart from many other property clauses, including that contained in the Fifth Amendment of the US constitution. Arguably, this reflects a recognition of the social aspects of property.[70]

However, this particular aspect of social function reasoning also fits within a traditional nar-

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

[69] See Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (2010) 59(04) International & Comparative Law Quarterly 1055, 1063-1065. As Allen notes, the liberal conception of property has since gained ground in Europe, causing jurisprudential developments that have been particularly clear in the case law from the European Court of Human Rights (ECtHR).

[70] See generally Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (n 69).

rative of private property rights, whereby social responsibilities attaching to property are only recognised as arising from state objectives and policies. Indeed, the chosen formulation in P1(1) appears to suggest that social aspects are external to private property, vested in the regulatory power of the state.

This marks a possible tension with the social function theory, which asks us to recognise that social obligations are inherent in private property, attaching to owners directly. The importance of this in the present context is that a social function perspective can occasionally suggest stricter limits on state interference, not out of greater concern for individual entitlements, but out of concern for property's proper functions as a building block of social and political life.

Despite the conventional formulation used in P1(1), such a perspective does in fact play a role to the European Court of Human Rights (ECtHR). A series of cases involving hunting rights provide a clear example of this.[71] In these cases, the Court in Strasbourg has explicitly granted stronger property protection to owners who oppose hunting on ethical grounds, compared to owners who want to retain exclusive hunting rights for themselves.

For the former group of owners, it has been held that the state may not compulsorily transfer hunting rights to hunting associations for collective management.[72] For the latter group of owners, by contrast, the Court held in *Chabauty v France* that such transfers must be tolerated.[73]

For owners opposing hunting on ethical grounds, an interference with their hunting right is an interference with their moral duty to act in accordance with their beliefs. The belief that hunting is unethical gives the owners a personal obligation to prevent their hunting rights from being used. If owners are deprived of their opportunity to fulfil this obligation, it changes the social function of their property because it severs the link between the owners' value system and the use that is

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71 See *Chassagnou and Others v France* ECHR 1999–III 22; *Hermann v Germany* ECHR 2010 1110; *Chabauty v France* ECHR 2012 1784.

72 See *Chassagnou and Others v France* (n 71); *Hermann v Germany* (n 71).

73 See *Chabauty v France* (n 71).

made of their property.

In *Chassagnou and others v France*, the Court regarded this as a particularly severe interference in property, which could not be upheld despite the fact that it had been carried out in the public interest to secure sustainable management of hunting rights. The Court concluded that "compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol No. 1".[74]

Clearly, the Court is not expressing an opinion on the ethical status of hunting. Rather, the Court merely observes that the owners are entitled to have unconventional personal convictions in this regard. Crucially, however, managing one's property in accordance with one's convictions is part of what it means to be an owner. Moreover, as demonstrated by the ruling in *Chabauty*, protecting this aspect of ownership is more important to the Court in Strasbourg than protecting the right of owners to keep the fruits of the land to themselves. This can only be because the right to manage one's property in accordance with one's beliefs is itself regarded as a socially desirable aspect of property ownership, one that is entitled to increased protection under the ECHR.

The hunting cases also demonstrate that even when the legal system does not explicitly recognise the value of a social function inherent in property, such a function can still come to play a role when the Court assesses the legitimacy of interference against P1(1). In the next section, I make a more general claim, arguing that the law invariably prioritises between different social functions of property, even when this is not explicitly acknowledged.

74 See *Chassagnou and Others v France* (n 71) para 85.

### 2.4.2 The Impossibility of a Socially Neutral Property Regime

Property both reflects and shapes relations of power among members of a society.[75] Moreover, it does not act uniformly in this way – the effect depends on the circumstances. An indebted farmer who is prevented by state regulation from making profitable use of their land might come to find that their property has become a burden rather than a privilege. As a consequence, someone who has already amassed power and wealth elsewhere might be able to purchase the land from the farmer cheaply. By acquiring a farm and transforming it to recreational property, the outsider will symbolically and practically assert their dominance and power, while also reaping a potential financial benefit from investing in a more modern function of property.

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

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

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

property rights of outsiders wishing to invest in holiday homes?

Some may shy away from this way of posing the question, by arguing that it would be better to rely on neutral rules that treat all owners the same way. In the gentrification scenario, such an appeal to neutrality could be the first step in an argument against regulating the property market to prevent the displacement of local people. But would that truly be a socially neutral approach to residential property? Presumably, it would be in the interest of local owners, particularly those not wishing to sell, to introduce tighter regulation. Hence, if *their* property rights are to be given priority, regulation should be put in place.

Importantly, both sides of a conflict like this are in a position to adopt a property narrative to argue for their interests. If escalation occurs, it will become practically impossible to insist that property rules are neural on the issue of property's social functions. Here it is illustrative to briefly revisit the conflict between Donald Trump and Balmedie locals, discussed in Section 2.2.

As long as Trump threatened to use compulsory purchase, the local people could adopt a traditional "pro-property" stance against Trump. But as soon as Trump decided to fence them in by relying on his own property rights, they had to adopt a seemingly contradictory view on property, whereby Trump's property rights should be limited out of concern for the community. So how do we classify the anti-Trump stance with regard to property?

The answer is unclear under classical theories; a traditionally minded observer might even come to accuse the locals of having an unprincipled attitude towards private property. But under the social function stance, a completely different picture suggests itself. The locals sought to protect property, but not just any property. The property they wanted to protect was the property which served the social function of sustaining the existing community. The property they wanted to protect was the property that *meant* something to them.[77]

[77] This is more than merely observing that they wanted to protect *their* property. In their desire to regulate the use of Trump's property, it would seem that the locals wanted more than merely to protect their own properties. They also wanted to protect certain social functions inherent in Trump's property, against the harmful dispositions of

Undoubtedly, Trump and his supporters had a similar feeling about their property rights, and the development they wanted to carry out. Hence, in conflicts such as these the law will invariably have to take a stand regarding which social functions it wishes to promote. The social function theory asks us to be upfront about this, so that property adjudication in hard cases can proceed on the basis of substantive arguments about how to prioritise between different functions of property.

The social functions of property sometimes force the law to prioritise, when various functions come into conflict with one another. However, social functions can also work together in a way that promotes certain property uses and decision-making structures for property management. This can even alleviate the pressure for top-down government regulation, with desirably consequences for both owners and the public interest.

Again, this function of property is highly dependent on context. Small business owners, by virtue of being members of the local community, might be discouraged from becoming a nuisance to their neighbours, regardless of formal rules found in the law of nuisance.

However, if local shop owners go out of business and a non-local commercial owner replaces them, the regulatory effect of their property can change dramatically. Indeed, if we imagine that the new owner hopes to raze the local community in order to build a new shopping center, we are at once reminded of the stark contrasts that can arise between various social functions of property. The property rights of small shop owners can be the lifeblood of a community, while the exact same rights in the hands of a large-scale retailer can spell destruction.

Mechanisms like these can have important ramifications, not only for property, but also for the regulatory regime surrounding its use. For instance, it seems clear that if a non-local, commercially driven, owner is to be deterred from becoming a nuisance to neighbours, new and much stricter nuisance laws might have to be put in place. The social responsibility that was previously anchored in the community must now be protected more forcefully by the state. In turn, this can cause the

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Trump himself. I return to this subtle perspective in more depth in Section **??** below.

institution of property to weaken further, as the state assumes greater power to interfere. A feedback effect might result, as increased state regulation in turn threatens to make property ownership too burdensome for average community members. Hence, the most resourceful actors, those who are able to meet the state's demands and/or protect themselves against interference, gain more and more property, while the state gains more and more regulatory power.

The social function theory tells us that mechanisms such as this should be taken seriously as potential consequences of changes to the property regime. Moreover, by prioritising between social functions of property, the law indirectly serves a regulatory function, since different property functions correspond to different kinds of concrete property uses. On the one hand, direct regulation of land use can potentially be replaced by a more nuanced approach to property law, e.g., by promoting property ownership for marginalised groups. On the other hand, attempting to serve the public interest through direct state interference can have indirect effects on private property, e.g., by leading to concentration of property rights in the hands of the most resourceful, creating a need for yet more forceful mechanisms of state control.

The broader point at stake here can also be brought out in relation to the famous "tragedy of the commons".[78] In his seminal article, Hardin describes how individually rational users of a common resource can eventually cause the depletion of that resource. The problem arises, according to Hardin, because individuals have no proper incentive to refrain from over-exploitation; the damage will be distributed among all resource users, so it will not outweigh the benefit of individual over-use in the short term.

In response, it has been typical to regard either state management or individual private ownership as the answer.[79] State management is supposed to provide external incentives not to over-exploit, while private ownership is supposed to make it more difficult for individual resource users

[78] hardin68

[79] See Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (Cambridge ) 8-13.

to shift the cost of over-exploitation onto the community.

However, as Elinor Ostrom and others have shown, the traditional narrative overlooks the fact that commons tend to come with community structures that provide appropriate incentives through locally grounded institutions or social arrangements.[80] Moreover, as long as external forces do not threaten them, such arrangements can be more robust than either individual ownership or state control.

The ideas of Ostrom on common pool management focus on local institutions for collective decision-making, not property rights. As a complementary viewpoint, the idea that local institutions for resource management can be anchored in private property represents a potentially attractive way of thinking. Importantly, the social function theory of property already suggests pursuing this idea. Based on the social function approach, the descriptive fact that property structures shape decision-making processes at the local level is enough to conclude that local institutions for resource management should not be looked at in isolation from the law of property. I will build on this perspective in Chapter 4, when I consider the institution of land consolidation in Norway and the management tools it offers as a possible alternative to expropriation in economic development cases.

It also bears noting that property rights can entail a wider set of values than those associated with specific institutions for local management of resources. For instance, making property a conceptual starting point makes it natural to also recognise that private property can function to protect individuals against abuse by local elites, e.g., by offering opportunities for exit.

In addition, it becomes possible to recognise that social obligations may inhere in private property externally to whatever institutional frameworks happen to be in place at the local level. If such frameworks are marred by corruption and malpractice, a social function theorist can take the normative stance that property ownership still carries with it duties to care for other property

[80] See generally Ostrom (n 79).

dependants in the community. This duty, moreover, would exist independently of the extent to which it is presently fulfilled through local practices and institutional arrangements.

I will return to this point later, when I discuss the human flourishing theory of property and its promise of internalising economic and social rights for non-owners into the structure of property itself. First, I will argue that the it is useful to distil a descriptive core from the social function theory, so that it may serve as a common ground for debate, allowing the interchange of ideas between different normative perspectives.

### 2.4.3 The Descriptive Core of the Social Function Theory

The case of *State v Shack* is a standard US example of how social function reasoning can come to influence the application of rules that seem to be neutral on property's social functions.[81] The case concerned the right of a farmer to deny others access to his land, a basic exercise of the right to exclusion. The controversy arose after the two defendants, who worked for organizations that provided health-care and legal services to migrant farmworkers, entered the land of a farmer without permission. They were there to provide services to the farmer's employees, and when the farmer asked them to leave, they refused.

In the first instance, they were convicted of trespassing in keeping with New Jersey state law. However, the Supreme Court of New Jersey overturned the verdict on appeal. The Court held that as long as the defendants were there at the request of the workers, the owner's right to exclude them was more limited. Importantly, the court argued for this result – which was not based on a natural reading of the New Jersey trespass statute – by pointing also to the fact that the community of migrant workers was particularly fragile and in need of protection. Their right to receive visitors on the land where they worked and lived, therefore, had to be recognised, also in a situation when this would involve a limitation to the farmer's right to exclude.

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81 *State v Shack* 58 NJ 297 (1971).

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

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

A nice demonstration of how neutrality is elusive in this regard can be found in an article by Eric Claeys, where he is critical both of the social function theory generally and *State v Shack* in particular.[82] Importantly, despite his intention to criticise the social function theory, Claeys is led to argue against the ruling of *State v Shack* by pointing to those aspects of the social context that spoke in favour of the farmer.[83] Essentially, his argument is that by considering the social circumstances in *more* depth, a different outcome suggests itself.[84]

If this is true, it is no argument against the descriptive content of the social function theory. Rather, it becomes a further affirmation of the descriptive adequacy of such an account of property. At the same time, it becomes an argument against those who think that the social function idea

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

83 Claeys, 'Virtues and Rights in American Property Law' (n 82) 941-942.

84 Claeys, 'Virtues and Rights in American Property Law' (n 82) 941 ("there are good reasons for suspecting that there was more blame to go around in Shack than comes across in the case's statement of facts").

dictates the "correct" outcome in cases such as *State v Shack*. As Claey's advocacy on behalf of the farmer shows, the descriptive part of the social function theory does not necessarily entail specific normative commitments.

Claeys argues forcefully against normative fundamentalism, and he might have a point in criticising some social function theorists for normative naivety.[85] However, I do not follow Claeys when he takes this to be an argument against the form of legal reasoning that social function theories promote and which he himself skilfully engages in.[86]

In *State v Shack*, such reasoning was clearly in order. To engage in it was far less naive than to dismiss it on the basis that it would be irrelevant to the case. Indeed, if the social function view had been dismissed, the narrow exclusion-based idea of property would in effect do *unacknowledged* normative work, by pushing social aspects out of sight and out of mind.

By contrast, the social function narrative pushes us towards a more complete picture of the relevant facts. This is its primary contribution, in my opinion. However, many of its supporters appear to argue that the main significance of the theory is that it delivers an ethically superior approach to property law.[87] Unsurprisingly, critics such as Claeys use this to launch attacks on the social function theory, by suggesting that it represents a way of thinking that will invariably lead to lessened constitutional property protection and greater risk of abusive state interference.[88]

But why should it follow from property's social function that the state is the ultimate social institution to which property *should* answer? Why not take the view that property should answer

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

86 In particular, I do not follow the leap Claeys makes when he suggests that it is beneficial to keep "discretely submerged" what he describes as "culture war overtones" in legal reasoning, see Claeys, 'Virtues and Rights in American Property Law' (n 82) 947.

87 See, e.g., Eduardo M Peñalver, 'Land Virtues' (2009) 94(4) Cornell Law Review 821.

88 See Claeys, 'Virtues and Rights in American Property Law' (n 82) ("The more "virtue" is a dominant theme in property regulation, the less effective "property" is in politics, as a liberal metaphor steering religious, ethnic, or ideological extremism out of the public square").

to informal social structures, such as those that it is embedded in by virtue of owners' membership in local communities?

If so, one might as well want to limit the state's role to that of ensuring fair play among individuals and communities. Indeed, from the point of view of social function theories, the appropriateness of direct state control seems to depend on evidence that property-based social structures fail to function properly and, crucially, that state control is a *better* alternative, according to some normative measuring stick.

The social function theory provides us with a conceptual tool for reasoning more clearly about *when* it is appropriate for the state to intervene. But the Humean position, namely that the existing property structure represents a socially emergent equilibrium, remains plausible. Moreover, the normative stance that this equilibrium is a *good* one (or at least as good as it gets) remains as contentious as ever.

It bears emphasising that by promoting normative neutrality at the conceptual level, I depart from the stance taken by many contemporary scholars who advocate on behalf of social function theories. Hanoch Dagan, for instance, is a self-confessed liberal who argues for a social function understanding on the basis that it is morally superior. "A theory of property that excludes social responsibility is unjust", he writes, and goes on to argue that "erasing the social responsibility of ownership would undermine both the freedom-enhancing pluralism and the individuality-enhancing multiplicity that is crucial to the liberal ideal of justice".[89]

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

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

a reader might agree that property continuously interacts with social structures, but reject the theory on the basis that it seems to carry with it a normative commitment to promote liberalism.

Dagan is not alone in proposing highly normative social function theories. Indeed, most contemporary scholars endorsing a social function view on property base themselves on highly value-laden assessments of property institutions.[90] These scholars provide interesting insights into the nature of property, but they might overstate the desirable normative implications of adopting a social function view. In addition, they appear to believe we should embrace certain values and reject others. Hence, one is sometimes left with the impression that the social function theory has little to offer beyond the values with which it is imbued, which can in turn push the law in the direction that these writers deem desirable.

For instance, it is Dagan's stated aim to propose a theory that promotes specific liberal values. "There is room to allow for the virtue of social responsibility and solidarity", he writes, continuing by suggesting that "those who endorse these values should seek to incorporate them – alongside and in perpetual tension with the value of individual liberty – into our conception of private property".[91] This view is reflected further in the concrete policy recommendations he makes, for instance in relation to the question of when it is appropriate to award less than "full" (market value) compensation for property following a taking.[92]

Normative assertions like these are not necessarily wrong, but they need not be accepted in order to conclude that the social function of property should be given a more prominent place in the legal theory of property. Importantly, I think the focus on abstract normative assertions

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90 See, e.g.Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) Cornell Law Review 745; Colin Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80(3) Fordham Law Review 1089; Nestor M Davidson, 'Sketches for a Hamilton Vernacular as a Social Function of Property' (2011) 80(3) Fordham Law Review 1053; Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94(4) Cornell Law Review 1009; Peñalver (n 87).

91 Hanoch Dagan, 'Takings and Distributive Justice' (1999) 85(5) Virginia Law Review 741, 802.

92 See generally Hanoch Dagan, 'Expropriatory Compensation, Distributive Justice, and the Rule of Law' in H Mostert and LCA Verstappen (eds), *Rethinking Public Interest in Expropriation Law* (Forthcoming, 2014).

threatens to overshadow the most straightforward reason for looking to social structures, namely that they are almost always crucially important behind the scenes, even if they go unacknowledged by lawyers acting on the pretence of neutrality.

The social function theory, rather than being "good, period", as Dagan suggests, is simply more accurate, irrespective of one's ethical or political inclinations. As such, it provides the foundation for a debate where different values and norms can be presented in a way that is conducive to meaningful debate, on the basis of a minimal number of hidden assumptions and implied commitments. Thus, the first reason to accept the social function theory is epistemic, not deontic.

That is not to say that theories can ever be entirely value-neutral, nor that this should be a goal in itself. However, a good theory is one that can at least serve as a common ground for further discussion based on disagreement about values and priorities. Making room for normative divergences, moreover, can hopefully diminish the worry that a broader theoretical outlook is the first step towards unchecked state power and rule by "judicial philosopher-kings", as Claeys puts it.[93]

To further demonstrate that a cautious perspective is warranted here, it is useful to briefly consider how the Italian fascists appropriated the social function theory in 1930s.

According to Anna di Robilant, the fascists were remarkably happy to embrace a social function theory. This was because it provided them with an excellent conceptual starting point from which to develop their idea that rights and obligations in property should be made to answer to one core value: the interests of the state.[94] This stance was as effective as it was oversimplified. As di Robilant notes, "earlier writers had been hopelessly evasive about the meaning and content

93 Claeys, 'Virtues and Rights in American Property Law' (n 82) 944.

94 See Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?' (2013) 66(3) Vanderbilt Law Review 869, 908-909 ("Fascist property scholars had also appropriated the social function formula. For the Fascists, the social function of property meant the superior interest of the Fascist state.").

of the social element of property".[95] Hence, the fascist approach filled a need for clarity about the implications of the main idea, which was by now attracting increasing support both from the public and the academic community. Established property doctrine, it was widely felt, was both ineffective and unfair to ordinary people. Rather than securing productivity and a livelihood for all, property was used mainly as an instrument for maintaining the privileged position of the elites. By promising to change this state of affairs, the fascists attracted many to their cause.

As di Robilant notes, supporters of the fascist idea of property made clear that "social function meant the productive needs of the Fascist nation".[96] But at the same time, they cleverly denied that there was a "contradiction between subordinating individual property rights to the larger interest of the Fascist state and the liberal language of autonomy, personhood, and labor".[97] In this way, fascist scholars could claim that fascist liberalism was true liberalism, thereby subverting the conceptual basis for the traditional idea of liberal justice.[98] In this situation, there was reason to suspect that clinging to liberal dogma would be a largely ineffective response. Moreover, it seemed undeniable that fascism's appeal was rooted in real concerns about the fairness and effectiveness of the liberal legal order.

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

95 Robilant (n 94) 909.

96 Robilant (n 94) 909.

97 Robilant (n 94) 900.

98 Robilant (n 94) 900.

privacy, power and freedom that is worthy of protection.

To summarise their insights, Italian scholars adopted the metaphor of a "tree", by describing the core social function of property as the trunk, while referring to the various resource-specific values attached to property as branches.[99] As di Robilant notes regarding these theorists:

> The rise of Fascism, they realized, was the consequence of the crisis of liberalism. It was the consequence of liberals' insensibility to new ideas about the proper balance between individual rights and the interest of the collectivity.[100]

In light of this, the tree-theorists concluded that continued insistence on the protection of the autonomy of owners was not a viable response. Instead, they adopted a theory that "acknowledges and foregrounds the social dimension of property", but without committing themselves to fascist ideas about the supreme moral authority of the state.[101] The value of autonomy was in turn recast in terms of property's social function. Arguably, this served to make the case far more compelling. Protecting autonomy could be seen as an aspect of protecting property's freedom-enhancing function, both at the individual level and as a way of ensuring a right to self-governance and sustenance for families and local communities. This, moreover, could not easily be derided as tantamount to protecting unfair privilege and entitlement. Rather, property became elevated from an individual liberal right to a crucial building block of participatory democracy.

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

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99 Robilant (n 94) 894-916.

100 Robilant (n 94) 907.

101 Robilant (n 94) 907.

of the danger of attaching too much normative prestige to a theory that is abstract and open to various interpretations.

In particular, it seems that a failure to recognise the descriptive nature of the core idea can lead to unrealistic expectations of what the social function theory provides. In addition, it will make it harder for the theory to gain acceptance as a conceptual common ground from which to depart when engaging in debate. Indeed, if no division is recognised between normative and descriptive aspects, the historical record would allow detractors to make a *prima facie* plausible attack on the social function theory by arguing that it is fascism in disguise, or that fascism, rather than liberal justice, is where we end up in practice should we choose to adopt it.[102]

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

That said, the new dimensions uncovered by the social function view can also inspire novel normative theories. I explore this further in the next section.

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[102] This would echo the claim already made by Claeys, that the theory (when coupled with virtue ethics) might become a slippery slope towards the kind of extremism and revolt against oppression that gave rise to the Rwanda genocide in the early 1990s Claeys, 'Virtues and Rights in American Property Law' (n 82) 926-927.

## 2.5 Human Flourishing

Taking the social function theory seriously forces us to recognise that a person's relation to property can be partly constitutive of that person's social and personal identity, including both its political and economic components. Hence, property influences people's preferences, as well as what paths lie open to them when they consider their life choices.[103] This effect is not limited to the owner, it comes into play for anyone who is socially or economically connected to property in some way. The life-significance of property is often clearly felt also by a large group of non-owners.[104] The importance of property is obviously reduced if we move away from it in terms of social or economic distance. Hence, in many cases, property will be most important to its owner, simply because they are closest to it. This is not always the case, however, especially not if property rights are unevenly distributed, or in the possession of disinterested or negligent owners. Moreover, as mathematically oriented sociologists like pointing out, social connections are ubiquitous and the world is often smaller than it seems.[105]

Hence, there is great potential for making wide-reaching socio-normative claims on the basis of the social function perspective on the meaning and content of property. But which such claims *should* we be making? According to some, we should adjust our moral compass by looking to the overriding norm of *human flourishing* as a guiding principle of property law. In a recent article, Alexander goes as far as to declare that human flourishing is the "moral foundation of private property".[106]

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103 See generally Alexander, 'The Social-Obligation Norm in American Property Law' (n 90).

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

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

106 Gregory S Alexander, 'Property's Ends: The Publicness of Private Law Values' (2014) 99(3) Iowa Law Review 1257, 1261.

Human flourishing has a good ring to it, but what does it mean? According to Alexander, several values are implicated, both public and private.[107] Importantly, Alexander stresses that human flourishing is *value pluralistic*.[108] There is not one core value that always guarantees a rewarding life. To flourish means to negotiate a range of different impulses, both internal and external. Importantly, these act in a social context which influences their meaning and impact[109]

In the following, I consider some values that I regard as particularly important for the study of economic development takings. I start by the values enshrined in economic and social rights, which should arguably also inform how the law should approach property's social functions.

### 2.5.1 Property as an Anchor for Economic and Social Rights

The so-called "second generation" of human rights consists of basic economic and social rights that complement traditional political rights. This includes rights such as the right to housing, the right to food, and the right to work. Economic and social rights of this kind often involve property. Specifically, they often involve interests in property that are not recognised as ownership, e.g., housing rights for squatters or rights to food and work for landless rural people.

If the notion of property is conceptualised in the traditional way, as an arrangement to protect individual entitlements, the relationship between private property and economic and social rights appears to be one filled with tension. In particular, if economic and social rights require owners to give up some property entitlements, it becomes natural to portray property protection as standing in the way of social justice.

However, the human flourishing theory can be used to tell a very different story, namely one where economic and social rights are anchored in the notion of property itself.

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[107] See generally Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 106); Alexander, 'Pluralism and Property' (n 63).

[108] Alexander, 'The Social-Obligation Norm in American Property Law' (n 90) 750-751.

[109] Alexander, 'Pluralism and Property' (n 63) 1035-1052.

Importantly, the human flourishing theory compels us to take into account the interests and needs of property dependants other than owners. As Colin Crawford puts it, the purpose of property should be to "secure the goal of human flourishing for all citizens within any state".[110] Consider, for instance, the right to housing. If the interests of a property owner come into conflict with the housing rights of a property dependant, the human flourishing theory encourages us to approach this as a tension *within* property, between different property functions.

This way of understanding economic and social rights for non-owners can inform new perspectives on how to approach such rights when they involve property. Specifically, we are led to consider that the appropriate way to approach the rights of non-owners in relation to property also depends on who the owner is and the choices they make in managing their property.

For instance, if owners live on their land and don't own much more than they need themselves, squatting is effectively discouraged. At the same time it becomes much harder to maintain the criticism that this is somehow an affront to the housing rights of the landless. But even the owner of an unoccupied building can discourage squatting by managing their property well. Moreover, this too can undercut potential criticism on the basis of housing rights, for instance if the owner uses the building to engage in commercial activity that contributes to sustaining the local community.

On the other hand, if owners mismanage their properties, for instance because they seek to obtain demolition licenses or engage in other forms of speculation, squatters might take opportunity of this and feel encouraged to occupy the property. This risk clearly increases if housing cannot be afforded by a large number of a society's members.

If private property is thought of merely as entitlement-protection, the state might stake from this the lesson that interference in property is required to secure housing rights, even though the real problem is that property itself does not function as it should within society. Hence, the result can be that property structures are damaged further, as the state pursues policies of interference

[110] Crawford (n 90) 1089.

and centralised management, without addressing how private property as such can promote human flourishing.

By contrast, the human flourishing narrative suggests a perspective whereby both owners and non-owners are recognised as victims of a failure of the state to protect property's proper functions. For a concrete example, I mention the case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd*, analysed in depth by Alexander and Penñalver.[111]

The case dealt with squatting on a massive scale: some 400 people had initially taken up residence on land owned by Modderklip Farm, apparently under the belief that it belonged to the city of Johannesburg. The owner attempted to have them evicted and obtained an eviction order, but the local authorities refused to implement it. Eventually, the settlement grew to 40 000 people and Modderklip Farm complained that its constitutional property rights had not been respected.

The Supreme Court of Appeal concluded that Modderklip's property rights had indeed been violated, but noted that so had the rights of the squatters, since the state had failed to provide them with adequate housing.[112] However, the Court upheld the eviction order and granted Modderklip Farm compensation for the state's failure to implement it. Hence, while the Court recognised that both housing rights and property rights were at stake, it pursued a traditional balancing approach, finding in favour of property.

The Constitutional Court, on the other hand, adopted an agnostic view on the relationship between housing rights and property rights. The Court agreed that the eviction order was valid, but concluded that as long as the state failed in its obligations towards the squatters, the order should not be implemented.[113] Hence, the owner's right to have the squatters evicted was made contingent upon an adequate plan for relocation.

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

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

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

However, the Court also ordered that Modderklip should receive monetary compensation from the state. In this way, the Court implicitly recognised the social function of property; they refused to give full effect to Modderklip's property rights as long as that meant putting other rights in jeopardy. The fact that the squatters had no place to go influenced the content of Modderklip's right, making it impermissible to implement a standing eviction order. Importantly, however, this was a failure of the state to protect property, on the basis of which compensation should be paid.

The failure to protect property that the Court recognised in *Modderklip* can be understood broadly, as encompassing also the failure to provide adequate housing to a large group of property dependants. Indeed, this perspective is suggested by how the housing rights of the squatters influenced the content of the property rights and obligations of Modderklip. Taking this one step further means recognising that protection of property can be a potential source of justice for anyone, including squatters.

In a detailed analysis of *Modderklip*, Alexander and Peñalver go quite far in this direction. They argue that the case highlights how property owners themselves can have responsibilities towards property dependants, obligations that endure as long as private property is protected.[114] This normative turn makes property owners addressees of obligations arising from the economic and social rights of non-owners. In this way, it strengthens such rights.

However, it also strengthens the institution of property, highlighting why it might be appropriate to grant it strong protection against interference by external forces. In particular, a human flourishing approach might serve as a bulwark against the idea that the ultimate expression of the public interest can be found in the actions taken by the state. In this way, the human flourishing theory also points towards a novel way to address the economic and social rights of marginalised groups, for whom it often appears that neither private property nor state management is capable

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

of delivering basic justice.[115]

Specifically, the human flourishing account suggests the view that public interests and obligations can acquire legal relevance even in the absence of international treaties or equitable decision-making within (inter)national institutions. This is so because the values typically associated with the public sphere, such as those pertaining to economic and social rights, are in fact legally relevant already at the level of interaction between private subjects, including in relation to private property. As Alexander puts it in a recent article:

> The values that are part of property's public dimension in many instances are necessary to support, facilitate, and enable property's private ends. Hence, any account of public and private values that depicts them as categorically separate is grossly misleading. One important consequence of this insight is that many legal disputes that appear to pose a conflict between the private and public spheres or that seemingly require the involvement of public law can and should, in fact, be resolved on the basis of private law – the law of property alone.[116]

Perhaps the most important structural aspect of this insight concerns the mechanisms used to resolve tensions between different property values. Importantly, it might not be necessary to introduce intermediaries between owners and other primary stakeholders. To introduce such intermediaries, whether they are state bodies, international institutions, NGOs, or commercial enterprises, carries with it the risk that the decision-making process can be captured by external forces. It

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115 For instance, it has been noted that in India, the human right to water has at times been simultaneously frustrated both by a non-egalitarian distribution of riparian rights as well as a regulatory framework that grants the state almost limitless proprietary power over water resources. See **cullett12** To address shortcomings of the current system for water management in India, Cullet recommends a conceptual approach that "leaves aside property rights altogether" (both private and public) and instead emphasises that water is a common heritage of humankind. Leaving aside the special characteristics (and great importance) of water as a physical substance, the human flourishing theory points to an alternative, whereby fairness is to be achieved by embracing a progressive notion of property, rather than by abrogating it altogether.

116 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 106) 1295-1296.

might be better, therefore, if the necessary balancing of interests occurs at the level of property law.[117]

This would also allow economic and social rights to be promoted to the private law sphere, even in the absence of specific state action or legislation. Effectively, it would become necessary for private parties to recognise that human rights give rise to obligations that apply to them directly, as property owners. If successful, this idea can obviate the need for direct state interference to secure desirable social and economic objectives.

At the same time, a human flourishing account could be used to argue against the legitimacy of interference on the basis of broader concerns rooted in communitarian economic and social values. If such values inform property's proper function, it underscores that the state has an obligation to not undermine property. Instead, the state's duty becomes that of continuously facilitating improved legal frameworks for private property.

A clear commitment to property as an institution is needed in order for this aspect of the human flourishing idea to come to fruition. Moreover, such a commitment can not be taken for granted. A good example is again found by looking to South Africa, specifically the fallout of the Mineral and Petroleum Resources Development Act 2002.[118] This act introduced state "custodianship" over mineral and petroleum rights that had previously been privately owned.[119] Importantly, in *Agri South Africa v Minister for Minerals and Energy*, the Constitutional Court ruled that this did not amount to expropriation, only deprivation.[120]

The property clause in section 25 of the South African Constitution gives effect to an import-

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117 This can also involve institutions as long as they are directly based on property, set up to facilitate participatory decision-making about property among the class of property dependants most directly affected. For private owners of parts of jointly owner property, the land consolidation courts discussed in Chapter 5 are an example of such a mechanism. However, as I discuss more in that chapter, exporting this institution to a setting of non-egalitarian property ownership might require granting legal standing to a larger group of property dependants.

118 See Mineral and Petroleum Resources Development Act 2002.

119 See Mineral and Petroleum Resources Development Act 2002, s 3.

120 See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1.

ant distinction between expropriation and deprivation, as it only demands compensation in case of expropriation.[121] Hence, the decision in *Agri* implied that privately held mineral and petroleum rights in South Africa could be brought under state custodianship without any payment of compensation.[122]

The state custodianship introduced by the act in question would undoubtedly deprive the current owner of their mineral rights. Moreover, the state would subsequently be empowered to grant the minerals to a third party, e.g., a competing commercial company. In my terminology, therefore, the introduction of state custodianship amounted to a sweeping authorisation for economic development takings affecting all mineral and petroleum resources found in South Africa.

The crucial finding of the majority in *Agri* was that this did not involve any transfer of mineral rights to the state. On plain reading, this seems quite absurd. In effect, the rights would be taken from the owner by the state, which would then be free to pass those rights onto someone else. However, the majority did not engage in any plain reading. Rather, its decision was motivated by what it thought would be appropriate given the history of South Africa and the prevailing social context of property, shaped by a past of racial discrimination.

Importantly, the majority did not use this past as an argument to inform the assessment of the owners' compensation rights in the concrete case that was before the Court. Instead, it relied on the social context as an argument when interpreting the word "expropriation" in full generality. This may have been a grave mistake. As the minority pointed out, the understanding of expropriation established by the majority "in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country's

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[121] See AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011) 18-19.

[122] For a commentary on the decision, see Ernst Marais, 'When does state interference with property (now) amount to expropriation? An analysis of the Agri SA court's state acquisition requirement (Part i)' (2015) 18(1) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 3032; Ernst Marais, 'When does state interference with property (now) amount to expropriation? An analysis of the Agri SA court's state acquisition requirement (Part ii)' (2015) 18(1) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 3071.

resources, from being recognised as expropriation".

This is not a precedent that strengthens the institution of property. Moreover, it reverts back to the traditional narrative that curing social ills requires negating private property or at least placing it under direct state management. It even seems to indirectly diminish the social obligations of property owners. Indeed, to the majority, the uncompensated taking of mineral rights was justified under reference to the "obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state's social responsibilities".

Notice how social obligations are talked about as though they only target states. On the Court's narrative, honouring "social responsibilities" can only mean enhancing state power at the expense of private property. Hence, the implication appears to be that in the absence of active state interference, private property is a privilege unbridled by social obligations. However, in the future of mineral and petroleum exploitation in South Africa, this will be a privilege enjoyed only by those chosen by the state.

The principle established in *Agri* could prove very important to the future of property in South Africa. Because *Agri* was decided on the basis of an interpretation of the word "expropriation" as such, there is no need in the future to continue pointing to the social context of past injustice when arguing that the state should be allowed to carry out economic development takings. As a custodian, the state is by definition entitled to do so, without paying any compensation at all to the original owners, regardless of the social merits of the taking. This opens the floodgates to predatory practices, creating very strong incentives for the government to abuse its power.

It is interesting to note that on this point of principle, *Agri* could easily have gone differently. This would have been achieved by a ruling consistent with the minority opinion, which held (1) that compensation should be paid and (2) that sufficient compensation *had* in fact been paid, as the mineral and petroleum act provided for a limited form of compensation in kind whereby the previous mineral owners were given a chance of maintaining substantially the same mineral

interests provided they could meet certain conditions within a deadline (the mineral owner in *Agri* had been unable to do so due to insolvency).

This did not amount to anything resembling market value compensation, but the minority invoked the social context concretely to argue why it was nevertheless sufficient. Hence, by following the opinion of the minority, the outcome would have been the same, but the apparent implications for the institution of property would have been very different.

This shows the importance of one's conceptual understanding, since the main point of difference between the minority and the majority arose with regard to the role that the social context of property should play in legal reasoning. The minority invoked such concerns concretely, to determine the extent of a concrete right to compensation. By contrast, the majority invoked this reasoning at the highest possible level of abstraction, by holding that owners generally have no compensation rights following property deprivation in favour of state custodianship (even when this entails a right for the state to give the property to third parties).

The human flourishing theory clearly speaks in favour of the minority view. However, it also asks us to consider the possibility of going a step further, to challenge the very idea that state custodianship is the best way to address past injustices or social ills more generally. Indeed, it would perhaps have been more appropriate to look for a solution consistent with the protection of private property, for instance by building on *Modderklip* to improve the legal position of non-owning property dependants and communities, who may well be entitled to a share of the benefit arising from privately owned mineral and petroleum resources.

Ideally, it should be possible to pursue key economic and social values without massively increasing the power of the state and weakening the institution of property. At the same time, it should be possible to more effectively enforce social obligations on private property owners.[123] Achieving

[123] Indeed, enforcing such obligations will become much harder after a new class of owners are in place, chosen and approved of by an increasingly powerful state.

this in practice requires mechanisms that enable negotiations between competing private property interests, to facilitate a balancing of those interests through participatory decision-making rather than top-down state management. This highlight the importance of another property value that the human flourishing theory emphasises, namely that of participation, discussed in the following section.

### 2.5.2 Property as an Anchor for Democracy

The value of participation is closely related to the value of democracy. Participation in local decision-making processes is the root which enables democracy to come to fruition at the regional and national level. Of course, the role that property plays in this regard, as it empowers and encourages owners to take active part in the political process, has been noted before.[124] Indeed, it has been important to property theorising ever since the early days of democracy. Alexander himself traces the emphasis on participation in politics back to Aristotle and the republican tradition. He notes, however, that this tradition involves a notion of participation that is rather narrowly drawn. For thinkers in the republican tradition, participation tends to mean public participation, meaning people's engagement with the formal affairs of the polity.[125] For Alexander, participation has a broader meaning, involving also the value of being included in a community. He writes:

> We can understand participation more broadly as an aspect of inclusion. In this sense participation means belonging or membership, in a robust respect. Whether or not one actively participates in the formal affairs of the polity, one nevertheless participates in the life of the community if one experiences a sense of belonging as a member of that community.[126]

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[124] For a thorough assessment of the idea that property, for this reason, is the most fundamental right, I refer to Carol M Rose, 'Property as the keystone right?' (1996) 71(3) Notre Dame Law Review 329.

[125] Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 106) 1275.

[126] Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 106) 1275.

Importantly, participation in a community can have a crucial influence also on people's preferences and desires. In this way, it is also invariably relevant – behind the scenes – to any assessment of property that focuses on welfare, utility or public participation in the classical sense. As Alexander and Peñalver put it, drawing on the work of Amartya Sen and Martha Nussbaum:[127]

> The communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations and the scope of our aspirations.[128]

Therefore, for anyone adhering to welfarism, rational choice theory, utilitarianism or the like, neglecting the importance of community is not only normatively undesirable, it is also unjustified in an epistemic sense. In particular, it should be recognised as a descriptive fact that community is highly relevant to *any* normative theory that attempts to take into account the preferences and desires of individuals.[129] But Alexander and Peñalver go further, by arguing that participation in a community should also be seen as an independent, irreducibly social, value, not merely as a determinant of individual preferences and a precondition for rational choice. They write:

> Beyond nurturing the individual capabilities necessary for flourishing, communities of all varieties serve another, equally important function. Community is necessary to create and foster a certain sort of society, one that is characterized above all by just social relations within it. By "just social relations", we mean a society in which individuals can interact with each other in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy. Communities foster just relations

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

128 Alexander, 'The Social-Obligation Norm in American Property Law' (n 90) 140.

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

with societies by shaping social norms, not simply individual interests.[130]

This, I believe, is a crucial aspect of participation. Moreover, it is a notion that invariably leads us to recognise that other property dependants should also have a voice, as they form part of the "just social relations" within the community to which the owners belong. In addition, this is a notion of participation that it is hard, if at all possible, to incorporate in theories that take preferences and other attributes of individuals as the basis upon which to reason about their legal status. Instead, the human flourishing perspective asks us to consider how property serves as an anchor for participation that shapes and influences preferences and the norms that guide them, possibly in ways that should be protected even if this seems to contradict the stated interests of owners.

For instance, if people in a community come under pressure to sell their homes to a large commercial company that wishes to construct a shopping mall, it may be appropriate to consider this as an unjustifiable attack on their property rights. Importantly, this may be so *irrespective* of what the individual owners themselves think they should do. If they are offered generous financial compensations for their homes, or if they are threatened by eminent domain, economic incentives might trump the value of social inclusion and participation for all or a majority of these owners. As a consequence, the community might decide to sell.

Even so, in light of the value of community, it would be in order for planning authorities, maybe even the judiciary, to view such an agreement as an *attack on their property*. It is clear that by the sale of the land, the "just social relations" inhering in the community will be destroyed. The members of the community – including all the non-owners – will lose their ability to participate in those relations. The property rights that once contributed to sustaining just relations will now be transformed into property rights that serve different purposes. This includes aiding the con-

130 Alexander, 'The Social-Obligation Norm in American Property Law' (n 90) 140.

centration of power and wealth in the hands of commercially powerful actors. Such a change in the social function of property might have to be regarded – objectively speaking – as a threat to participation, community and democracy. Hence, on the human flourishing theory, it is also a threat to property. Property institutions, therefore, should protect against it.

In Norway, a range of such rules are in place to protect agricultural property, by limiting the owners' right to sell parcels of their land without local government consent, as well as by compelling them to reside on their property and to make use of it for agricultural production.[131]

When the law actively promotes egalitarian property in this way, the natural counterpart is to limit direct state interference. The danger otherwise is that the limited economic strength of each individual property owner – appropriate in a democracy of property owners – is exploited by the state and others to bestow special benefits on select groups.

The broader issue at stake here is again highlighted by recent developments in South Africa, where rules closely resembling those found for agricultural property in Norway have been proposed in a recent act on land reform. In South Africa, however, these rules have been proposed alongside a new framework of "state custodianship" of agricultural land, corresponding to the formulation used in the mineral and petroleum legislation, as discussed in the previous section.[132]

If the proposal passes, the proper functioning of agricultural property in South Africa will seem to depend very strongly on the benevolence of the state, which will greatly increase its own power to interfere with private property. This, one worries, contradicts the aim of creating a property regime that is truly democracy-enhancing.

The human flourishing perspective suggests that even when provisions to promote egalitarian ownership and community commitment are appropriate, provisions that inflate the state's authority

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131 See Land Act 1995, s 8 and Land Concession Act 2003, s 4.

132 See Annette Steyn, 'More time needed for comment on state "custodianship" of agri land Bill' (*Democratic Alliance*, 29th May 2015) ⟨http://www.da.org.za/2015/05/more-time-needed-for-comment-on-state-custodianship-of-agri-land-bill/⟩ accessed 12th July 2015.

might not be. As I believe the history of democracy in Norway shows, strict property rules to protect and promote self-governing agrarian communities can work well, as long as they are applied consistently and coupled with strong institutions of local democracy and strict limits on state power.[133]

This raises the question of what kind of institutions we need to enable local communities and owners to flourish and make informed decisions about how to use their properties. In the final chapter of the thesis, I discuss this concretely in the context of economic development situations, by looking to the Norwegian institution of land consolidation.

In the next section, I zoom in on economic development takings. First, I introduce such takings by considering the seminal case of *Kelo v City of New London*[134], which brought this category to prominence in the US discourse on property law. Then I will assess the unique aspects of such takings against the social function theory, to provide an argument that the category has significance for legal reasoning in takings law, as well as with respect to property as a constitutionally protected human right. Finally, I will provide an abstract presentation of the values that I believe are important when normatively assessing the law in this area. In doing so, I will draw on the human flourishing theory, setting out the main values that will inform the concrete policy assessments I provide later.

## 2.6 Economic Development Takings

Constitutional property rules in many jurisdictions indicate, with varying degrees of clarity, that eminent domain should only be used to take property either for "public use", in the "public interest", or for a "public purpose". Such a restriction can be regarded as an unwritten rule of

[133] I discuss the role of agrarian property to the development of Norwegian democracy in more depth in Chapter **??**.

[134] *Kelo* (n 6).

constitutional law, as in the UK, or it can be explicitly stated, as in the basic law of Germany.[135] In some jurisdictions, for instance in the US and in Norway, explicit property clauses exist, but do not provide much information about the intended scope of protection.[136]

Both the Norwegian and the US property clauses appear to refer to public use only as a pre-condition for the duty to pay compensation. However, this is universally understood as expressing the *presupposition* that the power of eminent domain is only to be used in the public interest.[137] Indeed, in cases when one might say that private property is "taken" for a non-public use without compensation, for instance in a divorce settlement, it is not commonly regarded as an exercise of eminent domain. Rather, it is justified by reference to a different category of rules, meant to ensure enforcement of obligations that arise between private parties independently of the state's power to single out and compulsorily acquire specific properties.

The exact boundary between eminent domain and other forms of state interference in property is not always clear, but I will not worry too much about it in this thesis. Indeed, it suffices to note that legal scholars agree that the power of eminent domain is meant to be exercised in the public interest. However, interesting differences of opinion emerge when we turn to the question of whether the presupposed public use or public interest gives the judiciary a right and/or a duty to restrict the state's power to take. In the US, most scholars agree that some such restriction is intended, but there is great disagreement about its extent.[138] In Norway, on the other hand, a consensus has developed whereby the notion of public use is interpreted so widely that it hardly amounts to a practical restriction at all.[139] Moreover, the courts defer almost completely to the

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135 See Chapter 3. Section 3.3 below.

136 See Chapter 3, Section 3.5 and Chapter 5, Section 5.2.

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

138 Berger (n 137) 205.

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

assessments made by the executive branch regarding the purposes that may be used to justify a taking.[140]

Some US scholars adopt a similar stance, but others argue that the public use presupposition should be read as a strict requirement, forbidding the use of eminent domain unless the public will make actual use of the property that is taken.[141] Most scholars fall in between these two extremes. They regard the public use restriction as an important limitation, but they also emphasise that courts should normally defer to the legislature's assessment of what counts as a public use.[142]

As I discuss in more depth in Chapter 3, Section 3.5.1, the debate in the US has its roots in case law developed by state courts – the federal property clause was for a long time not applied to state takings. This has changed, and today the Supreme Court has a leading role in this area of US law. It has developed a largely deferential doctrine, resembling the understanding of the public use limitation under Norwegian law.[143] The difference is that in the US, cases raising the issue still regularly arise and prove controversial. As mentioned in the introduction to this thesis, the most important such case in recent times was *Kelo*, decided by the Supreme Court in 2005.[144] This case saw the public use question reach new heights of controversy in the US.[145]

*Kelo* centred on the legitimacy of taking property to implement a redevelopment plan that involved construction of research facilities for the drug company Pfizer. The home of Suzanne Kelo stood in the way of this plan and the city decided to use the power of eminent domain to condemn

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140 Holmøyvik and Aall (n 139) 368.

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

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

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

144 *Kelo* (n 6).

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

it. Kelo protested, arguing that making room for a private research facility was not a permissible "public use". She was represented by the libertarian legal firm *Institute for Justice*, which had previously succeeded in overturning similar instances of eminent domain at the state level.[146] Kelo lost the case before the state courts, but the Supreme Court decided to hear it and assessed its merits in great detail.

The precedent set by earlier federal cases was clear: As long as the decision to condemn was "rationally related to a conceivable public purpose", it was to be regarded as consistent with the public use restriction.[147] Moreover, the role of the judiciary in determining whether a taking was for a public purpose was regarded as "extremely narrow".[148] It had even been held that deference to the legislature's public use determination was required "unless the use be palpably without reasonable foundation" or involved an "impossibility".[149]

This understanding was also reflected in the outcome of related cases. In *Midkiff*, the Supreme Court had upheld a taking that would benefit private parties, with no direct benefit to the public.[150] In *Berman*, it had upheld a taking for economic redevelopment of a blighted area, even though the property taken was not itself blighted.[151] But in the case of *Kelo*, the court hesitated.

Part of the reason was no doubt that takings similar to *Kelo* had been heavily criticised at state level, with an impression taking hold across the US that eminent domain "abuse" was becoming a real problem.[152] A symbolic case that had contributed to this worry was the infamous *Poletown*

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

147 *Midkiff* (n 143) 241.

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

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

150 *Midkiff* (n 143). For a more detailed discussion, see Chapter 3, Section 3.5.1 below.

151 *Berman v Parker* (n 143). For a more detailed discussion, see Chapter 3, Section 3.5.1.

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

*Neighborhood Council v City of Detroit Poletown Neighborhood Council v City of Detroit.*[153] In this case, General Motors had been allowed to raze a town to build a car factory, a decision that provoked outrage across the political spectrum.[154] The case was similar to *Kelo* in that the taker was a powerful commercial actor who wanted to take homes. This, in particular, served to set the case apart from *Midkiff*, which involved a taking in favour of tenants, and to some extent also *Berman*, which involved a taking of businesses (and homes) in the interest of removing blight. Moreover, the Michigan Supreme Court had recently decided to overturn *Poletown* in the case of *Wayne County v Hatchcock Wayne County v Hatchcock.*[155] Hence, it seemed that the time had come for the Supreme Court to re-examine the public use questions.[156]

Eventually, in a 5-4 vote, the court decided to apply existing precedent and upheld the taking in *Kelo*. The majority also made clear that economic development takings were indeed permitted under the public use restriction, also when the public benefit was indirect and a private company would benefit commercially.[157] This resulted in great political controversy in the US. According to Ilya Somin, the *Kelo* case ranks among the most disliked decisions in the history of the Supreme Court.[158]

Some 80 - 90 % of the US public expressed great disapproval, with critical voices coming from across the political spectrum.[159] Why did the case prove so controversial? No doubt, the discontent with the decision was fuelled in large part by the fact that it was seen as a case of the government

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

154 See generally Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 152).

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

156 See, e.g., Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 152); Claeys, 'Public-use limitations and natural property rights' (n 141).

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

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

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

siding with the rich and powerful, against ordinary people.[160] Indeed, the party that appeared to benefit the most from the taking was Pfizer – a multi-billion dollar company – while Suzanne Kelo, who stood to lose, was a middle class homeowner. In this context, the taking of Kelo's home seemed morally suspect, an act of favouritism showing disregard for less influential members of society.[161]

In addition, it is worth noting that many commentators conceptualised the *Kelo* case by thinking of it as belonging to a special category, by describing it as an economic development taking, a *taking for profit*, or, more bluntly, a case of *Robin Hood in reverse.*[162] Categories such as these had no clear basis in the property discourse before *Kelo*. Indeed, in terms of established legal doctrine, it would be more appropriate to say that the case revolved entirely around the notion of "public use".

However, when considering the most common reasons given for condemning the outcome in *Kelo*, it becomes clear that many critics felt it was natural to classify the case along additional dimensions. A survey of the literature shows that many made use of a combination of substantive and procedural arguments to paint a bleak picture of the *context* surrounding the decision to take Kelo's home. Important aspects of this include the imbalance of power between the commercial company and the owner, the incommensurable nature of the opposing interests, the lack of regard for the owner displayed by the decision makers, the close relationship between the company and the government, and the feeling that the public benefit – while perhaps not insignificant – was made conditional on, and rendered subservient to, the commercial benefit that would be bestowed on a commercial beneficiary.[163] This dynamic, in which public bodies no longer seem to be leading and

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

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

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

163 See, for instance, Underkuffler, 'Kelo's moral failure' (n 161); Somin, 'Controlling the Grasping Hand: Economic De-

pushing the process forward, but are rather being led and being pushed, is regarded as particularly suspicious. This, in turn, is typically derided as a perversion of legitimate decision-making, used to argue that economic development takings such as *Kelo* suffer from what I will refer to here as a *democratic deficit*.

From a theoretical point of view, I take all of this to suggest that many critics of *Kelo* effectively adopted a social function view on property, by paying close attention to the wider social and political context of the taking.[164] Hence, the social function theory of property appears to provide a highly natural starting point for further exploring economic development takings. Specifically, the theory inspires reasoning that can justify a departure from the course laid down by previous cases on the "public use" requirement, by encouraging a broader perspective on legitimacy in takings cases. In fact, it seems to me that such a perspective was indeed adopted by the minority of the Supreme Court in *Kelo*, particularly Justice O'Connor, who formulated a strongly worded dissent.[165]

### 2.6.1 Justice O'Connor as a Social Function Theorist

Justice O'Connor was joined by all the four other dissenters, but Justice Thomas also formulated his own dissent where he argued for the revival of a strict literal reading of the public use requirement.[166] As such, Justice Thomas' dissent fits better with a traditional property narrative, while also being less relevant outside the context of US law. Justice O'Connor, by contrast, made a broad assessment of the social and political consequences of allowing takings in cases like *Kelo*,

velopment Takings after Kelo' (n 5); Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (n 141); Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 5); Daniel S Hafetz, 'Ferreting out favoritism: Bringing pretext claims after Kelo' (2009) 77(6) Fordham Law Review 3095; Zachary D Hudson, 'Eminent domain due process' (2010) 119(6) Yale Law Journal 1280.

164 For a particularly clear example of this, see Underkuffler, 'Kelo's moral failure' (n 161).

165 *Kelo* (n 6) 494-505.

166 *Kelo* (n 6) 505-523.

an assessment that seems to be of general relevance to any jurisdiction where commercial interests benefit from the power of eminent domain. Her analysis culminates in the following warning:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[167]

Interestingly, Justice O'Connor's concern is directed at substantive notions of fairness and democracy, emphasising how unrestrained economic development takings can distort the democratic process and lead to socially unjust results. This perspective provides a plausible basis on which to strike down certain kinds of economic development takings. Moreover, it allows us to do so without giving up the value of judicial deference, since it focuses on the democratic deficit rather than the exact meaning given to the notion of public use. In addition, it is a call for institutional reform, to search for new governance frameworks that will empower owners and their communities.

Moreover, the values Justice O'Connor relies on appear to be closely related to the values associated with the notion of human flourishing, particularly those relating to the political function of property as an anchor for community and democracy.

Indeed, Justice O'Connor seems to argue that the taking of Kelo's home would be a particularly harmful interference in exactly those "just social structures" that Alexander highlights as the bedrock of a well-functioning property regime.[168] At least, it seems clear that an entitlement-based approach to property cannot explain the degree of disapproval seen in Justice O'Connor's

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[167] *Kelo* (n 6) 505.

[168] See ...

opinion. After all, Kelo had been offered generous compensation, there had been no clear breach of concrete procedural rules, and the claim that the taking was *only* a pretext to bestow a benefit on Pfizer did not seem supported by the facts.[169] Hence, in the absence of support for a literal reading of public use, it had to be the overall character and consequence of the taking that rendered it illegitimate. In this regard, the lack of a clearly identifiable public benefit becomes only one of many observations pointing towards a democratic problem with the use of eminent domain on display in *Kelo*.

It also bears noting how structural aspects are crucial in Justice O'Connor's argument. The economic implications for the owner are comparatively unimportant and even the importance of home-ownership to the integrity of the person falls into the background compared to issues relating to democratic legitimacy and good governance. The overarching concern is that economic development takings can come to result in a form of governmental interference in property that systematically favours the rich and powerful to the detriment of the less resourceful. In this way, the power of eminent domain can be used to establish and sustain patterns of inequality, under the pretence of providing an economic benefit. Hardly anyone would openly regard this as desirable. Indeed, it is not hard to agree that if Justice O'Connor's predictions about the fallout of *Kelo* are correct, then it is indeed "perverse".

The crucial question becomes whether her predictions are warranted. In fact, the main importance of her dissent might be that it flags this issue as a crucial one in relation to very typical uses of eminent domain in the modern world. In light of its high level of generality, Justice O'Connor's dissent becomes a call for empirical and qualitative assessment of economic development takings, a quest for understanding of how they actual affect political, social and bureaucratic processes. In addition, it raises the question of how to *avoid* negative effects, that is, how to design rules and procedures that can reduce the democratic deficit of economic development takings. These will be

[169] See Bell and Parchomovsky, 'The Uselessness of Public Use' (n 141).

the main two themes that will occupy the remainder of this thesis.

I will start by recording in some more detail a tentative list of conditions that can be used for identifying those takings that qualify as evidence for eminent domain abuse, in the broader sense of that term found in Justice O'Connor's dissent. This is not a trivial task, but in the following section I present a template that I believe can prove useful, based on a proposal due to Kevin Gray.[170]

### 2.6.2 The Gray Test

Pointing to early US case law on public use as a "laboratory of elementary proprietary ideas", Kevin Gray builds on the evidence found there to provide a set of conditions for recognising what he calls "predatory takings". [171] His conditions capture key aspects of eminent domain abuse that I believe should be recognised by a theory of economic development takings inspired by the notion of human flourishing. Below, I briefly present the criteria proposed by Gray, as well as three riders that I believe suggest themselves on the basis of the discussions presented earlier in this chapter. I will refer to the resulting set of conditions as the *Grey test*, to be understood as a proposed general heuristic for assessing the legitimacy of takings, especially in situations when there are strong commercial interests present on the taker side.

Several combinations of conditions might be sufficient to justify designating a taking as eminent domain abuse. The purpose of the Gray test is not to produce a definite set of such conditions that provide a final answer in any case. Rather, the aim is to provide an abstract heuristic to facilitate concrete assessment against the social, economic and political circumstances surrounding the taking in question. In general, if a commercial or private-to-private taking represent an abuse of power, one would expect it to run afoul with regard to some, and probably several, of the criteria

[170] See Gray, 'Recreational Property' (n 20).

[171] See Gray, 'Recreational Property' (n 20) 28-30.

set out in the following points.

**Balance of Power among the Parties**

In a typical case of eminent domain abuse, the parties that stand to benefit will be more economically and politically powerful than those from whom property is taken.[172] This can be reflected in the takers' ability to solicit legal assistance and other services to defend the taking, as well as in the owners' inability to launch a coordinated defence.[173] If there is an imbalance of power, this is particularly likely to be noticeable early on, during the planning stages, before the decision to condemn has actually been made.

After the decision has been made, the position of the owners might improve, for instance because they are entitled to have their costs covered during the proceedings used to award compensation. However, this might not serve to restore any meaningful balance between the parties; when special procedural protections kick in, it will often be too late for the owners to launch an effective defence against the taking. Indeed, strict rules concerning cost reimbursement for costs incurred *after* the decision to take has already been made, is not a sufficient response to imbalance of power in legal systems that do not offer extensive judicial scrutiny of takings purposes.

More generally, a possible imbalance of power should be assessed against the decision-making process as a whole, going back to the first initiative made for taking the property in question. A critical assessment of what role the owners have played throughout the process is a good way to ascertain whether imbalances of power between the parties may have unduly influenced the final outcome.

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[172] See Gray, 'Recreational Property' (n 20) 30-31. Gray himself omits any explicit mention of political power, but it is present in Justice O'Connor's dissent in *Kelo*, and in my view clearly belongs here.

[173] See Gray, 'Recreational Property' (n 20) 30-31.

### The Net Effect on the Parties

As Gray notes, a hallmark of eminent domain abuse is that the net effect of the taking is a "significant transfer of valued resource from one set of owners to another"[174] In itself, this is not a conclusive sign of abuse, but it directs us to ask two important questions. First, we should inquire critically into the main purpose of the taking. Is it possible to regard the transfer of resources as a mere side-effect, arising from the realisation of a distinct public purpose? In many cases of eminent domain abuse, this claim will be entirely unconvincing, as the main motivation appears to be the transfer of resources as such.

In case of economic development takings, this becomes the question of whether the public interest in development can convincingly sustain a narrative whereby the primary aim is an incidental economic benefit, rather than the transfer of resources from owners to developers. If this narrative appears unconvincing, it points towards predation.

In some cases, however, it might be that the redistribution of resources is openly acknowledged as part of the rationale behind using eminent domain. In such cases, it is pertinent to ask questions about the economic and social status of the parties, particularly the extent to which it is permissible to embark on a redistributive campaign to benefit one at the expense of the other. If there is eminent domain abuse, one would except the taking to fail to stand up to scrutiny in this regard. Failure is particularly likely when commercial companies benefit at the expense of local populations.

In many cases, however, it might be unclear and debatable whether the taking stands up to scrutiny under the net effect test. The importance of scrutiny in these cases is still significant, since it helps bring the crucial questions into the open, thereby ensuring higher quality of the decision-making regarding the taking. Indeed, if legitimacy tests such as the Gray test are applied at an early stage of the proceedings, this in itself might help increase legitimacy, tipping the balance in

[174] See Gray, 'Recreational Property' (n 20) 31.

favour of upholding an eventual decision to make use of eminent domain. Indeed, making room for more extensive legitimacy tests in takings law might well end up bolstering the government's power to take land, provided this power is used properly.

### Initiative

In many suspicious economic development takings, the party benefiting commercially from the taking is the party that initially made the suggestion for using eminent domain.[175] In uncontroversial cases, on the other hand, the initiative tend to come from some government body that seeks to pursue a specific policy goal, e.g., to provide a public service or bestow a benefit on a particular group that is found to be in need of support. The contrast between this and cases when the initiative lies with the commercial beneficiaries themselves point to a disturbance of the decision-making underlying the decision to use eminent domain, and as such is an important hallmark of abuse.

I note, however, that the proper assessment to make in this regard also depends critically on the wider social and political context of the taking, particularly the relative status of the parties involved. If the beneficiary is both more powerful and privileged than the owners *and* takes the initiative for the taking, this is clearly a sign pointing towards predation. On the other hand, if the beneficiaries are marginalised groups who could not expect to be given any consideration at all unless they take the initiate themselves, things might have to be viewed differently. In these cases, the fact that the system leaves room for marginalised non-owners to acquire property interests might have to be considered a strength rather than a weakness. Still, as discussed in later points, the appropriateness of using eminent domain for redistributive purposes can be questioned, even if the redistributive goal itself appears democratically legitimate. In such cases, however, the question of legitimacy is unlikely to turn on the initiative test.

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[175] See Gray, 'Recreational Property' (n 20) 32.

### Location

The location, in a broad sense of the word, of the property that is taken, can be a strong indicator that eminent domain is inappropriate.[176] For instance, cases involving the taking of dwellings are naturally more suspect than cases involving the taking of barren and unused plots of land. Similarly, the taking of property that is important to the sustenance of the current owner should raise the bar for when a taking may be considered legitimate. The location of the property can also attain relevance independently of the current owner. For instance, if the taker's choice of property appears to be one of convenience rather than necessity, this points towards predation. It is particularly telling if alternative locations would be less intrusive, or obviate the need for using eminent domain altogether.

On the other hand, the location of the property can sometimes point towards *increased* legitimacy of a taking that would otherwise appear suspect. This would be the case, for instance, if the property that is taken has special value to the taker specifically because of its strategic location with respect to the taker's own property. For instance, if riparian owners cannot make rational use of the water flowing over their land without intruding on the land of their neighbours, using eminent domain to resolve this might be considerably less suspect than other kinds of economic development takings.[177] The same can also be said for cases when property rights frustrate efforts to secure other rights of non-owners, such as rights to drinking water in cases when riparian owners prevent water dependants from appropriating water for their basic needs.

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[176] See Gray, 'Recreational Property' (n 20) 33-34.

[177] I mention that this particular scenario was much discussed in the US during the 19th century, as the result of the fact that many states had passed so-called mill acts which authorised neighbour-to-neighbour takings of limited property rights needed for development projects involving water, c.f., the discussion of this in Chapter 2, Section **??**.

### Social Merit

If the taking is hard to justify on the basis of its social merits, this is a sign that it is inappropriate.[178] This condition asks for closer scrutiny of the type of public interest that is used to justify the taking.

Importantly, if the justification narrative surrounding the taking revolves solely around 'trickle-down' effects and the successful business ventures that the takings will facilitate, there is reason to be suspicious. If the taking cannot sustain a social merit narrative, whereby attention is shifted away from purely economic considerations, this becomes a further indication that the taking might count as predation. The point here is not that the language of social merit should replace the language of public use or public interest as some kind of conclusive test of legitimacy. Rather, the point is that one should always be encouraged to analyse takings specifically in terms of non-economic, social, effects. This is particularly important in difficult cases, because it can help us arrive at a better understanding of where exactly the taking sits on the gray scale between admissible governance and predatory exploitation.

If a taking appears to stand up to scrutiny only when embedded in a purely economic narrative, this in itself suggests a lack of legitimacy. Indeed, even if one concedes that incidental economic effects are relevant, it seems clear that however one circumscribes a notion such as public use, this notion certainly encompass *more* than merely those incidental economic effects that tend to occupy center stage in legitimacy disputes.[179]

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[178] See Gray, 'Recreational Property' (n 20) 34. Gray writes of lap-dancing clubs and cigarette factories as examples of purposes that are suspect. Importantly, such purposes might well fulfil a public interest requirement via the economic development narrative, yet still fail a social merit test that focuses rather on the social dimensions of the use to which the property will be put.

[179] Indeed, it bears emphasising that those arguing against economic development takings might achieve more by emphasising non-economic aspects, compared to arguing that incidental economic benefits should not at all be considered relevant as a justification for eminent domain.

### Environmental Impact

According to Gray, a typical feature of eminent domain abuse is that it has an adverse environmental impact. Moreover, a typical feature of eminent domain abusers is that they show disregard for such adverse affects.[180] This is an additional element that pertains specifically to the status of the taker, asking us to consider whether it is appropriate to grant their activities public interest status.

This is not primarily a question of how the development stands with regard to environmental regulation. That is a question for administrative decision-makers, possibly a basis for separate judicial review on the basis of environmental law. What is at stake in relation to the taking question is something else, namely whether or not the characteristics of the taker and their plans are such that it is permissible to make the power of eminent domain available on their behalf.

The relevant environmental standard in this regard should arguably be drawn up more strictly than what which follows from general environmental law. Presumably, one is entitled to expect *more* in terms of environmental awareness and concern from a developer and a development plan that benefit from the power of eminent domain. Indeed, the mere fact that takers are actively lobbying for leniency in relation to environmental standards can shed doubt on the proposition that they act in the public interest. What might otherwise be considered natural and admissible behaviour from a commercial company can be improper or inadmissible behaviour for one that benefits from eminent domain powers.

### Rider 1: Regulatory Effects

As discussed in Section **??**, property has an important regulatory effect, also outside the realm of positive law. This effect typically changes following a taking, sometimes quite dramatically.

[180] See Gray, 'Recreational Property' (n 20) 34 ("predatory takers tend to be relatively unperturbed if they lay waste to the earth").

For instance, if locally owned property is taken by external commercial actors for high-intensity commercial use, the post-taking regulatory status of the property will most likely be completely different to its status prior to the interference. Importantly, the changed status might have as much to do with informal social functions as it has to do with positive regulation.

It might be, for instance, that the property in question is found in a jurisdiction that emphasises the freedom of owners to do as they please without state interference. In this case, the fallout of allowing external commercial actors to take locally owned property can be particularly severe, as the the new owner is likely to be unconstrained by locally grounded systems of sustainable resource management. In these cases, there is a risk that there will be a 'tragedy of the taken', arising from how the taking undermines locally grounded frameworks for sustainable resource management. As a result, a society emphasising egalitarianism and limited state interference might find itself incapable of appropriately restraining the actions of commercial actors who accumulate property for high-intensity use.[181] If this is resolved by increasing the state's power to interfere with private property, the effect can be a further undermining of local management frameworks, increased subsequent use of eminent domain, and a general spreading and amplification of the democratic deficit already inherent in the original act of taking.

A different regulatory concern is that an economic development taking has the effect of changing the regulatory status of the property in positive law, for instance because the development in question brings it under the scope of different rules. It is possible that these new rules offer weaker protection for the local community, the environment, or even the general public interest, in which case it reflects badly on the initial decision to use eminent domain.[182]

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[181] This problem can of course arise independently of the use of eminent domain, e.g., in the context of land grabs arising from voluntary or semi-voluntary transactions. However, the situation appears particularly problematic if the state itself is complicit in bringing about the problem, by undermining property's social function through the use of the takings power.

[182] The case study of Norwegian waterfall expropriation will offer an example of this mechanism, c.f., Chapter 5, Section **??**.

**Rider 2: Impact on Non-Owners**

Following up on the theoretical arguments made previously in this chapter, it is appropriate to direct special attention at the status of non-owners affected by economic development takings. It is of particular interest to ascertain whether or not the interests of non-owners were given due consideration prior to the decision to use eminent domain. If their interests appear to have been neglected, or have not been considered at all, there is additional reason to be sceptical of the purported public interest of the taking. Indeed, just as disregard for the environment is a typical sign of predation, a general disregard for non-owners is also a clear sign of abuse.

To shed further light on the status of directly affected non-owners, one may first ask what role they played in the decision-making process. If the non-owners directly affected by the taking were allowed to express their opinion, and enjoyed some measure of influence, this can enhance legitimacy. If, on the other hand, the most strongly affected non-owners were not consulted, or not given a proper voice in the proceedings, it indicates abuse. However, there is also an important substantive aspect to consider: how is the taking going to affect property dependants without recognised ownership rights? If it is clear that they will suffer severely, for instance by being displaced from their homes or by loosing their livelihoods, this must be counted as an indication of predation irrespective of procedural aspects.

Importantly, it follows from the social function perspective that financial compensation can not by itself excuse shortcomings in this regard. If people are displaced, for instance, the fact that new dwellings are provided somewhere else does not detract from the fact that a community has been destroyed. It is possible that the needs of the public necessitate such a drastic interference with property's proper function, but this should always give rise to serious questions about legitimacy. Indeed, the bar to pass the legitimacy test should be raised considerably compared to less intrusive exercises of the eminent domain power.

**Rider 3: Democratic Merit**

Perhaps the most important characteristic to consider when assessing the legitimacy of a taking is its democratic merit. In an important sense, putting a taking to the test against this measure of legitimacy serves to encapsulate all the other points raised above, as we are asked to consider the totality of factors in order to judge whether the taking decision conforms to good governance standards within a system based on democratic decision-making. The inquiry made in this regard should not be focused on second-guessing government policies, but should compel us to take seriously the idea that a commitment to democracy places real constraints on the exercise of government power. As such, an overarching focus on democratic merit can render the principles of scrutiny expressed by the Gray test as a suitable template for courts in many different jurisdictions to engage in more extensive forms of judicial review on the basis of human rights and constitutional property law.

The overarching question that arises with respect to democratic merit is whether the taking in question can be said to arise from a legitimate process of decision-making, in the pursuit of a fair and equitable outcome. It bears emphasising that in line with a more modern appreciation of the meaning of democracy and human rights, the relevant assessment under this point involves both procedural and substantive elements. Fairness in itself is a constraint on the democratic process, particularly when fundamental economic and social rights are involved. However, the notion of democratic merit rightly brings procedural questions to the foreground. Indeed, it might be a weakness of Gray's own points that they do not single out procedural issues for special consideration. Certainly, one would not wish to reduce the takings question to a matter of administrative law. However, the way in which the taking decision was made can often tell us much about its legitimacy, including with regard to broader notions of fairness. It is particularly important, in this regard, to inquire into the position of local owners and communities during the planning process leading up to the decision to use eminent domain. In the context of property as a human right, moreover, a stricter standard might be appropriate here, compared to that which might follow

from administrative law.

Importantly, our commitment to property as a social institution requires us to take into account that the owners generally make up the group of people who will be most directly affected by any decision involving the future of their property. As such, they should normally be granted a decisive voice in decision-making processes leading up to economic development. At the same time, the social function account leaves room for recognising that this presumption in favour of emphasising owners does not apply equally to all merely as a result of formal rights. It is clear, for instance, that the substantive interests of absentee landlords might be limited compared to the substantive interests of local non-owners who depend more directly on the relevant property for their livelihoods. In these cases, the social function approach allows us to recognise that a taking might have significant democratic merit, even if it is based on a form of decision-making that prioritises the interests and participation rights of non-owners.

Nevertheless, within a system based on private property rights it will always be appropriate to show caution in this regard. The presumption should always be, within such a system, that the owners are the primary stakeholders in decision-making processes involving their property. Moreover, if this presumption is not found to be correct with respect to a substantive assessment of the interests at stake, it points to a structural weakness of property's function within society, a weakness that should normally be addressed by general property reforms, not by adopting a more permissive attitude towards takings.

Indeed, if imbalances in the distribution of property is used to justify giving the state increased powers to interfere on a case-by-case basis, it does *more* than implement redistribution (which might well have considerable democratic merit). Importantly, granting such power to the government, particularly if the power is vested in the executive branch, risks undermining property as an institution. Hence, property might become a less secure basis on which to support local communities in the future, including those marginalised groups that are most in need of protection from external

forces.[183]

The difficult takings cases will be those which seem suspect even though marginalised groups directly benefit, and even though none of the other points of the Gray test appear to indicate predation. Normally, such takings should be regarded as legitimate (assuming, of course, that they do not offend against the relevant positive expropriation law). However, I believe the democratic merit test rightly points to a possible exception, if such takings unduly contribute to undermining property as an institution, thereby setting the stage for future abuses. Arguably, the *Agri* case from South Africa, discussed in Section **??**, is an example of such a case.[184]

In this thesis, the cases considered will most often not involve subtleties like that of *Agri*. Indeed, when Norwegian waterfalls are taken for hydropower development, no one argues that this is necessary to correct past injustices or to bestow benefits marginalised groups. Quite the contrary, as I will show, these takings typically involve the opposite scenario, where property is taken from marginalised groups and handed over to more resourceful owners. In such cases, the social function theory of property suggests that there is a *prima facie* good reason for suspecting that the takings lack democratic legitimacy. There might be extenuating circumstances, but at least special scrutiny is in order. Plainly, the apparent lack of democratic merit is why takings like these, the quintessential economic development takings, deserve to be considered as a separate category in takings law.

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183 A concrete discussion of the point at stake here, in the context of Indian law, is given in **...** ("....."). 

184 Indeed, an assessment against democratic merit along the lines I propose here appears to provide a plausible basis on which to argue against the decision made by the Constitutional Court, c.f., the discussion in Section **??**. Moreover, by focusing on the systemic effect of the decision in that case, rather than the liberal rights of the affected owners, we would be in an excellent position to draw a crucial distinction between the minority and the majority in the Constitutional Court. Specifically, the democratic merit condition might well support the conclusion that while the majority opinion reflects a predatory attitude, a decision made in keeping with the minority argument (for the same concrete outcome) would have been legitimate.

## 2.7 Conclusion

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

This turn of events made the example even more relevant to the points I have been trying to make in this chapter. It served to highlight, in particular, that the question studied in this thesis is not a black-and-white balancing act between property privileges on one side and the good will of the regulatory state on the other. Rather, the example of Trump's golf course allowed me to emphasise the importance of context when assessing both the nature of property rights and the meaning of protecting them. In particular, to protect the property rights of those opposing Trump's golf course was not about protecting just any property, it was about protecting the property of members in a local community that felt it would be detrimental to this community, and to their lives, if Trump was allowed to redefine it. In particular, after Trump decided not to pursue compulsory purchase, protecting the property of these members of the community became a question of *restricting* the degree of dominion that Trump could exercise over his own property. Hence, under a conventional and overly simplistic way of looking at these matters, protecting property then became tantamount to restricting its use, a seeming paradox.

To resolve this paradox, and to arrive at a better conceptual understanding of economic development takings, I looked to various theories of property. I noted that there are differences between

civil law and common law theorising about property, but I concluded that these differences are not particularly relevant to the questions studied in this thesis. In particular, I observed that neither the bundle theory, dominant in the common law world, nor the dominion theory, taught to many civil law jurists, helped me clarify economic development takings as a category of legal thought.

I then went on to consider more sophisticated accounts of property, 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.

After this, I went on to consider economic development takings specifically, by drawing on the

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

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

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

# 3 Taking Property for Profit

## 3.1 Introduction

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

This chapter develops this idea further, by considering how economic development cases are dealt with in England, where such takings have yet to be widely recognised as a separate category, and the US, where they first began to attract special attention. In addition, the chapter considers case law from the ECtHR and asks what it tells us about how to approach economic development takings under European human rights law.[1] Finally, the chapter considers recent proposals for reform that focus on how to increase legitimacy by developing new institutions for self-governance to replace the traditional takings procedure in economic development cases.

I begin in Section 3.2 by commenting briefly on the importance of economic development takings on the global stage. Specifically, I note that the core issues raised by such takings appear relevant also in the context of developing economies, even when property rights as such are an unstable basis

[1] So far, the issue of economic development takings have been brought into focus at the Court in Strasbourg.

on which to reason about the rights and obligations of individuals and communities. Specifically, I propose that the social function theory might offer a conceptual bridge between the study of economic development takings and the study of *land grabbings*, large-scale land acquisitions in the developing world. In both cases, the worry is often that local communities, who might lack formal title to the land, suffer as a result of a dramatic change in property's social function.

In Section 3.3, I move on to consider the status of economic development takings in English law. This also serves to introduce the topic of my thesis from the point of view of an important jurisdiction in Europe, where the issue of economic development takings has attracted far less attention than in the US. It appears to be gaining importance, however, as public-private partnerships and a market-oriented approach to public services has become influential in many jurisdictions, including in England.

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

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

The Supreme Court adopted deference to state *courts* initially, before changing their perspective by adopting a policy of deference directed rather at the state *legislature* (in practice also the administrative branch). I argue that this shift in Supreme Court jurisprudence can be pin-pointed to the case of *Berman*.[2]

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

In Section 3.5.4, I follow this up by a discussion of developments after *Kelo*, which has seen a resurgence in state court scrutiny of the public use requirement, often backed up by state legislation that explicitly seeks to limit the scope of takings for economic development. According to some, such state reforms have been largely ineffective. In principle, the US public is almost unanimously on the side of the local communities in cases like *Kelo*, but in practice, the great distance between

[2] See *Berman v Parker* 348 US 26.

political cause and effect makes effective reform policies hard to formulate. The danger is that reform proposals come to rely on oversimplified narratives tailored to centralised processes of decision-making.

In Section **??**, I consider a proposal due to Heller and Hills that serves as a possible answer to this concern.[3] This proposal focuses on the need for new frameworks for collective action, institutions that can replace the top-down dynamics of eminent domain in cases of economic development. The goal is to ensure a greater level of self-governance for the communities directly affected by the development, the individual members of which have a rational incentive to invest time and effort in reaching sophisticated compromises that can replace the use of black-white solutions (be it in the form of an economic development taking or a politically sanctioned top-down *ban* on such takings).

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

## 3.2 The "Underscrutinised" Language of Economic Development

Economic development takings can be seen as a form of public-private partnership, whereby the state seeks to rely on for-profit takers and the market to fulfil some public purpose. Public-private partnerships are becoming increasingly important to the world economic order.[4] To some, they

[3] See Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) Harvard Law Review 1465.

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

are the illegitimate children of privatisation and deregulation, while others see them as efforts to make the public sector more efficient and accountable. Either way, public-private partnerships are becoming more important, and they appear to be here to stay.[5] In this situation, it is inevitable that when eminent domain is used to acquire property for economic development, those who directly benefit will often be commercial companies rather than public bodies. In the previous chapter, I pointed out how indirect public benefits are typically used to justify such takings. Standard legitimizing reasons include the prospect of new jobs, increased tax revenues, and various other economic and social ripple effects.

Despite more or less convincing evidence of such benefits, economic development takings have a tendency to result in controversy. After *Kelo*, economic development takings have also been at the forefront of the constitutional property debate in the US. In the rest of the world, a similar shift in academic outlook has yet to take place, but expropriation-for-profit situations are increasingly coming into focus also on the global stage.[6] If we broaden our perspective even more, to consider commercially motivated interference in property on the global scale, it even seems appropriate to speak of a crisis of confidence in property law, particularly in relation to land rights. This is most clearly felt in the developing world, where egalitarian systems of property use and ownership are coming under increasing pressure. It has been noted, in particular, that large-scale commercial actors are assuming control over an increasing share of the world's land rights, a phenomenon known as *land grabbing*.[7]

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

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

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

## 3.2. THE "UNDERSCRUTINISED" LANGUAGE OF ECONOMIC DEVELOPMENT

So far, most research on land grabbing has looked at how commercial interests, often cooperating with nation states, exploit weaknesses of local property institutions, to acquire land voluntarily, or from those who lack formal title. However, the similarity between economic development takings and state-aided land grabbings in favour of large commercial companies is striking.

In some cases, the two notions may coincide entirely. In India, for example, the scope of eminent domain has apparently become so wide that it allows for a "complete assertion of power" by the state.[8] This state power, moreover, is often used to "disempower people and redistribute rights and benefits", often to the benefit of people who are already better-off than those negatively affected.[9] Moreover, the language of eminent domain is apparently also invoked to justify controversial plans for the changed use of land that is not privately owned at all, but rather under forms of state ownership/custodianship.[10] Embedding controversial policy choices in a takings narrative has become an effective strategy to silence opposition of all kinds, including that which pertains directly to the question of social and economic justice for the poor and the landless.[11]

More specifically, it has been noted how the purported public interest in economic development can be used to justify massive land grabs that would otherwise appear unjustifiable. In a recent article, Smita Narula cites *Kelo* directly and warns that procedural safeguards alone might not provide sufficient protection against abuse. She writes:

> Procedural safeguards, however, can all too easily be co-opted by a state because its claims about what constitutes a public purpose may not be easy to contest. Partic-

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8 See Philippe Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (Oxford University Press 2009) 43.

9 See Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (n 8) 33.

10 See Lyla Mehta (ed), *Displaced by Development: Confronting Marginalisation and Gender Injustice* (Sage 2009) 141.

11 See Mehta (n 10) 143-144 ("the power of eminent domain has been interpreted as being close to absolute power of the State over all land and interests in land within its territory. The effect of this has been that those without access to land and rights over land (including the landless, artisans, women as a composite group), those who may have use rights but no titles, communities holding common rights and others with inchoate interests, have had to bear the burden heaved on to them by eminent domain.")

> ularly within the context of land investments, states could use the very general and under-scrutinized language of "economic development" to justify takings in the public interest.[12]

This quote underscores the broader relevance of the study of economic development takings. In addition, it asks us to keep in mind that the question of what can be justified in the name of "economic development" is a general one, not confined to particular systems for organizing property rights. To address this, and to restore confidence in the institution of property more generally, some academics and policy makers have proposed a novel concept of property as a human right.[13] It has been argued, in particular, that a human right to land should be recognised on the international stage, a right that would apply even when those affected by a land grab lack formal title. If successful, this approach promises to deliver basic protection against interference in established patterns of property use independently of how particular jurisdictions approach property.

In Europe, the human right to property is still usually understood in more conventional terms, as pertaining primarily to the rights of formally titled owners. However, a broad, social-function perspective on this right is influential due to the ECHR and the court in Strasbourg.[14] The issue of land grabbing highlights the importance of maintaining such a perspective, particularly when attempting to use western legal categories when analysing the developing world. In the context of land grabbing, protecting land rights is not primarily a question of protecting the civil law ideal of individual dominion. Rather, it is a question of providing protection against large-scale transactions that destabilise or destroy established patterns of land use, to the detriment of local

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

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

14 As discussed in Chapter 2, Section 6.3.2.

communities.

In human rights discourse, particularly relating to the developing world, the focus is often on pressing problems related to food and water security as well as the protection of basic livelihoods, issues that can arise with particular urgency in the context of land grabbing. However, to achieve effective protection we need firm categories and enforcible legal principles to back up our benchmarks and our good intentions. In this regard, I think Narula is right to stress that the lack of a convincing approach to the notion of "economic development" is a crucial challenge.

As an overarching goal, economic development is no doubt sound, particularly for poor nations. The problem is that the risk of abuse is great when such a vague term is used to justify dramatic interferences in property. Such interferences typically cause severe disturbances in people's lives. This, moreover, is true for a middle-class US homeowner in much the same way as it is true for a self-sustaining farmer in Africa, or a landless artisan in India, although the stakes might be very different. Hence, there seems to be great potential for exchange of ideas and insight between those working on economic development takings and those studying land grabs in the developing world.

In this thesis, I focus on legal systems where private property is well-established and relatively stable as a legal category. Moreover, my case study will look to Norway, a prosperous European country with a long tradition of an egalitarian distribution of land rights among the rural population. Hence, I will focus on situations when those affected by takings of land for economic development have a *prima facie* cause for objecting on the basis of recognised property rights. Therefore, the complications that occur when those most severely affected do not have formally recognised property rights will not be considered in any depth. However, I believe this a very interesting avenue for future work.

In the following, I will present a comparative background for my case study. I will begin by considering English law, where courts have generally been reluctant to broadly scrutinize the use of economic development as a justification for state interference in property. After this, I turn

to the ECHR and the proportionality test that is now at the core of property adjudication at the ECtHR. I note that while states are considered to have a wide margin of appreciation with regards to the legitimacy of the purpose underlying interference, the balancing required under the proportionality test can still become a powerful basis on which to scrutinize the broader negative effects of economic development takings.

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

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

## 3.3 Economic Development Takings in England

Economic development takings have not become as controversial in Europe as they are in the US, but there have been cases where the issue has come up, in several different jurisdictions.[15]

In this section, I address economic development takings from the point of view of English law.

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

In England, the principle of parliamentary supremacy and the lack of a written constitutional property clause has led to expropriation being discussed mostly as a matter of administrative law and property law, not as a constitutional issue.[16] Moreover, the use of compulsory purchase – the term most often used to denote takings in the UK – has not been restricted to particular purposes as a matter of principle. The uses that can warrant compulsory alienation of property are those that parliament regard as worthy of such consideration. However, as private property itself has long been recognised as a fundamental right, the power of compulsory purchase has typically been exercised with caution.

In his *Commentaries on English Law*, William Blackstone famously described property as the "third absolute right" that was "inherent in every Englishman".[17] Moreover, Blackstone expressed a very restrictive view on the possibility of expropriation, arguing that it was only the legislature that could legitimately interfere with property rights. He warned against the dangers of allowing private individuals, or even public tribunals, to be the judge of whether or not the "common good" could justify takings. Blackstone went as far as to say that the public good was "in nothing more invested" than the protection of private property.[18]

Historically, Blackstone's description conveys a largely accurate impression of takings practice in England. Indeed, Parliament itself would usually be the granting authority in expropriation cases, through so-called *private Acts*. Hence, compulsory purchase would not take place unless it had been discussed at the highest level of government. Moreover, the procedure followed by parliament in such cases strongly resembled a judicial procedure; the interested parties were given

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

17 See William Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press 1979) 134-135. The first right, according to Blackstone, is security, while the second is liberty.

18 Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (n 17) 134-135.

an opportunity to present their case to parliament committees that would then decide whether or not compulsion was warranted.[19]

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

During the 19th Century, as an industrial economy developed, private acts granting compulsory purchase powers to commercial companies grew massively in scope and importance.[20] Private railway companies, in particular, regularly benefited from such acts.[21] During this time, the expanding scope of private-to-private transfers for economic development led to high-level political debate and controversy. Usually, it would attract particular opposition from the House of Lords. Interestingly, this opposition was not only based on a desire to protect individual property owners. It also often reflected concerns about the cultural and social consequences of changed patterns of land use.[22]

Hence, the early *political* debate on economic development takings in the UK shows some reflection of a social function approach to property protection. At the same time, as society changed following increasing industrialisation, an expansive approach to compulsory purchase would eventually emerge as the norm.[23] The idea that economic development could justify takings gradually

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

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

21 Allen, *The Right to Property in Commonwealth Constitutions* (n 19) 204. See generally RW Kostal, *Law and English Railway Capitalism* (Clarendon Press 1997).

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

23 Arguably, the social function perspective is the key to understanding why this happened. Indeed, the expanded use of private takings in England during the 19th century, particularly in connection with the railways, might have served

became less controversial.

Today, the law on compulsory purchase in England is regulated in statute and the role of courts is to a large extent limited to the application and interpretation of statutory rules. Some common law rules still play an important role, such as the *Pointe Gourde* rule, which stipulates that changes in value due to the compensation scheme itself should be disregarded when calculating compensation to the owner.[24] With respect to the question of legitimacy, however, the starting point for English courts is that this is a matter of ordinary administrative law.[25]

More recently, the Human Rights Act 1998 adds to this picture, since it incorporates the property clause in P1(1) into English law. Even so, the usual approach in England is to judge objections against compulsory purchase orders on the basis of the statutes that warrant them, rather than constitutional principles or human rights provisions that protect property.[26] It is typical for statutory authorities to include standard reservations to the effect that some public benefit must be identified in order to justify a compulsory purchase order, but the scope of what constitutes a legitimate purpose can be very wide. For instance, to warrant a taking under the

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a more easily justifiable social function than that commonly associated with economic development takings today. Waring, in particular, notes how railway takings tended to affect aristocratic landowners rather than marginalised groups ("unlike private takings today, the railway legislation was most likely to affect those who could best defend their property rights from attack"), see **waring09**

24 The rule takes it name the case of *Pointe Gourde Quarring & Transport Company Limited v Sub-Intendent of Crown Lands (Trinidad and Tobago)* [1947] UKPC 71. The underlying principle, including also statutory regulations with a similar effect, is referred to as the "no scheme" principle, see Compulsory Purchase and Compensation: Disregarding the Scheme (Discussion Paper, Law Commission 2001). The principle is found in many jurisdictions, see Jacques Sluysmans, Stijn Verbist and Regien de Graaff, 'Compensation for Expropriation: How Compensation Reflects a Vision on Property.' (2014) 2014(1) European Property Law Journal 3. The principle is often quite contentious, and notoriously hard to apply in practice. For a recent attempt at clarifying the principle, see *Waters and other v Welsh National Assembly* [2004] UKHL 19. I note that a strict interpretation of the no-scheme principle effectively precludes benefit sharing between takers and owners, a phenomenon that is of particularly relevance in the context of economic development takings. I will not address this particular issue in any depth here – I choose instead to focus on legitimacy of takings in a broader, non-compensatory sense. However, the compensation aspect of economic development takings is also very interesting (and challenging). For further details, I refer to Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

25 See Taggart (n 16).

26 See **waring09** The important statutes are the Acquisition of Land Act 1981, the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004.

Town and Country Planning Act 1990, it is enough that it will "facilitate the carrying out of development, redevelopment or improvement on or in relation to the land".[27]

While various governmental bodies are authorised to issue compulsory purchase orders (CPOs), a CPO typically has to be confirmed by a government minister.[28] The affected owners are given a chance to comment, and if there are objections, a public inquiry is typically held. The inspector responsible for the inquiry then reports to the relevant government minister, who makes the final decision about whether or not it should be granted, and on what terms. The CPO may then be challenged in court, but will usually only be scrutinized on the basis of whether or not it lies within the scope of the statute authorising it, not on the basis of whether or not the purpose of the taking appears to be legitimate as such.[29]

That said, the idea that property may only be compulsorily acquired when the public stands to benefit permeates the system. Indeed, this has also been regarded as a constitutional principle, for instance by Lord Denning in *Prest v Secretary of State for Wales*.[30] He said:

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

27 Town and Country Planning Act 1990 s 226.

28 See **waring09**

29 See, e.g., **waring09**

30 *Prest v Secretary of State for Wales* (1982) 81 LGR 193.

matter, the balance must be resolved in favour of the citizen.[31]

Lord Denning also supported the doctrine of necessity, as expressed by Forbes J in *Brown v Secretary for the Environment*:[32]

> It seems to me that there is a very long and respectable tradition for the view that an authority that seeks to dispossess a citizen of his land must do so by showing that it is necessary, in order to exercise the powers for the purposes of the Act under which the compulsory purchase order is made, that the acquiring authority should have authorisation to acquire the land in question.[33]

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

> The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.[34]

In *R v Secretary of State for Transport, ex p de Rothschild*, Slade LJ referred to *Prest* and made clear that he did not regard it as expressing a rule concerning the burden of proof in compulsory

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31 *Prest v Secretary of State for Wales* (n 30) 198.

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

33 *Brown v Secretary for the Environment* (n 32) 291.

34 *Prest v Secretary of State for Wales* (n 30) 211-212.

purchase cases. Rather, he took it as more general observation on the severity of property interference and the importance of vigilance in such cases.[35] He pointed to "a warning that, in cases where a compulsory purchase order is under challenge, the draconian nature of the order will itself render it more vulnerable to successful challenge".[36]

### 3.3.1 *Sainsbury's Supermarkets Ltd v Wolverhampton City Council*

An illustration of how English courts approach objections to the legitimacy of takings is found in the recent case of *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*.[37] Here a CPO was granted to allow the company Tesco to acquire land from its competitor Sainsbury, in a situation when they were both competing for licenses to undertake commercial development on the same land, owned partly by both. The decisive factor that had led the local authorities to grant the CPO was that Tesco had offered to develop a different property in the same local area, which was currently in need of regeneration.

Sainsbury protested, arguing that the local council could not strike such a deal on the use of its compulsory purchase power. It was argued, moreover, that taking the land for incidental benefits resulting from development in a different part of town was not legitimate under the Town and Country Planning Act 1990. The UK Supreme Court agreed 4-3, with Lord Walker in particular emphasising the need for heightened judicial scrutiny in cases of private-to-private takings for economic development.[38] Lord Walker even cited *Kelo*, to further substantiate the need for a stricter standard in such cases.[39]

However, the main line of reasoning adopted by the majority was based on an interpretation of

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

36 *R v Secretary of State for Transport, ex p de Rothschild* (n 35) 938.

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

38 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 37) 80-84.

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

the Town and Country Planning Act itself. In particular, the majority held that it was improper for the local council to take into consideration the development that Tesco had committed itself to carry out on a different site.[40] This, in particular, was not "improvement on or in relation to the land", as required by the Act.[41] In addition, Lord Collins, who led the majority, said that "the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision maker".[42] These comments reflect the traditional approach to judicial review of CPOs under English law, demonstrating how the underlying statutory authority tends to be at the center of attention.

However, it is interesting to see how the purpose of the interference featured in the background of the Supreme Court's interpretation and application of the statutory rule. The opinion of Lord Walker is particularly interesting, since he stresses that "the land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential."[43] He goes on to state that "economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive."[44]

Lord Walker then makes clear that he does not think it is impermissible, as such, for the local council to take into account positive effects on the local area, even when these do not directly result from the planned use of the land that is being acquired. Instead, he relies explicitly on the for-profit character of the taking, by arguing that "the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current owner's

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40 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 37) 73-79.

41 Town and Country Planning Act 1990, s 336.

42 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 37) 70.

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

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

proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for."[45]

Lord Walker's opinion might indicate that the narrative of economic development takings is about to find its way into English case law. Moreover, a more critical approach might be adopted in the future, when compulsory purchase powers are made available to commercial companies wishing to undertake for-profit schemes. However, for schemes where the commercial aspect appears less dominant, English courts still appear very reluctant to quash CPOs, also when the purpose is economic development. This is so even in situations when the owners have requested a stricter standard of review on the basis of human rights law.[46]

## 3.4 The Property Clause in the European Convention of Human Rights

The standard account of the protection against interference inherent in P1(1) describes it as consisting of three rules.[47] First, there is the rule of *legality*, asserting that an interference needs to be authorized by statute. Second, there is the rule of *legitimacy*, making clear that interference should only take place in pursuance of a legitimate public purpose. The third rule is the "fair balance" principle, requiring proportionality between the means and the aims in cases involving property interference.[48]

The starting point for property adjudication at the ECtHR is that States have a "wide margin

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45 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 37) 84.

46 See *Smith and Others v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), (2008) 1 WLR 394; *Alliance Spring Co Ltd v The First Secretary of State* [2005] EWHC 18 (Admin). See also the commentary in Gray, 'Recreational Property' (n 6).

47 For a more detailed description of P1(1) generally, I refer to Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005).

48 See *Sporrong and Lónnroth v Sweden* Series A no 52, para 69 and *James and others v United Kingdom* (1986) Series A no 98, para 120.

of appreciation" with regard to the legitimacy question.[49] This question is thought to depend on democratically determined policies to such an extent that it is rarely appropriate for the Court to censor the assessments made by member states. At the same time, the Court has gradually adopted a more active role in assessing whether or not particular instances of interference are proportional and able to strike a fair balance between the interests of the public and the property owners. As argued by Allen, this has caused P1(1) to attain a wider scope than what was originally intended by the signatories.[50]

In the early case law behind this development, the focus was predominantly on the issue of compensation, with the Court gradually developing the principle that while P1(1) does not entitle owners to full compensation in all cases of interference, the fair balance will likely be upset unless at least some compensation is paid, based on the market value of the property in question.[51]

As mentioned in Section **??** of Chapter 2, it has now become clear that the fair balance test encompasses more than this. In particular, the hunting cases show that the Court in Strasbourg is willing to reflect broadly on the context and purpose of interference, to critically assess the social function of the taking.

Less obviously, a similar sentiment appears to be behind the Court's reasoning in recent cases involving rent control schemes and housing regulation.[52] There are obvious financial interests at stake in such cases, for both landlords and tenants. However, the Court has addressed these cases by looking to the fairness of the underlying regulation more generally, by critically evaluating the social, economic and political context. Moreover, the Court has not shied away from using concrete cases as a starting point for providing an assessment of the sustainability of national provisions as

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49 See *James* (n 48) para 54.

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

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

52 See *Hutten-Czapska v Poland* ECHR 2006–VIII 628; *Lindheim and others v Norway* ECHR 2012 985.

such.

### 3.4.1 *Hutten-Czapska v Poland*

The striking conclusion in *Hutten-Czapska v Poland*, which makes it interesting for the questions studied in this thesis, was that it demonstrated "systemic violation of the right of property".[53] The case concerned a house that had been confiscated during the Second World War. After the war, the property was transferred back to the owners, but in the meantime, the ground floor had been assigned to an employee of the local city council. The state implemented strict housing regulations during this time, which eventually led to the applicant's house being placed under direct state management.[54] Following the end of communist rule in 1990, the owners were given back the right to manage their property, but it was still subject to strict regulation that protected the rights of the tenants.[55] In addition to rent control, rules were in place that made it hard to terminate the rental contracts. Hence, it became impossible for the owners to make use of the house themselves.[56]

After an in-depth assessment of the relevant parts of Polish law and administrative practice, the Grand Chamber of the ECtHR concluded that there had been a violation of P1(1). Importantly, they did not reach this conclusion by focusing on the owners and the interference that had taken place with respect to their individual entitlements. Rather, they focused on the overall character of the Polish system for rent control and housing regulation, as it manifested in the concrete circumstances of the applicant's case.

The financial consequences for the owners were considered to shed light on a broader question of sustainability, as was the financial situation of the tenants.[57] The Court was particularly

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53 *Hutten-Czapska* (n 52) para 239.

54 *Hutten-Czapska* (n 52) paras 20-31.

55 *Hutten-Czapska* (n 52) paras 31-53.

56 *Hutten-Czapska* (n 52) paras 20-53.

57 *Hutten-Czapska* (n 52) paras 60-61.

concerned with the fact that the total rent that could be charged for the house in question was not sufficient to cover the running maintenance costs.[58] In particular, it was noted that the consequence of this would be "inevitable deterioration of the property for lack of adequate investment and modernisation".[59]

In the end, the Court highlighted how three factors combined to bring both owners and their properties to a precarious position. First, the rigid rent control system made it hard to sustainably manage rental property. Second, tenancy regulation made it hard for owners to terminate tenancy agreements. Third, the Court noted that the state itself had set up these tenancy agreements during the days of direct state management, shedding doubt on the legitimacy of the commitments that these contracts imposed on owners. In combination, these factors led the Court to conclude that a fair balance had not been struck.[60]

The contextual nature of the Court's reasoning in *Hutten-Czapska* is evidenced not only by the extent to which the concrete circumstances were assessed against the goal of fairness. It is also illustrated by how the Court explicitly places the "social rights" of the tenants on equal footing with the property rights of the owners.[61] The result, therefore, was not premised on a narrow understanding of property protection as an individual entitlement, but on a broader vision of property as a social institution.

It is also of interest to note how the Court concludes that the root of the problem is with the Polish legal order as such. In this regard, great weight is placed on the observation that the regulatory system suffers from a lack of adequate safeguards to protect owners against imbalances such as those identified in *Hutten-Czapska*. In particular, the Court reflects on the position of

58 *Hutten-Czapska* (n 52) para 224.

59 *Hutten-Czapska* (n 52) para 224.

60 *Hutten-Czapska* (n 52) paras 224-225.

61 *Hutten-Czapska* (n 52) para 225.

owners and comments on "the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with the maintenance of property or to have the necessary repairs subsidised by the State in justified cases". Hence, the rent control scheme alone was not the whole problem, the Court also criticised what it saw as a defective way of implementing it.[62] Moreover, the Court did not censor the political reasoning that motivated Polish housing legislation, but concluded instead that the "burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole".

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

Instead, the aim should always be to get at the systemic features that cause perceived imbalances. As in *Hutten-Czapska v Poland Hutten-Czapska*,[63] the Court serves its function best when it is able to use concrete information about a suspect case to identify a sense in which the domestic legal order needs to be improved to better comply with human rights standards. This is particularly true when, as in that case, the Court notes that the applicants have insufficient options

62 *Hutten-Czapska* (n 52) para 224.

63 *Hutten-Czapska* (n 52).

available for achieving a fair balance by appealing to institutions within the domestic legal order. By demanding *institutional* changes, the Court effectively delegates responsibility for ensuring the kind of fair balance that is required under the ECHR. Moreover, by scrutinizing the procedures and principles that the states apply when fulfilling this duty, it is likely that the Court will still be able to steer and unify the development of the case law.

Importantly, they would then be able to do so without having to engage extensively in concrete assessments of fairness. Against this, one may argue that the judicial or administrative bodies of the signatory states can easily circumvent their obligations by giving a superficial or biased assessment of the facts in human rights cases, to avoid embarrassment for the state's political or bureaucratic elite. However, this might then be raised as a procedural complaint before the ECtHR, resulting in cases revolving around Articles 6 (fair trial) and 13 (effective remedy).[64] In this way, the Court can streamline its functions, by always aiming to direct attention at issues that arise at a higher level of abstraction. This, in my view, is desirable. The ECtHR should not aim to micromanage the signatory states, particularly not in relation to a norm such a P1(1), which the Court itself regards as highly dependent on context.

However, the question arises as to what kind of institutions the Court should focus on in its effort to ensure fairness in relation to Convention rights such as property. It is not given, in particular, that directing attention towards domestic judicial bodies is the most appropriate approach. Rather, it is logical to assume that those institutions most in need of reform will be exactly those that are most often responsible for violations. A possible lack of an effective complaints procedure would be worrying, but not as problematic as systemic weaknesses of those institutions that act in ways that give rise to complaints in the first place.

By shifting attention towards the institutional context of the primary decision-maker, the Court

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

can also avoid getting stuck in deference to domestic judicial bodies. This can then be accomplished alongside a shift of attention away from concrete assessment of alleged violations. The Court can achieve this by concretely and critically assessing those rules and procedures that are identified as causally significant to individual complaints, at the administrative rather than the judicial level.[65]

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

The proportionality doctrine could still be applied, but approached in more abstract terms as the question of what kinds of rules, and what kinds of institutions, member states need to put in place to ensure fairness. This perspective appears to have been adopted in the case of *Lindheim and others v Norway*. Here the applicants complained that their rights had been violated by a recent Norwegian act that gave lessees the right to demand indefinite extensions of ground leases on pre-existing conditions.[66] In the end, the Court concluded that there had indeed been a breach of P1(1). They engaged in the same form of assessment that they had adopted in *Hutten-Czapska v Poland Hutten-Czapska*.[67] Moreover, they concluded that the Ground Lease Act 1996 as such was the underlying source of the violation – the problem was not merely that this act had been applied in a way that offended the rights of the applicants. In light of this, the Court did not only

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

66 *Lindheim and others v Norway* (n 52) para 119.

67 *Hutten-Czapska* (n 52).

award compensation, it also ordered that general measures had to be taken by the Norwegian state to address the structural shortcomings that had been identified.

The Court also commented that its decision should be regarded in light of "jurisprudential developments in the direction of a stronger protection under Article 1 of Protocol No. 1".[68] However, in light of the change in perspective that accompanies this development, it is interesting to ask in what sense the protection is stronger. In particular, it is not *prima facie* clear that the Court's remark should be read as a statement expressing a change in its understanding of the content of individual rights under P1(1). Rather, it may be read as a statement to the effect that the Court now assumes it has greater authority to address structural problems under that provision. In effect, this allows the Court to conclude that a violation has occurred due to structural unfairness, even when it is not possible to trace this back to any flawed decision that specifically targets the applicants.

### 3.4.2 How Would the ECtHR Approach an Economic Development Taking?

Is the jurisprudential developments illustrated by the rent control cases relevant to the issue of economic development takings? I believe so. Indeed, I am struck by how the reasoning of the ECtHR in recent cases on hunting and rent control mirrors the kind of reasoning that Justice O'Connor engaged in when considering *Kelo*.[69] The emphasis is on structural aspects and fairness, grounded on the facts of the concrete case, but mainly interested in what these facts reveal about the rules and procedures involved.

This is a contextual approach that can maintain a broad focus without loosing its bite. The crux of arguments used to conclude violation is the observation that the system currently in place

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68 *Lindheim and others v Norway* (n 52) para 135.

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

can offend against the role that owners *should* occupy in order to be able to meet those obligations and exercise those freedoms that are attached to the properties they posses.

On this narrative, interference becomes illegitimate when it demonstrates a failure of governance. In the case of *Hutten-Czapska v Poland Hutten-Czapska*,[70] this boiled down to the observation that it was illegitimate to address problems in the Polish housing sector by placing the burden "on one particular social group", namely the owners.[71] This conclusion was backed up by the concrete observation that the rules and procedures in place meant that owners who were obliged to maintain their properties in good condition for their tenants were in fact prevented from doing so because they were not permitted to charge rents that would cover the costs.

In the case of *Kelo*, Justice O'Connor argued in a similar fashion when she concluded that the system which had led to the decision to condemn Suzanne Kelo's house was likely to function so as to systematically "transfer property from those with fewer resources to those with more". To Justice O'Connor, there was little doubt that this could become a general pattern, if safeguards were not put in place.

To conclude, I think the ECtHR would have been likely to approach a case like *Kelo* in a manner consistent with Justice O'Connor's approach. Whether they would reach the same conclusion seems more uncertain, particularly since confidence in the nation states' ability and willingness to regulate private-public partnerships might be higher in Europe.[72] However, it seems unlikely that the ECtHR would follow the majority in *Kelo*, by simply deferring to the determinations made by the granting authority. Moreover, with the recent change in perspective towards structural assessment of property institutions, Justice O'Connor's predictions about the "fallout" of the *Kelo*

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70 *Hutten-Czapska* (n 52).

71 *Hutten-Czapska* (n 52) para 225.

72 For a discussion from the point of view of English law, arguing that the prevailing regulatory regime limits the risk of eminent domain abuse largely through regulation of the takings power rather than strict property protection, see in .

decision would likely have been of significant interest to the justices at the Court in Strasbourg.

## 3.5 The US Perspective on Economic Development Takings

In this section, I consider US law in more depth. First, I track the development of the case law on the public use restriction found in the Fifth Amendment and in various state constitutions. I consider the jurisprudential development from the early 19th century up to the present day.[73] Many writers assert that case law from the 19th and early 20th century was characterised by a tension between 'narrow' and 'broad' readings of the notion of public use.[74] Adding to this, I argue that while different state courts expressed different theoretical views on the meaning of "public use", there was a growing consensus that the approach to judicial scrutiny should be contextual, focused on weighing the rationale of the taking against the social, political and economic circumstances.[75] In particular, early state courts did not focus unduly on the exact wording of constitutional property clauses.

Following up on this, I argue that the doctrine of deference that was developed by the Supreme Court early in the 20th century was directed primarily at state courts, not state legislatures and administrative bodies.[76] I then present the case of *Berman*, arguing that it was a significant departure from previous case law.[77] After *Berman*, deference was now taken to mean deference to the (state) legislature, meaning that there would be little or no room for judicial review of the takings purpose.

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

74 See, e.g., Walt (n 15) 483; Allen, *The Right to Property in Commonwealth Constitutions* (n 19) 203-204. For a more in-depth argument asserting the same, see Philip Nichols, 'The Meaning of Public Use in the Law of Eminent Domain' (1940) 20 Boston University Law Review 615.

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

76 See *City of Cincinnati v Vester* 281 US 439 (1930) (echoing and citing *Hairston v Danville & W R Co* (n 75)).

77 *Berman v Parker* (n 2).

This paved the way for the infamous case of *Poletown*, where a neighbourhood of about 1000 homes was razed in order to provide General Motors with land to build a car factory.[78] I note how *Berman* provided a key authority used by the state court to uphold this taking. *Poletown* in turn links up with the even greater controversy surrounding *Kelo*, the eventual backlash of the deferential stance introduced in *Berman*.

After the historical overview, I go on to briefly present the vast amount of research that has targeted economic takings in the US after *Kelo*. I devote special attention to a proposal due to Heller and Hills, who propose a new institution that can replace eminent domain as a mechanism for land assembly in case of economic development.[79] This proposal will serve as important reference point later on, when I consider the Norwegian land consolidation courts in Chapters 6.

### 3.5.1 The History of the Public Use Restriction

Going back to the time when the Fifth Amendment was introduced, there is not much historical evidence explaining why the takings clause was included in the Bill of Rights.[80] Moreover, there is little in the way of guidance as to how the takings clause was originally understood. James Madison, who drafted it, commented that his proposals for constitutional amendments were intended to be uncontroversial.[81] Hence, it is natural to regard the property clause as a codification of an existing principle, not a novel proposal. Indeed, several state constitutions pre-dating the Bill of Rights also included takings clauses, seemingly based on codifying principles from English common law.[82]

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

79 Heller and Hills (n 3).

80 See Fifth Amendment to the US Constitution 1791.

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

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

As Meidinger notes, the Americans had never really charged the British with abuse of eminent domain, and private property had tended to be respected, also in the colonies.[83] This undoubtedly influenced early US law.

Just like English scholars at the time, early American scholars emphasised the importance of private property. For instance, in his famous *Commentaries*, James Kent described the sense of property as "graciously implanted in the human breast" and declared that the right of acquisition "ought to be sacredly protected".[84] Indeed, the Supreme Court itself expressed similar sentiments early on, when it spoke of the impossibility of passing a law that "takes property from A and gives it to B".[85]

However, just as would happen in England, this early US attitude would soon change in response to industrial advances and a desire for economic development. As the 19th century progressed, eminent domain was used more frequently, now also to benefit (privately operated) railroad operations, hydroelectric projects, and the mining industry.[86] During this time, it also became increasingly common for landowners to challenge the legitimacy of takings in court, undoubtedly a consequence of the fact that eminent domain was used more widely, for new kinds of projects.[87] Controversy arose particularly often with respect to the so-called mill acts.[88] Such acts were found throughout the US, many of them dating from pre-industrial times when mills were primarily used to serve the farming needs of agrarian communities.[89] Following economic and technological advances, provi-

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

84 See see James Kent, *Commentaries on American law* (1st edn, Commentaries on American Law, vol 2, O Halsted 1827) 257.

85 This was a *de dicta* in *Calder v Bull* 3 US 386, 388 (1798). See also *Vanhorne's Lessee v Dorrance* 2 US 304, 310 (1795).

86 Meidinger (n 83) 23-33.

87 Meidinger (n 83) 24.

88 Meidinger (n 83) 24. See also Johnson (n 82) 306-313 and Morton J Horwitz, 'The Transformation in the Conception of Property in American Law, 1780-1860' (1973) 40 University of Chicago Law Review 248, 251-252.

89 A total of 29 states had passed mill acts, with 27 still in force, when a list of such acts was compiled in *Head v Amoskeag Mfg Co* 113 US 9, 17 (1885). According to Justice Gray, at pages 18-19 in the same, the "principal

sions originally enacted to serve local farming purposes were now being used by developers wishing to harness hydropower for manufacturing and hydroelectric plants.[90]

It is important to note, however, that mill acts could not be used to authorise large-scale compulsory transfer of natural resources from owners to non-owners. Rather, mill acts provided management tools that could be used to ensure that owners of water resources could make better use of their rights. This would sometimes involve allowing riparian owners to interfere with, or take a necessary part of, the property of their neighbours, e.g., by constructing dams that would flood neighbouring land.[91] However, the primary purpose of most mill acts was to facilitate rational coordination among owners, to the benefit of their community as a whole. This point was frequently made by the courts to justify upholding takings on the basis of mill acts, including takings that would benefit the manufacturing industry.[92]

As the industrial use of mill acts increased in scope, the original aim of these acts gradually became overshadowed by the strength of the commercial interests involved, leading to public use controversy relating to provisions that had not previously raised any such doubts.[93] This mechanism, deeply dependant on the social and economic context, underscores the appropriateness of adopting a social function perspective on the relevant body of case law. More generally, it seems that most of the early case law on the public use test from US state courts is characterised by a contextual understanding of property protection. In the following, I explore this in some further detail.

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objects" for early mill acts had been grist mills typically serving local agrarian needs at tolls fixed by law, a purpose which was generally accepted to ensure that they were for public use.

90 See, e.g., *Head* (n 89) 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

91 See *Head* (n 89) (a mill case adjudicated by the Supreme Court, including a summary of mill acts and case law from various states). See also Abram P Staples, 'The Mill Acts' (1903) 9(4) The Virginia Law Register 265, 265.

92 See *Fiske v Framingham Mfg Co* 12 Pick 68 (1831). See also the discussion (including references to other cases) in *Head* (n 89).

93 See **head86**

### 3.5.2 Legitimacy in State Courts

When considering objections to the legitimacy of takings, state courts would not look to the federal Takings Clause directly, but rather base their decisions on corresponding property clauses from their own respective state constitutions.[94] Indeed, it was not until the late 19th century that state takings came to be regularly scrutinized at the federal level.[95]

When a state court upheld an interference that would benefit commercial interests, it would typically emphasise the broader purpose, often focusing on economic ripple effects.[96] By contrast, when a court decided that an interference was unconstitutional, it would often focus on the concrete use made of the property that was taken, pointing out that it did not directly benefit the public in the sense required by the public use restriction.[97] Sometimes, the question of legitimacy would turn on how widely the notion of 'use' was understood. Should this notion be interpreted narrowly, as requiring that the property had to be literally used by the public, or could it be understood broadly, as pointing to a public purpose or benefit of some sort?[98]

This tension between broad and narrow readings of the public use clause have received much attention from legal scholarship.[99] However, when studying the case law in more depth, a com-

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94 Not all states had such property clauses, and exact formulations varied, but a public use requirement was typically observed, see Johnson (n 82) 293-296.

95 At first, the federal scrutiny took place on the basis of the due process clause in the Fourteenth Amendment, see **head75** The federal takings clause itself was only applied to state takings after 1897, see *Chicago, Burlington & Quincy RR Co v City of Chicago* (n 73).

96 See, e.g., *Hazen v Essex Co* 66 Mass 475 (1853); *Scudder v Trenton Delaware Falls Co* 1 NJ Eq 694 (1832); *Boston & Roxbury Mill Corp v Newman* 29 Mass 467 (1832). A more comprehensive list of cases adopting a broad view can be found in Nichols (n 74) 617.

97 See, e.g., *Sadler v Langham* 34 Ala 311 (1859); *Ryerson v Brown* 35 Mich 333 (1877); *Gaylord v Sanitary Dist of Chicago* 68 NE 522 (1903); *Minnesota Canal & Power Co v Koochiching Co* (n 90). A more comprehensive list can be found in Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 'American Law Reports' (1928).

98 According to Nichols, the narrow view emerged as the "majority" opinion on public use, see (Nichols [n 74] 617-618). But contrast this with Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1978) 57 Oregon Law Review 203 and Meidinger (n 83) 24, who argue that the narrow view was only dominant in a handful of states, led by New York.

99 See Nichols (n 74); Berger (n 98); Meidinger (n 83); Johnson (n 82).

plementary picture emerges, testifying to some cohesion in the states' jurisprudence. Regardless of their reading of the public use requirement, state courts seem to have agreed that the question of what counted as a public use was a judicial question that should be assessed concretely, not abstractly.

A good example is the case of *Dayton Gold & Silver Mining Co v Seawell*, concerning an act that gave mineral owners a right to acquire additional rights needed to facilitate extraction.[100] The Supreme Court of Nevada decided that the act was constitutional on the basis of a highly contextual reading of the public use requirement in the property clause of the Constitution of Nevada. Interestingly, the Court argued against a literal (narrow) reading on the basis that such a reading would ultimately provide *weaker* protection of property:

> If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. [...] Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor.[101]

The quote presents an argument in favour of a broad understanding of the public use require-

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

[101] *Dayton Gold & Silver Mining Co v Seawell* (n 100) 410-411.

ment. However, it also prescribes broad judicial review of takings purposes, including purposes that would appear to pass a 'narrow' public use test. In this way, it asks us to resist the temptation to think that a broad understanding of public use necessarily entails a public use test that can be passed more easily.

The Court follows up on its reading of the public use requirement by giving a highly contextual assessment of the takings purpose. Specifically, it considers the social and economic importance of mining, concluding that it is the "greatest of the industrial pursuits" and that all other interests are "subservient" to it.[102] Indeed, the Court goes as far as to conclude that the benefits of the mining industry are "distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills".[103] On this basis, the Court upholds the taking.

I am agnostic as to whether or not this decision was based on an accurate description of the mining industry in Nevada in the late 19th century. The importance of the decision and the remarks above does not turn on this factual question. Rather, the importance arises from the fact that the Court felt the need to scrutinize the takings purpose very broadly. The issue of legitimacy was not approached as a linguistic exercise or an attempt at recreating the original intent of the relevant property clause. Instead, the court proceeded on the basis of their assessment of the prevailing social and economic conditions in the state of Nevada.

The Court noted the importance of deference to the legislature on matters of policy, but qualified this by remarking that any authority to take property had to be "enforced by the courts so as to prevent its being used as an instrument of oppression to any one".[104] Furthermore, the Court was convinced that its contextual approach in this regard would generally offer *increased* protection of private property compared to more formalistic approaches. The Court summarised its view on this

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[102] *Dayton Gold & Silver Mining Co v Seawell* (n 100) 409.

[103] *Dayton Gold & Silver Mining Co v Seawell* (n 100) 409.

[104] *Dayton Gold & Silver Mining Co v Seawell* (n 100) 412.

as follows:

> Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent.[105]

The *Seawell* case is not unique. For another example, I mention *Ryerson v Brown*, a case often cited as an authority for a narrow view of public use.[106] Here the taking in question was held to be unconstitutional. However, the Supreme Court of Michigan qualified also made clear that it was "not disposed to say that incidental benefit to the public could not under any circumstances justify an exercise of the right of eminent domain".[107]

The case concerned the constitutionality of a taking under a mill act, and while the court argues that public use should be taken to mean "use in fact", it is clear that "use" is understood rather loosely, not literally as physical use of the property that is taken.[108] Moreover, when clarifying its starting point for judicial scrutiny, the court explains that "in considering whether any public policy is to be subserved by such statutes, it is important to consider the subject from the standpoint of each of the parties". Following up on this, the court finds, with respect to the case in question, that "the power to make compulsory appropriation, if admitted, might be exercised under circumstances when the general voice of the people immediately concerned would condemn it". On thi basis,

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105 *Dayton Gold & Silver Mining Co v Seawell* (n 100) 398.

106 *Ryerson v Brown* (n 97).

107 *Ryerson v Brown* (n 97) 337.

108 The court explains its stance on the public use restriction by stating (emphasis added) "it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to *accommodations*." The court continues with an illustrative example: "A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbour to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed the two last named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade". See *Ryerson v Brown* (n 97) 336.

the Court strikes down the taking, summing up its factual assessment as follows: "what seems conclusive to our minds is the fact that the questions involved are questions not of necessity, but of profit and relative convenience".[109]

Hence, far from nitpicking on the basis of the public use phrase, the court adopts a contextual approach to takings that is rather similar to the approach of *Dayton Gold & Silver Mining Co. v. Seawell*. The outcome is different, but it is also based on a different assessment of the context and the consequences of the takings complained about. Importantly, the case does not rest on any *a priori* assumption that economic development takings of the kind in question could not meet a public use test – no general rule is relied on at all. Hence, it is somewhat strange that later commentators have focused on the case for its ambiguous comments on public use as "public in fact" rather than its broad and well-reasoned assessment of actual legitimacy.[110]

Many of the important cases from the late 19th century, on both sides of the public use debate, share crucial features with the two cases discussed above.[111] Hence, a shared trait appears to have emerged among state courts during this period, namely a willingness to engage in broad judicial scrutiny of the legitimacy of economic development takings. Indeed, state courts appear to have been conscious of the special legitimacy questions that arise when eminent domain is used to facilitate economic development through commercial enterprise. The question of how to understand public use terminology was an important part of this, but it was not considered in isolation from other aspects.

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109 *Ryerson v Brown* (n 97) 336.

110 See, for instance, Justice Thomas' dissent in *Kelo*, *Kelo* (n 69) 513 (using *Ryerson* as a reference to support an 'actual use' interpretation of the public use requirement in the fifth amendment).

111 See, e.g., *Scudder v Trenton Delaware Falls Co* (n 96) (Eminent domain power upheld, but said: "The great principle remains that there must be a public use or benefit. That is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to a general rule. What may be considered a public use may depend somewhat on the situation and wants of the community for the time being."), *Fallsburg Power & Mfg Co v Alexander* (1903) 101 Va 98 (Eminent domain struck down, on holding that "the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain"), *Board of Health of Portage Tp v Van Hoesen* 87 Mich 533, 538 (1891) (Eminent domain struck down, qualified by "not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use").

This observation is relevant when considering the takings doctrine that later developed at the federal level. In particular, the broad scrutiny offered by state courts suggests that the doctrine of extreme deference that was about to be adopted by the Supreme Court resulted from a completely new development, not a continuous broadening of the public use requirement.[112]

### 3.5.3 Legitimacy as Discussed by the Supreme Court

Initially, the Supreme Court held that the takings clause in the US Constitution did not apply to state takings at all.[113] Federal takings, on the other hand, were of limited practical significance since the common practice was that the federal government would rely on the states to condemn property on its behalf.[114]

This changed towards the end of the 19th century, particularly following the decision in *Trombley v Humphrey*, where the Supreme Court of Michigan struck down a taking that would benefit the federal government.[115] Not long after, in 1875, the first Supreme Court adjudication of a federal taking occurred, marking the start of the development of the federal doctrine on public use and legitimacy.[116]

At the same time, the Supreme Court began to hear takings cases originating from the states, first on the basis of the due process clause of the fourteenth amendment, introduced after the civil war.[117] Later, in 1897, the Supreme Court held that state takings could be scrutinized also against the takings clause of the fifth amendment.[118]

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112 This contrasts with the argument given by the majority in *Kelo*, see *Kelo* (n 69) 479-480 (placing the doctrine of deference in a tradition emerging from how the narrow view of some early state courts "steadily eroded" because of the "diverse and always evolving needs of society").

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

114 Meidinger (n 83) 30.

115 *Trombley v Humphery* 23 Mich 471 (1871).

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

117 See, e.g, *Head* (n 89).

118 See *Chicago, Burlington & Quincy RR Co v City of Chicago* (n 73).

## 3.5. THE US PERSPECTIVE ON ECONOMIC DEVELOPMENT TAKINGS

The early 20th century was a period of great optimism about the ability of *laissez faire* capitalism to ensure progress and economic growth, a sentiment that was reflected in the federal case law on eminent domain. A particularly clear expression of this can be found in *Mt Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co.*[119] This case dealt with the legitimacy of condemnation arising from the construction of a hydropower plant. The Supreme Court held that it was legitimate, with the presiding judge arguing briskly as follows:

> The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. The respect due to the judgment of the state would have great weight if there were a doubt. But there is none.[120]

On the one hand, the Court notes the importance of deference to the *state* judgement (not specifically the judgement of the state legislature). On the other hand, it prefers to conclude on the basis of its own assessment of the purpose of the taking. This assessment, however, is not

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

[120] *Mt Vernon-Woodberry Cotton Duck Co* (n 119) 32.

grounded in the facts of the case or the circumstances in Alabama. Rather, it is based on sweeping assertions about "all our welfare" and the desire to "save mankind from toil that it can be spared". This marks a contrast with the approach of state courts, as discussed in the previous subsection.

The contrast was even greater in cases when the takings in question had been authorised by the federal government itself. In such cases, the Supreme Court showed little willingness to subject takings purposes to public use scrutiny. In *United States v Gettysburg Electric Railway Co*, a case from 1896, deference to the legislature in federal takings cases was referred to as a principle that should be observed unless the judgement of the legislature was "palpably without reasonable foundation".[121]

However, such a deferential stance was not adopted in cases originating from the states. In *Cincinatti v Vester*, a case from 1930, the Supreme Court commented that "it is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one".[122] In this judgement, Chief Justice Hughes also describes how the judicial assessment of the public use question should be carried out:

> In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[123]

Notice how this echoes the contextual approach developed at the state level, while explicitly prescribing deference to state *courts*. In the earlier case of *Hairston v Danville & W R Co*, from

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[121] *US v Gettysburg Electric R Co* 160 US 668, 680 (1896).

[122] *City of Cincinnati v Vester* (n 76) 447.

[123] *City of Cincinnati v Vester* (n 76) 447.

1908, the same idea was expressed by Justice Moody, who surveyed the state case law and declared that "the one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."[124] Justice Moody continued by describing in more depth the typical approach of the state courts in determining public use cases:

> The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected.[125]

Justice Moody goes on to give a long list of cases illustrating this aspect of state case law, showing how assessments of the public use issue is inherently contextual.[126] Following up on this, he points out that "no case is recalled" in which the Supreme Court overturned "a taking upheld by the state *court* as a taking for public uses in conformity with its laws" (my emphasis). After making clear that situations might still arise where the Supreme Court would not follow state courts on the public use issue, Justice Moody goes on to conclude that the cases cited "show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people".[127]

*Hairston* is important for three reasons. First, it makes clear that initially, the deferential stance in cases dealing with state takings was primarily directed at state courts rather than legislatures and administrative bodies. Second, it demonstrates federal recognition of the fact that a consensus had emerged in the states, whereby scrutiny of the public use determination was consistently

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124 *Hairston v Danville & W R Co* (n 75) 606.

125 *Hairston v Danville & W R Co* (n 75) 606.

126 *Hairston v Danville & W R Co* (n 75) 607.

127 *Hairston v Danville & W R Co* (n 75) 606.

regarded as a judicial task.[128] Thirdly, it provides a valuable summary of the contextual approach to the public use test that had developed at the state level.

The *Hairston* Court clearly looked favourably on the case law from state courts. Indeed, the judicial scrutiny provided by state courts was held to be of such high quality that there was in general little need for federal intervention. Hence, when a deferential stance was adopted in *Hairston*, this was contingent on the fact that state courts would continue to administer the required public use test.

Despite this, *Hairston* would later be cited as an early authority in favour of almost unconditional deference.[129] This happened in *US ex rel Tenn Valley Authority v Welch*, concerning a federal taking.[130] The Court first cited *US v Gettysburg Electric R Co* as an authority in favour of deference with regards to the public use limitation.[131] The Court then paused to note that *Vester* later relied on the opposite view, namely that the public use test was a judicial responsibility.[132] The Court then attempts to undercut this by setting up a contrast between *Vester* and *Hairston*, by selectively quoting the observation made in the latter case that the Supreme Court had never overruled the state courts on the public use issue.[133] Hence, *Hairston* is effectively used to argue against judicial scrutiny, in a manner that is quite incommensurate with the full rationale behind the Court's decision in that case.

Later, *Welch* was used as an authority in the case of *Berman v Parker*.[134] This case concerned condemnation for redevelopment of a partly blighted residential area in the District of Colombia,

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128 Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 76) 606.

129 In fact, it was cited in this way also by the majority in *Kelo*, see *Kelo* (n 69) 482-483.

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

131 *US v Gettysburg Electric R Co* (n 121).

132 *City of Cincinnati v Vester* (n 76).

133 See *U S ex rel Tenn Valley Authority v Welch* (n 130) 552.

134 *Berman v Parker* (n 2).

which would also condemn a non-blighted department store. In a key passage, the Court states that the role of the judiciary in scrutinizing the public purpose of a taking is "extremely narrow".[135] The Court provides only two references to previous cases to back up this claim, one of them being *Welch*.[136]

Moreover, both of the cases cited were concerned with federal takings, while in *Berman* the Court explicitly says that deference is due in equal measure to the state legislature.[137] It is possible to regard this merely as a *dictum*, since the District of Columbia is governed directly by Congress. However, *Berman* was to have a great impact on future cases. In effect, it undermined a large body of case law on judicial scrutiny of taking purposes without engaging with it at all.

In *Hawaii Housing Authority v Midkiff*, the Supreme Court further entrenched the principle expressed in *Berman*.[138] Here the state of Hawaii had made use of eminent domain to break up an oligopoly in the housing sector. Given the circumstances of the case, it would have been natural to argue in favour of this taking on the basis that it served a proper public purpose.

However, the Court instead decided to rely on the doctrine of deference, shunning away from scrutinizing the takings purpose. Justice O'Connor, in particular, observed that "judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of eminent domain".[139]

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135 *Berman v Parker* (n 2) 32.

136 The other case, *Old Dominion Land Co v US*, concerned a federal taking of land on which the military had already invested large sums in buildings. The Court commented on the public use test by saying that "there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress of what it had in mind. Its decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use". See *Old Dominion Land Co v US* 269 US 55, 66 (1925) A misleading and partial quote, to the effect that deference to the legislature is in order except when it involves an "impossibility", has since become commonplace. In particular, such a quote was repeated by the Supreme Court itself in the later case of *Hawaii Housing Authority v Midkiff* 467 US 229, 240 (1984).

137 *Berman v Parker* (n 2) 32.

138 *Midkiff* (n 136).

139 **hawaii84**.

The formulation here is slightly less absolute than that given in *Berman*. In particular, the deferential stance is not presented as a system imperative, but rather made contingent on the fact that legislatures are "better able" to assess what counts as a public purpose. Moreover, Justice O'Connor also actively refers to the merits of the taking, especially when she points out that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers".[140]

Despite these nuances, *Midkiff* reaffirmed the main principle expressed in *Berman*, namely that the meaning of public use is a matter for legislatures and that the room for judicial review is narrow. In light of this, it is easy to understand why *Kelo* was decided in favour of the taker. It would have been a clear break with earlier precedent on the public use restriction if the Supreme Court had chosen to decide otherwise.

Formally, the case law on the federal takings clause is not binding on state courts when they assess cases against their own constitutions.[141] Moreover, as Merrill notes, state courts have not uniformly responded by embracing deference towards their own legislatures.[142] Rather, many state courts continued to offer scrutiny of taking purposes, despite the signals coming from the federal level.[143]

It should be noted, however, that the time after *Berman* was also a time when many government bodies throughout the US would actively seek to condemn homes for redevelopment projects, to combat "blight", but often also to the benefit of commercial enterprises.[144] Hence, continued public use scrutiny at state courts might also reflect an increased threat of eminent domain abuse. Sometimes, moreover, state courts seems to have failed in their duty to offer appropriate protection.

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140 **hawaii84**.

141 See Thomas W Merrill, 'The Economics of Public Use' (1986) 72 Cornell Law Review 61, 95.

142 Merrill (n 141) 65.

143 Merrill (n 141) 65.

144 See generally Wendell E Pritchett, 'The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain' (2003) 21(1) Yale Law & Policy Review 1.

The case of *Poletown Neighborhood Council v City of Detroit* is a classic example.[145] In this case, the Michigan Supreme Court held that it was not in violation of the public use requirement in the Michigan Constitution to allow General Motors to displace some 3500 people for the construction of a car assembly factory. The majority 5-2 cites *Berman*, commenting that the state court's room for review of the public use requirement is similarly limited.[146]

The *Poletown* decision was controversial, and the minority, especially Justice Ryan, was highly critical of it. He objects both to the deferential stance in general and to the majority reading of *Berman* in particular, pointing out that the Supreme Court's doctrine of deference outside the context of federal takings was directed at the state courts, not state legislatures.[147] Hence, as he concludes, the majority's reliance on *Berman* was "particularly disingenuous".[148]

Justice Ryan was not alone in his disapproval of *Poletown*.[149] Moreover, the case is widely regarded as the prelude to an era of increased tensions over economic development takings in the US.[150] This would culminate with *Kelo* which, despite upholding and strengthening the deferential doctrine, also inadvertently caused a shift towards stricter public use scrutiny at the state level, as discussed in the following subsection.

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145 *Poletown Neighborhood Council v City of Detroit* (n 78).

146 *Poletown Neighborhood Council v City of Detroit* (n 78) 632-633.

147 *Poletown Neighborhood Council v City of Detroit* (n 78) 668.

148 *Poletown Neighborhood Council v City of Detroit* (n 78) 668.

149 Indeed, the decision would later be overturned by the Supreme Court of Michigan itself, see generally Timothy Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (2005) 28(2) Harvard Journal of Law and Public Policy 651.

150 See Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 149) 664-668.

### 3.5.4 Economic Development Takings after *Kelo*

The fact that *Kelo* was decided against the homeowner met with wide disapproval among the public.[151] In addition, many scholars expressed concern that the deferential approach had been taken too far, and that economic development takings such as *Kelo* were in need of more substantive public use scrutiny by courts.[152] Moreover, following *Kelo*, much attention was directed at the perceived dangers of eminent domain abuse in the US.[153]

Many states responded by introducing reforms aimed at limiting the use of eminent domain for economic development.[154] Within two years, 44 states had passed post-*Kelo* legislation in an attempt to achieve this.[155] Various legislative techniques were adopted. Some states, including Alabama, Colorado and Michigan, enacted explicit bans on economic development takings and takings that would benefit private parties.[156] In South Dakota, the legislature went even further, banning the use of eminent domain "(1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue".[157]

In other states, more indirect measures were taken, such as in Florida, where the legislature

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151 See Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100, 2109.

152 For a small sample, see Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377; Timothy Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (2006) 10 Chapman Law Review 1; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183; Nicholas M Gieseler and Steven Geoffrey Gieseler, 'Strict Scrutiny and Eminent Domain After Kelo' English (2010) 25(2) Journal of Land Use & Environmental Law 191.

153 See generally Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151).

154 For an overview and critical examination of the myriad of state reforms that have followed *Kelo*, I point to Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust Journal 799. See also Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151).

155 See '50 State Report Card' (*Castle Coalition* ) ⟨http://castlecoalition.org/50-state-report-card⟩ accessed 17th July 2015.

156 See Eagle and Perotti (n 154) 107-108.

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

enacted a rule whereby property taken by the government could not be transferred to a private party until 10 years after the date it was condemned.[158] Many states also offered lengthy lists of uses that were to count as public, designed to restrict the room for administrative discretion while allowing condemnations for purposes that were regarded as particularly important.[159]

Somin points to an interesting trend, namely that state reforms enacted by the public through referendums tend to be more restrictive than reforms passed through the state legislature.[160] Many of the more radical reform proposals, moreover, did not emerge from the state government, but were initiated by activist groups as ballot measures. In some US states, initiative processes make it possible for activist groups to put measures on the ballot without prior approval by the state legislature.[161] As Somin observes, the reforms taking place via this route would be comparatively strict, testifying to the power of direct democracy.[162]

Indeed, the successes of popular anti-takings movements underscores how strongly the US public opposed the decision in *Kelo*. Surveys show that as many as 80-90 % believe that it was wrongly decided, an opinion widely shared also among the political elite.[163]

*Kelo* has clearly had a great effect on the discourse of eminent domain in the US. However, the effects of the many state reforms that have been enacted are less clear. According to Somin, most of these reforms have in fact been ineffective, despite the overwhelming popular and political opposition against economic development takings.[164] At the same time, property lawyers report a greater feeling of unease regarding the correct way to approach the public use requirement,

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158 Eagle and Perotti (n 154) 809.

159 Eagle and Perotti (n 154) 804.

160 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2143.

161 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2148.

162 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2143-2149.

163 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2109.

164 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2170-2171.

expressing hope that the Supreme Court will soon revisit the issue.[165]

Why have legislative reforms proved inadequate and ineffective? Part of the reason, according to Somin, is that people are "rationally ignorant" about the economic takings issue.[166] For most people, it is unlikely that eminent domain will come to concern them personally or that they will be able to influence policy in this area. Hence, it makes little sense for them to devote much time to learn more about it. This, in turn, helps create a situation where experts can develop and sustain a system based on practices that a majority of citizens actually oppose.[167] Indeed, Somin argues that surveys show how people tend to overestimate the effectiveness of eminent domain reform, possibly due to the fact that symbolic legislative measures are mistaken for materially significant changes in the law.[168]

I think Somin's analysis is on an interesting track. However, it should be noted that the notion of rational ignorance is a double-edged sword with regards to his main argument. In particular, it seems possible, in theory, that the prevailing critical attitude towards economic development takings is itself an instance of such ignorance. Perhaps people would change their opinion on economic development takings if they were better educated on the issue?

However, this possibility does nothing to detract from the main message, which is that the *Kelo* backlash have in fact caused greater insecurity about what the law is and what it delivers, often without significantly curbing those uses of eminent domain that are regarded as most problematic. Arguably, this shows that the legislative approach so far, which has focused on introducing more elaborate and detailed versions of the public use restriction, need to be supplemented by different kinds of proposals.

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165 See MM Murakami, BCK Ace and RH Thomas, 'Recent developments in eminent domain: Public use' (2013) 45(3) Urban Lawyer 809 ("Until the Supreme Court revisits the issue, we predict that this question will continue to plague the lower courts, property owners, and condemning authorities").

166 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2170.

167 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2163-2171.

168 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 151) 2155-2157.

In this regard, it seems important to also target governmental decision-making processes regarding the use of private land for economic development. These processes, it seems, need to be imbued with greater legitimacy. In particular, it seems crucial that owners themselves should be granted a better chance to participate in the management of their own land, even when this involves deliberating on, and possibly taking part in, large-scale development projects. After all, it is the owners' and their communities' feeling that they are being treated unfairly that tend to lie at the root of controversies surrounding takings for economic development.[169]

If improved principles of governance are put in place, this alone might be enough to restore some confidence in eminent domain as a procedure by which to implement democratically accountable decisions about land use. However, it seems that eminent domain as such might often be an unduly blunt instrument when society desires commercial development on private land. Instead, it might be possible to devise mechanisms for collective action that replaces the use of eminent domain altogether.

In the next section, I will consider a proposal for reform of this kind. This proposal targets the decision-making process leading to economic development by proposing a framework for land assembly that can sometimes replace the use of eminent domain.

## 3.6 Legitimacy and Institutions for Self-Governance

As mentioned briefly in Section **??** of Chapter 2, the work of Ostrom and others on common pool resources suggests that sustainable resource management can often be better achieved through local self-governance than by markets or states.[170] The connection between this work and property theory is highly interesting, and has been explored in some recent work, particularly by US

[169] For a similar perspective, see Underkuffler, 'Kelo's moral failure' (n 152).

[170] See generally **....** For a short and to-the-point exposition of main ideas, see Ostrom's Nobel Lecture, **...**

legal scholars.[171] It bears noting, in particular, that most kinds of property that are subjected to regulation (or a taking) in the public interest has features that make it possible to view them as pertaining to common pool resources.[172]

Importantly, designating something as a common pool resource does not imply that the resource in question is open-access or that it is held as a form of common property. Nor does it imply that the resource in question should *not* be held as private property.[173] According to Ostrom and Hess, the appropriate property regime for a given common pool resource is a pragmatic question that depends on the concrete circumstances.

It should be noted, however, that this neutral position on the relationship between property and common pool resources is premised on a bundle of rights understanding of the nature of property.[174] Potentially, a different understanding of property might suggest a different perspective. Specifically, the question arises as to how theories of common pool resource management relates to the social function theory. Clarifying this is interesting in its own rights, and is also a possible first step towards an institutional perspective on the takings question. Intuitively, such a perspective already suggests itself by the work done in this and the previous chapter, which has emphasised the position of the local community and the function of property as an anchor for democracy. It remains to work out in further detail what exactly such a perspective has to offer in relation to the issue of economic development takings.

To make progress in this regard, it will be useful to first briefly consider one of the most important theoretical legacies of Ostrom's work, namely a list of eight design principles that she

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171 See generally **rose...**

172 The key characteristic of such resources is that exclusion is difficult or costly, while use can cause depletion (and hence should be limited). As noted by X and Y, this is wide enough to potentially cover most kinds of property in which the public might take an interest.

173 See **ostrom07** ("there is no automatic association of common-pool resources with common-property regimes – or, with any other particular type of property regime").

174 See **ostrom07**

formulated on the basis of empirical studies. These principles were formulated because they seemed to be particularly crucial in ensuring good governance at the local level, and have since been supported by a growing body of empirical evidence. In brief, the so-called CPR principles are the following:

1. **Well-defined boundaries:** There should be a clearly defined boundary around the resource in question, and a clear distinction should exist between members of the user community, who are entitled to access the resource, and non-members, who may be excluded. This will internalise the costs of resource exploitation and other externalities, ensuring that proper incentives for sustainable management arises within the community of resource users.[175]

2. **Congruence between appropriation and provision rules and local conditions:** Management principles should be flexible and responsive to changing local conditions. Moreover, management practices should be anchored in the economic, social, and cultural practices prevalent at the local level. In addition, the individual benefits should exceed the individual costs associated with membership in the community of users, and collectively managed benefits should be distributed fairly among community members.

3. **Collective-choice arrangements:** The individual members of the user community should have an opportunity to participate in decision-making processes regarding the rules that relate to the user community and the resource management. In addition to securing fairness and legitimacy, this will enhance the quality of the decision-making, as the users themselves have first-hand knowledge and low-cost access to information about their situation and the state of the resource in question.

4. **Monitoring:** There should be mechanisms in place to ensure that the behaviour of users is

[175] Importantly, the possibility of excluding non-members marks a distinction between open-access resources and common pool resources, where the latter appears much less susceptible to a commons tragedy than the former, because externalities are internalised to a clearly defined community.

monitored for violations of management rules. To increase efficiency, monitoring should be locally organised. Moreover, to ensure local responsiveness and legitimacy, individuals acting as monitors should themselves be members of the user community or in some way answerable to this community.

5. **Graduated sanctions:** There should be an effective system in place for penalising violations of user community rules. These penalties should be graduated so that more severe or repeated violations are sanctioned more severely than minor or one-time transgressions.

6. **Conflict-resolution mechanisms:** The user community should be endowed with low-cost procedures for conflict resolution. Again, it is important that these procedures are rooted in local conditions, to ensure local legitimacy.

7. **Minimum recognition of rights:** The user community should be protected from interference by external actors, including government agencies. As a minimum, the right to self-governance and the existence of local institutions should be recognised and respected by the state.

8. **Nested enterprises:** There should be vertical integration between local, small-scale, management institutions and larger institutions aimed at protecting and furthering non-local interests. This integration should be based on the minimum recognition of rights mentioned in the previous point. Furthermore, it should provide a template for integrated decision-making about larger scale issues, where local competences are employed incrementally in more general settings, with respect to institutions working on behalf of municipalities, regions, states and the international community. Self-governing local institutions for resource management should not only be respected by larger scale structures, but should also feed into larger scale decision-making and be called to respond to greater community needs.

There is an interesting link between the principles described here and the property norms

discussed in Chapter 1. There the focus was on norms arising in relation to the social function of property, particularly those related to the idea of human flourishing through membership in a community. The main argument was that property plays an important constitutive role in this regard, as the rights and obligations inhering in private property has an important function as a promoter of collective action and equity at the local level, as well as a protector of local communities against exploitation and undue interference from external actors.

The role that property can play in this regard is linked to the local institutions for resource management that property rights can help sustain. Under individualistic, entitlements-based, theories of property, one might worry that institutions for collective management, even at the local level, will have to be rendered very thin in order not to conflict with the rights of owners. However, on the social function theory, this should no longer be a concern. On this theory, there is no opposition between strong property rights and strong community institutions for collective management of local resources, even if these resources are held as private property. The inclusion of non-owners as full members of the user community is also consistent with the social function theory of property and its emphasis on obligations as well as rights.[176]

The design principles listed above further underscores how well the human flourishing theory of property coheres with the theory of common pool resources. Specifically, the property concept endorsed by human flourishing theorists promises to deliver a straightforward and robust implementation of several key design features. Recognising something as property will tend to deliver clearly defined boundaries and a minimal recognition of rights. Moreover, on a human flourishing

[176] More subtly, limitations on the owners' rights imposed on the basis of property's social function do not necessarily deprive owners of their protected status as property holders. Hence, property does not lose its power to protect the community, merely because the rights of individual owners is limited by community interests. For instance, even if (local) institutional arrangements limits the owners' right to alienate their property, this does not mean that they are no longer owners. Private property with restrictions on alienation can provide the legal basis for local resource management, without removing us from the realm of private property. This is seen, for instance, in Norway, as discussed in Section x of Chapter 2. By contrast, Ostrom and Hess adopt a more narrow view on ownership, where the right to alienation is considered so basic that resource users who lack this right are not considered owners at all, but merely proprietors. See **ostrom07**

account, property is also required to deliver congruence between burdens and benefits among property users, particularly at the community level. Finally, property provides a template for a form of organisational nesting where larger scale institutions may be awarded regulatory competences, but must still be prevented from usurping the power to manage local resources as *de facto* proprietors. In short, it appears that property alone can take us halfway towards a well-functioning CPR institution.

The final step, pertaining specifically to the institutional framework for collective management, might well place significant limits on the "despotic dominion" of individual owners. However, on the social function theory, such limitations might be understood as means to fulfil property's purpose, rather than as an attack on the rights of owners. More generally, the social function understanding of property makes it possible to sustain a property narrative by regarding resource users as owners even if local institutional arrangements mean that they are not in possession of some of the sticks typically found in liberal property bundles. Arguably, local people should still be entitled to recognition as owners of their resources, even if the form of ownership in question does not conform to the standard liberal expectation of what private property looks like. If this is true, it would also appear that abrogation of private property is neither required nor desirable, in order to secure sustainable management of local resources.

This observation connects Ostrom's theory of common pool resources to the human flourishing theory of property at a high level of abstraction, suggesting that the two are in fact mutually conducive to one another. There are two different ways in which this also connects concretely to the issue of economic development takings. First, one may observe that when economic development takings appear to lack legitimacy with respect to social functions, this is typically also an indication that the surrounding framework for resource management is not well-designed. In particular, it appears that the Gray test presented at the end of Chapter 1 closely tracks many of the design principles proposed by Ostrom.

For instance, consider the balance of power between the owners and beneficiaries of a taking, the first point to consider according to the Gray test. There can be little doubt that when a taking fails on this point, there is good reason to critically question the workings of the surrounding framework for resource management. In particular, doubts arise with regard to the recognition of local rights, collective-choice arrangements, and the congruence between appropriation, provision and local conditions. If property is taken by powerful actors, chances are that these actors are not representative of local community interests. Hence, takings of this kind will tend to demonstrate that government is unwilling to recognise the rights of local people, even when these rights are formally recognised as property rights.

By contrast, the situation might be quite different if it involves a taking that is not suspect according to the Gray test. For instance, if property is taken from absentee landlords and given to local land users in order to facilitate development, this might be an honest attempt at setting up a management framework that complies with CPR principles. In such a case, moreover, one would obviously not expect the balance of power between owners and takers to point towards abuse.

The second link between CPR design and economic development takings is arguably even more interesting. It becomes apparent as soon as we shift attention away from diagnosing a lack of legitimacy towards coming up with alternative management principles that can restore it. Specifically, the work on local governance of common pool resources point to an *alternative* way of approaching the goal of economic development in cases that might otherwise result in the use of eminent domain.

The search for viable alternatives to eminent domain as a means to ensure economic development on private property has not received much attention in the literature so far. One notable exception, discussed in depth in the following subsection, is the work of Heller, Dagan and Hills.[177]

[177] The work of Lehavi and Licht also deserves a brief mention, even though it focuses on compensation rather than alternatives to eminent domain. The reason is that this work relies on proposing a novel institution that also touches on issues related to self-governance. In particular, Lehavi and Licht propose that post-taking, collective,

Looking at their work will serve to make the abstract discussion above more concrete, and will set the stage for a comparison between their proposal and solutions that can be facilitated by the system of land consolidation presented in Chapter 5.

### 3.6.1 Land Assembly Districts

In an important article from X, Heller and Dagan considered the connection between CPR design principles and overarching (liberal) property values. From this, they arrived at a proposal for what they call a "liberal commons", which adds some design constraints rooted in a desire to protect individual autonomy and minority rights. In particular, they emphasise the value of exit, the opportunity for members of the governance structure to alienate their share in the commons resource (conceived of as a property right). However, they propose mechanisms, such as rights of first refusal, meant to ensure that exit does not prove too disruptive to the local collective.

In a later article, Heller and Hills build on the idea of the liberal commons by proposing a novel approach to the takings issue, consisting of a proposal for a new institutional framework that can facilitate land assembly for economic development. Importantly, it is meant to replace eminent domain altogether, in certain kinds of cases. The goal is to ensure democratic legitimacy while also setting up a template for collective decision-making that will prevent inefficient gridlock and holdouts.

The core idea is to introduce *Land Assembly Districts* (LADs), institutions that will enable property owners in a specific area to make a collective decision about whether or not to sell the land to a developer or a municipality.[178] The idea is that while anyone will be able to propose and promote the formation of a LAD, the official planning authorities and the owners themselves

price bargaining should be carried out on behalf of owners by a Special Purpose Development Company, in an effort to give them a chance to get their share of the commercial benefit arising from development. See Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704. For a more in-depth discussion of this proposal, and the compensatory approach to economic development takings more generally, see Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 24).

[178] Heller and Hills (n 3) 1469-1470.

must consent before it is formed.[179] Clearly, some kind of collective action mechanism is required to allow the owners to make such a decision.

Hiller and Hill suggest that voting under the majority rule will be adequate in this regard, at least in most cases.[180]

How to allocate voting rights in the LAD is given careful consideration, with Heller and Hills opting for the proposal that they should in principle be given to owners in proportion to their share in the land belonging to the LAD.[181] Owners can opt out of the LAD, but in this case, eminent domain can be used to transfer the land to the LAD using a conventional eminent domain procedure.[182]

Heller and Hills envision an important role for governmental planning agencies in approving, overseeing and facilitating the LAD process. Their role will be most important early on, in approving and spelling out the parameters within which the LAD is called to function.[183] Hence, it appears to be assumed that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue.

A possible challenge that arises, not discussed by Heller and Hills at any length, is that the scope of the LAD needs to be broad enough to allow for meaningful competition and negotiation after LAD formation. To achieve this might be difficult, particularly in light of incentives to make the outcome of the LAD process more predictable. Indeed, both governments, initiating developers, and landowners eager for development might want to ensure that the scope of the LAD is defined

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179 Heller and Hills (n 3) 1488-1489.

180 See Heller and Hills (n 3) 1496. However, when many of the owners are non-residents who only see their land as an investment, Heller and Hills note that it might be necessary to consider more complicated voting procedures, for instance by requiring separate majorities from different groups of owners. See Heller and Hills (n 3) 1523-1524.

181 See Heller and Hills (n 3) 1492. For a discussion of the constitutional one-person-one-vote principle and a more detailed argument in favour of the property-based proposal, see Heller and Hills (n 3) 1503-1507.

182 Heller and Hills (n 3) 1496.

183 Heller and Hills (n 3) 1489-1491.

narrowly enough to give confidence that zoning permissions will not later be denied. In addition, there is the obvious nefarious incentive that some actors might have to ensure that a specific development is chosen. In light of this, LAD regulation is needed to ensure a balanced approach to the issue of how the initial development possibility should be defined, and to what extent this definition should limit the authority of the LAD to choose alternative projects.

If the owners do not agree to forming a LAD, or if they refuse to sell to any developer, Heller and Hills suggest that the government should be precluded from using eminent domain to assemble the land.[184] This is a crucial aspect of their proposal that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. A LAD will not only ensure that the owners get to bargain with the developers over compensation, it will also give them an opportunity to refuse any development to go ahead. Hence, the proposal shifts the balance of power in economic development cases, giving owners a greater role also in preparing the decision whether or not to develop, and on what terms. Hence, the LAD proposal promises to address the democratic deficit of economic development takings, without failing to recognise that the danger of holdouts is real and that institutions are needed to avoid it.

There are some problems with the model, however. First, I observe that planning authorities might have an incentive to refuse granting approval for LAD formation. After all, doing so entails that they give up the power of eminent domain for the land in question. For this reason, Heller and Hills propose that a procedure of judicial review should exist whereby a decision to deny approval for LAD formation can be scrutinized.[185] However, the question then arises to what extent the courts should adopt a deferential stance in this regard, echoing the conundrum that engulfs the safeguard intended by the public use restriction. Presumably, one would want the courts to strictly scrutinise LAD rejections, to instil in governments that LADs should normally

184 Heller and Hills (n 3) 1491.

185 Heller and Hills (n 3) 1490.

be promoted. However, would the courts be comfortable providing such scrutiny, also against a government body claiming that the "public interest" speaks against LAD formation? This would likely depend on the exact formulation and spirit of the LAD-enabling legislation. To work as intended, some sort of presumption in favour of LAD approval appears to be in order, but this in turn can have the effect of making it easier for powerful landowners to abuse the LAD system.

A second possible objection against the LAD proposal concerns the practicalities of the process leading up to the LAD's decision on whether or not to accept a given offer. Is it possible to organise such a process in a manner that is at once efficient, inclusive and informative, without making it too costly and time consuming? Here Heller and Hills envision a system of public hearings, possibly organised by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[186] The process envisioned here would resemble existing planning procedures to such an extent that additional costs could hopefully be kept at a minimum.

The significant difference would concern the relative influence of the different actors, with the owners receiving a considerable boost as a result of the LAD. Rather than being sidelined by a narrative that sees the use of eminent domain as the culmination of planning, the owners are now likely to occupy center stage throughout, as they now will have the final say on whether or not the development will go ahead.

From this, however, arises the question of how the interests of other locals, without property rights, will be protected. Heller and Hills assumes that local non-owners will also be represented during the stages leading up to the LAD's final decision, but their role in the process is not clarified in any detail.[187] This raises the worry that LADs might undermine local democracy by giving

[186] See Heller and Hills (n 3) 1490-1491. It might also be necessary for the planning authorities or other government agencies to take on some responsibilities with respect to providing guidance and assistance to less resourceful members among the owners.

[187] Heller and Hills (n 3) 1490-1491.

property owners a privileged position with respect to policy questions that should be decided jointly by all members of the local community. The risk in this regard depends heavily on the circumstances. In a context of egalitarian property ownership and sensible government regulation of land uses and LAD operations, the risk should be minimal. In principle, the local anchoring that LADs provide should also benefit non-owners, by brining the decision-making process closer and making it more easily accessible. Moreover, if some members of the local community remain marginalised, this is probably best regarded as a regulatory failure or a reflection of underlying inequality, not a shortcoming of the LAD proposal. In these cases, a reasonable approach might even be to *expand* the function of LADs, by granting voting rights to a larger class of local property dependants, not only formally titled owners.[188]

However, the LAD proposal raises some highly problematic issues pertaining to the proposed mechanism of collective decision-making. As Kelly points out, the basic mechanism of majority voting is deeply flawed.[189] He argues, in particular, that if different owners value their property differently, majority voting will tend to disfavour those with the most extreme viewpoints, either in favour of, or against, assembly. If these viewpoints are assumed to be non-strategic and genuine reflections of the welfare associated with the land, the result can be inefficiency. In short, the problem is that a majority can often be found that does not take due account of minority interests.

For instance, if a minority of owners are planning alternative development, conflicting with the LAD proposal, they might simply be ignored. Indeed, they might *have to be* ignored, if the development description underlying LAD formation is incompatible with the kind of development they wish to pursue. This could become particularly inefficient in cases when the alternative devel-

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188 The important invariant to maintain, I believe, is that the locally anchored institution should be the active, invested, agent, while more centralised and/or expert-dominated government bodies should act as passive, impartial, regulators. In the processes leading to economic development takings, this equation is typically reversed, with government bodies and commercial companies being the active agents, while the owners and the local community are the passive agents whose property rights and dependencies place some nominal limits on the authority of other parties (limits which, due to the weakness of owners as a group, tend to be easily disregarded).

189 Daniel B Kelly, 'The Limitations of Majoritarian Land Assembly' (2009) 122 Harvard Law Review Forum 7.

opment is more socially desirable than the development sketched during LAD formation. In such cases, LAD formation will not improve the quality of the decision to develop, since it pushes the decision-making process into a track where those interests that *should* prevail are voiced only by a marginalised minority inside the new institution.[190]

More generally, the lack of clarity regarding the role of LADs in the planning process is a problem. If LAD formation as such can be used to privilege a specific development over alternatives, developers would have a great incentive to form a LAD as early as possible. Moreover, if the presumption is in favour of allowing LAD formation, with limited room for government censorship, developers might rely on LADs to push through a *de facto* condemnation of property, through a procedure that might leave the minority less protected than the traditional takings process. Indeed, it would be theoretically possible for any landowner to use a LAD to condemn any neighbouring property smaller than their own. Eventually, a whole community might be taken over by one or a few powerful landowners, through a sequence of cleverly designed LAD processes and development projects.

Despite these worries, the ideal of the LAD proposal is clearly stated and highly attractive. LADs should help to establish self-governance for land assembly and economic development. In particular, Heller and Hills argue that LADs should have "broad discretion to choose any proposal to redevelop the neighbourhood – or reject all such proposals".[191] As they put it, two of the main goals of LAD formation is to ensure "preservation of the sense of individual autonomy implicit in the right of private property and preservation of the larger community's right to self-government".[192] Unfortunately, these ideals turn out to be at odds with some of the concrete rules that Heller and

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190 Of course, one might imagine these landowners opting out of the LAD, or pursuing their own interests independently of it. However, they are then unlikely to be better off than they would be in a no-LAD regime. In fact, it is easy to imagine that they could come to be further marginalised, since the existence of the LAD, acting 'on behalf of the owners', might detract from any dissenting voices on the owner-side.

191 See Heller and Hills (n 3) 1496.

192 See Heller and Hills (n 3) 1498.

Hills propose, particularly those aiming to ensure good governance of the LAD itself.

In relation to the governance issue, Heller and Hills emphasise, in direct contrast to their comments about "broad discretion" and "self-governance", that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[193] This is a good thing, according to Heller and Hills, since it provides a safeguard against mismanagement, serving to prevent LADs from becoming battle grounds where different groups attempt to co-opt the community voice to further their own interests. As Heller and Hills puts it, the narrow scope of LADs will ensure that "all differences of interest based on the constituents' different activities and investments, therefore, merge into the single question: is the price offered by the assembler sufficient to induce the constituents to sell?".[194]

This means that there is a significant internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighbourhood bickering and majority tyranny on the other. Indeed, it is hard to see how LADs can at once have both a "narrow purpose" as well as enjoy "broad discretion" to choose between competing proposals for development. If such discretion is granted to LADs, what prevents special interest groups among the landowners from promoting development projects that will be particularly favourable to them, rather than to the landowners as a group? What is to prevent landowners from making behind-the-scene deals with favoured developers at the expense of their neighbours? It might be difficult to come up with rules that prevent mechanisms of this kind, without also making meaningful "self-governance" an impossibility.

If a LAD is obliged to only look at the price, this might prevent abuse. But it will not give owners broad discretion to consider the social functions of property when choosing among development proposals. In my view, it is undesirable to restrict the operations of LADs in this way. It is easy to

193 See Heller and Hills (n 3) 1500.

194 Heller and Hills (n 3) 1500.

imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will be made in response to the formation of a LAD. Such proposals may involve novel solutions that are superior to the original development plans, in which case it is hard to see any good reason why they should not be taken into account, even if they are proposed by a minority. Moreover, it is hard to see why they should be disregarded simply because they are less commercially attractive, or because the developer interested in pursuing such a proposal cannot offer the highest payment to the owners. In the end, the decision that the LAD makes concerns the future of the community as a whole. This is not an exercise in profit-maximization, and there are good reasons to believe that LAD regulation should encourage a broad perspective, not enforce a narrow one.

However, when it comes to the details, Heller and Hills seem to give up on the ideals of self-governance in favour of strict regulation to reduce the risk of LAD abuse. In particular, they argue that "LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler".[195] Hence, the notion of self-governance is made even thinner, as owners will effectively be barred from using LADs as a template for gaining the right to participate in development projects on their own land. We are almost back to square one: the owner must sell or receive nothing. Moreover, new questions arise. For one, what is meant by "affiliation"? Say that a landowner happens to own shares in some of the companies proposing development. Should they then be barred from voting? If so, should they be barred from voting on all proposals, or just those involving companies in which they are a shareholder? If the answer is yes, how can this be justified? Would it not be easy to construe such a rule as discrimination against landowners who happen to own shares in development companies? On the other hand, if the landowner in question is allowed to vote on all other proposals, would it not be natural to suspect that their vote is biased against assembly

[195] Heller and Hills (n 3).

that would benefit a competing company? Or what about the case when some of the landowners are employed by some of the development companies? Should such owners be barred from voting on proposals that could benefit their employers? This seems quite unfair as a general rule. But in some cases, employment relations could play a decisive factor in determining the outcome of a vote. This might happen, for instance, if an important local employer proposes development in a neighbourhood where it has a large number of employees.

The fundamental issue that arises is the following: who exactly should be empowered to make the determination of when an affiliation is such that an owner should be deprived of their voting rights? Heller and Hills give no answer, but it is easy to imagine that whoever is given this task in the first instance, the courts must be prepared to deal with complaints. At this point, the circle has in some sense closed in on the proposal. In particular, one might ask: why is it less objectionable to deprive someone of their LAD voting rights whenever they enter into an "affiliation" with a developer, than it is to deprive someone of their property rights to ensure economic development on their land? In both cases, severe interferences with basic rights are taking place, on the basis of vague proclamations. Moreover, both interferences appear to be based on the premise that owners are passive agents who can at best hope to be remunerated if they step aside, but who are not themselves meant to be active contributors to economic development.

I conclude that how to best organise a LAD remains an open problem. The challenge is to ensure that LADs deliver a real possibility of self-governance, while also ensuring good governance and protection against abuse. That it remains unclear how to do this is acknowledged by Hiller and Hills themselves, who point out that further work is needed and that only a limited assessment of their proposal can be made in the absence of empirical data. Later in the thesis, I will shed light on this challenge when I consider the Norwegian framework for land consolidation. This framework can be looked at as a sophisticated institutional embedding of many of the central ideas of LADs.

I will discuss how Norwegian land consolidation can be employed in cases of economic devel-

opment, and how it is increasingly used as an alternative to expropriation in cases of hydropower development. This will allow me to shed further light on the issues that are left open by Heller and Hills' important article.

## 3.7 Conclusion

In this chapter, I have given a more in-depth presentation of economic development takings. I began by noting that the issue is particularly pressing for land users that are not regarded as bringing about economic growth. Hence, I argued that the issue is closely related to that of land grabbing, which is currently receiving much attention, both academic and political. Under the social function understanding of property there is in principle no difference between protecting property rights arising from formal title and property rights arising from use. That said, special issues arise in the latter case, not least because it is unclear how the law should deal with rights resulting from cultural practices that western property regimes are not designed to handle. In addition, I noted that special issues related to poverty and basic necessities such as food and water arise with particular urgency in relation to land grabbing.

The nature of my case study makes it natural for me to focus on traditional western systems of property law. Hence, I went on to discuss how economic development takings are dealt with in such legal systems, focusing on Europe and the US respectively. For the case of Europe, this assessment was made more difficult by the fact that the category is not an established part of legal discourse. However, by looking to England for concrete examples, I noted that such cases do arise and that they are increasingly seen as controversial.

I then went on to consider the property protection offered by P1(1) of the ECHR, and how it is applied by the Court in Strasbourg. I zoomed in on those aspects that I believe to be the most relevant for economic development takings. While I noted that this category has yet to be discussed by the ECtHR, I argued that a recent shift in the Court's property adjudication is

suggestive of the fact that it would likely approach such cases similarly to how Justice O'Connor approached *Kelo*. In particular, I noted how the Court has recently adopted a stricter standard of assessment. This standard, I argued, is characterised primarily by increased sensitivity to systemic imbalances causing alleged P1(1) violations. Hence, to regard economic development takings as a special category appears to fit well with recent jurisprudential developments at the Court in Strasbourg.

I went on to consider US sources on economic development takings, noting that the issue has receive an extraordinary amount of attention in recent years. I adopted an historical approach to the material, by tracing the case law surrounding the public use restriction in the fifth amendment to the US constitution, which was much debated even before the specific issue of economic development takings rose to prominence. I focused particularly on case law developed by state courts, and I argued that it shows great sensitivity to the need for contextual assessment. Indeed, it seems that many state courts originally adopted an implicit social function view of property when assessing such cases.

I then looked at the history of Supreme Court adjudication of public use cases. I noted that the doctrine of deference was developed early on, but that it was initially directed mainly at state courts. In fact, I showed that the Supreme Court itself explicitly approved the contextual and in-depth approach these courts relied on when dealing with the legitimacy issue.

The shift, I argued, came with *Berman*, in which the Supreme Court adopted a deferential doctrine that was directed specifically at the state legislature.[196] This was quite a dramatic departure from the Court's previous attitude towards state takings. Moreover, it was almost entirely backed up by precedent set in cases when *federal* takings had been ordered by Congress.

I went on to consider the fallout of *Berman* at state level, which culminated with the infamous *Poletown* case. This case prompted wide-spread accusations of eminent domain abuse and thus set

[196] *Berman v Parker* (n 2).

the stage for *Kelo*.

After completing the historical overview, I went on to consider the literature after *Kelo*. I expressed particular support for those responses that focus on the need for *institutional* reform, to address dangers that Justice O'Connor pointed to in her minority opinion. As a shorthand, I proposed referring to the mechanisms she identified as the *democratic deficit* of economic development takings.

I then gave a thorough presentation of a recent reform suggestion that might help address this deficit, namely the proposal for Land Assembly Districts (LADs) made by Heller and Hills. According to the motivation behind this proposal, local communities should be entitled to greater self-governance in economic development scenarios, organised through LADs. Importantly, this proposal recognises the need for a mechanism to avoid inefficient and socially harmful gridlock due to holdouts among unwilling owners. Instead of eminent domain, however, a different mechanism is proposed, namely that of a majority decision made by a land assembly district.

I pointed out some problems and seeming inconsistencies in the proposal, particularly regarding the lack of clarity regarding the exact role LADs are supposed to play during the planning process. I argued that while the risk of abuse and failure increases with the level of participation, so does the overall potential for achieving a positive effect on legitimacy. I concluded that to reduce the democratic deficit in economic development cases, a wide power of participation must be granted to the land owners and their communities. This is needed, in particular, to restore balance in the relationship between owners and others directly connected with the land, the planning authorities, and the commercial actors interested in development for profit. The question that is as of yet unresolved is how to organise such participation in a way that avoids obvious pitfalls, such as administrative inefficiency and tyranny by majorities or elites that assume control of the local agenda.

In Chapter 6, I will shed light on this question by considering the Norwegian institution of land

consolidation, which has a very long tradition behind it. It is a flexible framework which includes, among other things, a template for establishing institutions that can function as a LAD. I will focus on how land consolidation functions in cases of economic development that would otherwise likely be pursued by eminent domain. The case study is based on considering hydropower development, but I will also discuss planning law and development more generally, as the Norwegian government is now considering making consolidation, traditionally a rural institution, a primary mechanism for land development even in urban areas.

Before I delve into this, I will present an overview of Norwegian hydropower and the role of waterfalls as private property. This will serve as an introduction to the second part of this thesis, to which I now turn.

# Part II

# A Case Study of Norwegian Waterfalls

# 4 Norwegian Waterfalls and Hydropower

## 4.1 Introduction

Norway is country of mountains, fjords and rivers, where around 95 % of the annual domestic electricity supply comes from hydropower.[1] The right to harness energy from rivers, streams and waterfalls generally belongs to local landowners under a riparian system.[2] Historically, waterfalls were very important to local communities, particularly as a source of power for flour mills and saw mills.[3]

Following the industrial revolution, local ownership and management came under increasing pressure. At the beginning, this pressure was exerted by private commercial interests, often foreign investors, who saw the industrial potential in hydropower and started speculating in Norwegian water resources.[4] Later, the pressure on local self-governance was exerted mainly by the government,

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1 See Statistics Norway, data from the year 2011, http://www.ssb.no/en/elektrisitetaar/.

2 This arrangement is rooted in the first known legal sources in Norway, the so-called "Gulating" laws, thought to have been in force well before AD 1000. See Knut Robberstad (ed), *Gulatingslovi* (4th edn, An edition of the old "Gulatingsloven", a collection of the first known legal principles used by a Norwegian court (the Gulating), dating back to before AD 1000, Det Norske Samlaget 1981) 111-112,120.

3 See Terje Tvedt, *A Journey in the Future of Water* (IB Tauris 2013) 121.

4 See Hjemfall, 'NOU 2004:26' (Report to the Ministry of Petroleum and Energy from a special committe appointed by the King in Council on 04 April 2003, ) 30-31.

following the introduction of new legislation to regulate the development of hydroelectric power.[5] This legislation set up a system that gave highly preferential treatment to public utilities over private actors, including local owners.[6] At first, the motivation behind this reform was to facilitate a decentralised form of government control, led by public utilities controlled by the municipality governments.[7] However, the hydroelectric sector underwent gradual centralisation, a process that gained momentum after the Second World War when the state itself assumed a leading role.[8] At this time, local communities and local riparian owners became increasingly marginalised. In particular, they were forced to shut down their hydroelectric plants in order to connect the national, monopolised, electricity grid.[9]

Then, in the early 1990s, the electricity sector was reformed once again, largely inspired by the market-orientation and privatisation of the public sector in the UK under Thatcher.[10] The production sector was liberalised, while public utilities where reorganised as commercial companies.[11] At the same time, the regulatory system was decoupled from both political and commercial decision-making processes, to become more expert-based.[12] Moreover, the sector underwent additional centralisation, as a result of mergers and acquisitions among former public utilities.[13]

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5 See Lars Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (Ad notam Gyldendal 1996) 41-57 (describing the regulatory system set up during this time).

6 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 46 (describing legislation introduced to promote public utilities, including new expropriation authorities directed at local owners of waterfall).

7 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 44-47.

8 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 59-85. For the history of the state's involvement with hydropower generally, see Lars Thue, *Statens Kraft 1890-1947: Kraftutbygging og Samfunnsutvikling* (Universitetsforlaget 2006); Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006); Lars Thue and Yngve Nilsen, *Statens Kraft 1965-2006: Miljø og Marked* (Universitetsforlaget 2006).

9 See Hans Hindrum, *Elektrisitetsforsyning ved hjelp av statsstøtte* (NVE 1994) p.111.

10 See generally Atle Midttun and Steve Thomas, 'Theoretical ambiguity and the weight of historical heritage: a comparative study of the British and Norwegian electricity liberalisation' (1998) 26(3) Energy Policy 179.

11 See *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Court Report 164, 86 (describing how Norwegian electricity companies, most of which are still (partly) publicly owned, now operate as for-profit, limited liability companies).

12 [26-27]brekke12.

13 See Jens Bibow, 'Energiloven, forvaltningspraksis og EØS-retten: Organisatoriske krav til energiselskaper' (2003)

Following the reform, access rights to the national grid are meant to be granted equally to all potential actors on the energy market, including private companies.[14] After the passage of the Energy Act 1990, the energy companies controlling the local grids were no longer authorised to shut out competitors.[15] A side-effect of this is that it has become possible for local landowners to undertake their own hydropower projects. Local owners can now access the grid to sell the electricity they produce on Nord Pool, the largest electrical energy market in Europe.[16] This has led to increased tension between local interests and established hydropower companies. The following fundamental question has arisen: who is entitled to benefit from rivers and waterfalls, and who is entitled to a say in decision-making processes concerning their use?

In this chapter, I set the stage for discussing this question in more depth, by detailing how the hydropower sector is organised. I look to the law as well as to commercial and administrative practices and I focus on those aspects that have changed following the reform of the early 1990s. I pay particular attention to the growing importance and competitiveness of so-called *small-scale* hydropower, including development projects that are undertaken by local owners, or in cooperation with them. Several commercial actors have emerged who now specialise in such cooperation, by offering waterfall owners a significant share of the commercial value resulting from development.

To bring out the multi-faceted character of the current debate on hydropower in Norway, I begin in Section 4.2 by offering a basic overview of the Norwegian political system. I focus on the

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42(10) 579, 583. I mention that despite significant continuous centralisation from the Second World War to this day, the Norwegian hydroelectric sector is still relatively decentralised compared to other countries, e.g., the UK, see **"cite** midttun98. Arguably, this is a lasting influence of a tradition based on local, egalitarian, ownership of water resources.

14 See generally Ulf Hammer, 'Hovedtrekk ved Organiseringen og Reguleringen av Kraftmarkedet' [1996] Lov og Rett 390. For an interesting presentation and analysis of grid-based markets in general, see Ingvald Falch, *Rett til Nett: Konkurranse i Nettbundne Sektorer* (Universitetsforlaget 2004).

15 See the Energy Act 1990 s 3-4.

16 See generally Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Erstatning for erverv av fallrettigheter' (2006) 2006 Tidsskrift for eiendomsrett 175; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Fallerstatning – Ulebergdommen' (2008) 2008 Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (2012) 2012(1) Tidsskrift for eiendomsrett 21.

role that property has played in the history of Norwegian democracy. In Section 4.3, I move on to describe the law relating to hydropower development. I first identify a basic tension in the law – some would call it an inconsistency – between hydropower as a private right on the one hand, and a public good on the other. I then go on to explain how this tension permeates the law, by presenting the statutory regulation of hydropower development in more depth.

I follow this up by considering hydropower in practice, especially practices that relate to small-scale development in cooperation with local owners. I trace the history of the dominant model used to organise this form of development, going back to the first expression I could find of the core principles, given in the so-called *Nordhordlandsmodellen*, from 1996.[17] This model presented a financial mechanism for benefit sharing that was later adopted by the market for small-scale hydropower development. In addition, the model expressed broader governance principles pertaining to the importance of sustainability, the involvement of non-owners, and the desirability of long-term planning based on local conditions and local participation in decision-making processes.

However, as I discuss in Section 4.6, these aspects of the model have largely failed to make an impact. I go on to argue that a lack of social awareness might be part of the reason why small-scale hydropower now appears to be falling out of favour. I note, moreover, how a recent change in the perception of small-scale hydropower has also lead to a resurgence of large-scale development. This is threatening to undermine the position of local communities and owners, and has led to a series of controversial cases before the courts.

This underscores the importance of maintaining a social function perspective on local ownership of riparian rights. Moreover, it provides important background and context for my study in the two chapters that follow, wherein I specifically address the use of expropriation – and alternatives to it – to facilitate hydropower development.

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[17] See Otto Dyrkolbotn and Arne Steen, *Nordhordlandsmodellen* (A manifesto on local hydropower development, published following a seminar at Dyrkolbotn Leirskole, fall of 1996, Dyrkolbotn Leirskole 1996).

## 4.2 Norway in a Nutshell

Norway is a constitutional monarchy, based on a representative system of government.[18] The executive branch is led by the King in Council, the Cabinet, headed by the Prime Minister. Legislative power is vested in the Storting, the Norwegian parliament, elected by popular vote in a multi-party setting.[19] In 1884, the parliamentary system first triumphed in Norway, as the cabinet was forced to resign after it lost the confidence of parliament. The principle has since obtained the status of a constitutional custom. In particular, the cabinet can not continue to sit if parliament expresses mistrust against it. However, an express vote of confidence is not required. In practice, due to the multi-party nature of Norwegian politics, minority cabinets are quite common. These can sustain themselves by making long-term deals with supporting parties, or by looking for a majority on a case-by-case basis.

The judiciary is organised in three levels, with 70 district courts, 6 courts of appeal, and the Supreme Court. The district courts have general jurisdiction over most legal matters; there is no division between constitutional, administrative, civil, criminal courts. [20] The courts of appeal have a similarly broad scope. Moreover, the right to appeal is ensured in most cases.[21] The Supreme Court, on the other hand, operates a very strict restriction on the appeals it will allow.[22] It

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18 For Norwegian constitutional law generally, see Johs Andenæs and Arne Fliflet, *Statsforfatningen i Norge* (10th edn, Akademika 2006).

19 It should be noted that the executive branch also enjoys considerable legislative power under Norwegian law. Both informally, because it prepares new legislation, and also formally, because it has wide delegated powers to issue so-called *directives* (forskrifter). Indeed, it is typical for acts of parliament to include a general delegation rule which permits the executive to legislate further on the matters dealt with in the act, by clarifying and filling in the gaps left open by it.

20 However, there are distinct procedural rules for civil and criminal cases and a special court exists for *land consolidation*. See the Land Consolidation Act 1979. Moreover, both the district courts and the courts of appeal follow special procedural rules in *appraisement disputes*, for instance when compensation is awarded following expropriation. See the Appraisal Act 1917 respectively, discussed in more detail in later chapters.

21 The right to an appeal is not absolute. In civil cases, it is generally required that the stakes are above a certain lower threshold, measured in terms of the appellants' financial interest in the outcome. See Civil Dispute Act 2005 s 29-13.

22 See the Civil Dispute Act 2005, s 30-4.

typically only hears cases if a matter of principle is at stake, or if the law is thought to be in need of clarification.[23]

The Norwegian legal system is often said to be based on a special "Scandinavian" variety of civil law, which includes strong common law elements: legislation is not as detailed as elsewhere in continental Europe, some legal areas lack a firm legislative basis, it is generally accepted that courts develop the law, and the opinions of the Supreme Court are considered crucial to the legislative interpretation at the lower courts.[24] At the same time, legislation remains the primary source used to resolve most legal disputes. Moreover, when applying the law, the courts tend to place great weight on preparatory documents procured by the executive branch. These documents are widely regarded as expressions of legislative intent, even though parliament is not usually actively involved in the process during the preparatory stages.

The Constitution of Norway dates back to 1814 and was heavily influenced by contemporaneous political movements, particularly in the US and France.[25] Moreover, it was influenced by a desire for self-determination, as Noway was at that time a part of Denmark-Norway, largely controlled by the Danish elite.[26] Following the Napoleonic wars, Norwegian politicians sought to take advantage of Denmark's weak position to gain independence. In the end, Norway was instead forced to enter into a union with Sweden, but the Constitution remained in place. Moreover, after the triumph of the parliamentary system in 1884, Norway would also eventually gain independence, in 1905, following a peaceful and democratic transition process.[27]

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[23] See, generally, Jens Edvin A Skoghøy, 'Anketillatelse til Norges Høyesterett' in *Festskrift til Lars Heuman* (Jure 2008).

[24] See, generally, Ulf Bernitz, 'What is Scandinavian law?' (2007) 50 Scandinavian Studies in Law 13.

[25] See generally 'Grunnlovas Historie' (*Store norske leksikon*, 4th October 2014) ⟨https://snl.no/Grunnlovas_historie⟩ accessed 14th July 2015.

[26] See generally

[27] See generally Francis Sejersted, 'Unionsoppløsningen i 1905' (*Store norske leksikon*, 24th April 2015) ⟨https://snl.no/Unionsoppl%C3%B8sningen_i_1905⟩ accessed 14th July 2015.

During the 19th century, farmers and peasants emerged as a powerful group in Norwegian politics. This, it is commonly held, was in large part due to the fact that they were also landowners, whose rights and contributions were not limited to traditional farming.[28] Importantly, Norwegian tenant farmers and small-holders had a significant degree of influence over the management of the land and its natural resources. The feudal tradition was never as strong in Norway as elsewhere in Europe.[29]

The Danish-Norwegian nobility had fallen into a fiscal crisis in the 18th century, weakening their influence further. This had in turn made it possible for tenant farmers in Norway to buy land from their landowners, including grazing grounds and non-arable land.[30] As a result, the distribution of land ownership in Norway had already become highly egalitarian at the time of the Constitution. Moreover, many resources attached to land were owned jointly by several members of the local community, as larger estates were partitioned into several individual smallholdings. As a result, Norway became a society were land ownership was not a privilege for the few, but held by the many, particularly compared to feudal Europe.[31]

In 1814, the landed nobility in Norway was further marginalised. Indeed, the Constitution itself prohibited the establishment of new noble titles and estates.[32] Then, in 1821, all hereditary titles were abolished (although existing nobles kept their titles for their lifetimes).[33] By the middle of the 19th century, ordinary farmers had gained even greater political influence. In fact, they

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28 The "classic" presentation of the political influence of farmers in Norway is Halvdan Koht, *Norsk Bondereising: Fyrebuing til Bondepolitikken* (Aschehough 1926).

29 See Tore Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (Samlaget 1999) 59-60.

30 See Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (n 29) 59-60.

31 For a comparative discussion of this, focusing on how it influenced the industrialisation process in Norway, setting it apart from the industrialisation process in the UK, see Ottar Brox, 'Fattigdom og framgang: Alternative fortider? – Norsk industrialisering i komparativt lys' (2013) 24(3/4) Norsk antropologisk tidsskrift 169.

32 Constitution of the Kingdom of Norway 1814, s 23.

33 See 'Lov, angaaende Modificationer og nærmere Bestemmelser af den Norske Adels Rettigheder' (Act of August 1, 1821).

emerged as the leading political class, alongside the city bureaucrats.[34] During this time, Norway also introduced a system of powerful local municipalities. These were organised as representative democracies, becoming miniature versions of the cherished, as of yet unfulfilled, nation state (Norway was still in a union with Sweden at this time). Even today, municipalities retain a great deal of power in Norway, particular in relation to land use planning.[35] They represent a highly decentralised political structure, with a total of 428 municipalities in force as of 01 January 2013.[36]

Local control of water resources, ensured through property rights, was very important to farmers and rural communities in pre-industrial Norway. According to Terje Tvedt, 10 000 - 30 000 mills were in operation in Norway in the 1830s.[37] As Tvedt argues, the fact that these mills were under local control was particularly important because it helped ensure self-sufficiency. In addition, saw mills became an important source of extra income for Norwegian farming communities.

Today, the importance of water is clearly felt throughout Norwegian society. This is not because water is scarce, but rather because it is so plentiful. Not only is water power the main source of domestic energy. It also occupies a special place in Norwegian culture. It is important to the identity of many communities, particularly in the western part of the country, where majestic waterfalls are important symbols both of the hardship of the natural conditions and the sturdiness of local people. One particular aspect of this, with significant economic implications, is that waterfalls are an important asset to Norwegian tourism. The so-called "Norway in a nutshell" tours, for instance,

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34 See generally Marthe Hommerstad, *Politiske bønder - Bondestrategene og kampen om demokratiet 1814–1837* (Spartacus 2014).

35 They are the primary decision-makers for spatial planning, as pursuant to Planning and Building Act 2008.

36 This is down from the all-time high of 747 in 1930. There have long been proposals to reduce the number of municipalities further, but so far the political resistance against this has prevented major reforms. See 'Kriterier for god kommunestruktur' (1st December 2014) ⟨https://www.regjeringen.no/no/tema/kommuner-og-regioner/kommunereform/ekspertutvalg/sluttrapport/id751494/⟩ accessed 14th July 2015 (report to the Ministry from an expert committee on municipality reform, 2014).

37 See Tvedt (n 3) 121.

have become greatly popular, based on delivering access to wild and unspoilt nature, with fjords, waterfalls, idyllic villages, and railway lines that seem to defy gravity.[38]

Another aspect of the same is the great tradition in Norway for local resistance against large-scale development that is considered damaging to the environment. In the 1960s and 70s, when the state embarked on their most ambitious projects, this led to a general political movement in Norway which saw progressive leftist protest groups join forces with local opposition groups in a fight against centralisation, exploitation of weaker groups, and environmental destruction.[39]

This all speaks to the fact that water resources are embedded in the social fabric in Norway in such a way that an entitlements-based account of property rights to such resources would be largely inappropriate. Rather, the case of Norwegian streams and waterfalls seems to be particularly suited for an investigation based on a social function view on property. As I show in this and the following two chapters, rivers and waterfalls serve to bring out tensions between rights and obligations in property, while also shedding light on the question of how to organise decision-making processes regarding economic development.

In the next section, I argue that the present law on hydropower in Norway tends to recognise only a small part of the relevant picture. On the one hand, it recognises the financial entitlements of individual owners, which it tries to balance against the regulatory needs of the state. But it largely fails to take into account that owners have broader interests, even obligations, relating to the sustainable management of their streams and their waterfalls. Moreover, it also seems that the law is increasingly failing to take into account that commercial interests can exert a strong pull on various state bodies, particularly those that are only weakly grounded in processes of democratic decision-making.

As a result, the current narrative on water resource management in Norway appears to be

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[38] See Norway in a Nutshell ⟨http://www.norwaynutshell.com/en/explore-the-fjords/⟩.

[39] See ....

based on a false dichotomy that sees the interests of "profit-maximising" owners, acting out of self-interest, pegged against the interests of a "benevolent" state, acting for the common good. In the following, I shed further light on this narrative and argue that it is deeply flawed.

## 4.3 Hydropower in the Law

Under Norwegian law, rights to harness power from rivers and waterfalls are regarded as private property.[40] The system is riparian, so by default, a stream belongs to the owner of the land over which the water flows.[41] The landowners do not own the water as such – freely running water is not subject to ownership – and the riparian owners' right to withhold or divert water is limited.[42] It is common in Norway to refer to owners of hydropower rights as *waterfall owners* ('falleiere'), a terminology I will also adopt-[43]

The waterfall owners have the exclusive right to harness the potential energy in the water over the stretch of riverbed belonging to them. This right can be partitioned off from rights in the surrounding land, and large-scale hydropower schemes typically involve such a separation of water rights from land rights. In this way, the energy company acquires the right to harness the energy, while the local landowners retain ownership of the surrounding land.

Norwegian rivers, and especially rivers suitable for hydropower schemes, tend to run across

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40 Historically, the law emphasised ownership of traditional agrarian water resources, such as fishing rights. However, new sticks were added to the waterfall bundle over the years, including the right to develop hydropower, see Arne Vislie, *Grensene for Grunneierens Rådighet over Vassdrag* (Centraltrykkeriet 1944) 14-32. For a detailed presentation of the history of water law in pre-industrial times, I refer to UA Motzfeld, *Den Norske Vasdragsrets Historie indtil Aaret 1800 med Domsamling* (Brøgger 1908).

41 See the Water Resources Act 2000 s 13.

42 See Water Resources Act 2000, s 8.

43 The Norwegian term 'fall' has a somewhat broader meaning than its English counterpart, 'waterfall'. The word 'fall' is used to describe a continuous section of any stream or river, typically identified by giving the total difference in altitude over the relevant stretch of riverbed. Furthermore, the Norwegian term 'falleier' refers to a legal person who possesses the rights to the hydropower over such a section. In this thesis, I will typically refer to the owners of waterfalls, streams and rivers with the intended reading being the same as the Norwegian notion of a 'falleier'. If special qualification is needed, for instance to distinguish between different classes of riparian owners, I will make a note of this explicitly.

grazing land and non-arable land that is owned jointly by local farmers. Hence, rights to streams and waterfalls are typically held among several members of the rural community.[44] Local owners might not be willing to give up their ownership to facilitate development, especially not on terms proposed by external developers. Hence, the authority to expropriate has become an important legal instrument for Norwegian hydropower companies.

This has resulted in a tension where, on the one hand, rights to harness hydropower from streams and waterfalls are considered private property, while on the other hand, it has become common to speak of hydropower as a resource belonging to the public. Since the Industrial Licensing Act 1917 was amended in 2008, this ambivalence in the discourse surrounding hydropower has also been part of the statutory provisions regulating hydropower development. I quote the two relevant sections side by side below:[45]

> A river system belongs to the owner of the land it covers, unless otherwise dictated by special legal status. [...]
>
> The owners on each side of a river system have equal rights in exploiting its hydropower.
>
> (Water Resources Act 2000, s 13)

> Norwegian water resources belong to the general public and are to be managed in their interest. This is to be ensured by public ownership.
>
> (Industrial Licensing Act 1917, s 1 (after amendment in 2008))

The intended reading of section 1 of the Industrial Licensing Act 1917, quoted on the right above, is that it expresses a "general starting point".[46] According to the Ministry, it expresses no more than what has always been the purpose of the special licensing requirements for large-scale

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44 Rivers tend to run through land that has not to been enclosed. Moreover, in places where there has been a land enclosure, water rights are often explicitly left out, such that they are still considered jointly owned rights belonging to the community of local farmers. For more details on (forms of) joint ownership among Norwegian farmers, see, e.g., Geir Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' [2007] Tidsskrift for Eiendomsrett 293, 570.

45 The first quote is taken from the general water law, with roots going back a thousand years to the so-called "Gulating" laws mentioned in Section 4.1. The second quote is taken from a law directed specifically at large-scale hydropower, introduced during the early days of the hydropower industry.

46 See Ot.prp.nr.61 (2007-2008) , 72.

hydropower.[47]

Despite appearances, it would be wrong to regard this as an attempt to explicitly confront the principle of private property expressed in section 13 of the Water Resources Act 2000, quoted on the left above. At least, such a confrontation does not appear to have been intended by the Ministry.[48] However, the Ministry's comment underscores the extent to which the government regards it as natural to interfere with private rights to waterfalls, to pursue policies that it regards to be in the public interest. Taken in this light, section 1 of the Industrial Licensing Act 1917 reflects the prevailing opinion that there are few, if any, recognised limits on the state's power to manage privately owned water resources.[49]

This aspect of the Norwegian system has become particularly significant following the liberalisation of the electricity sector in the early 1990s.[50] Since then, there have been an increasing number of cases where owners who are interested in undertaking their own development schemes attempt to fend off commercial energy companies wishing to expropriate.[51] Importantly, the state has tended to side with the commercial companies in these cases, granting them the authority to expropriate for economic development. This has resulted in several Supreme Court decisions on hydropower and expropriation in the past few years.[52] Before discussing the case law in more detail in the next chapter, I present the most important legislation regarding hydropower development

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47 See Ot.prp.nr.61 (2007-2008) (n 46) 72.

48 There are no indications in the preparatory materials that the Ministry sought to confront the principles of ownership encoded in the Water Resources Act 2000.

49 For a reflection of the same attitude, citing the state's broad regulatory competence as the main reason not to nationalise Norwegian water power rights, I refer to the preparatory documents underlying the Water Resources Act 2000. See Lov om vassdrag og grunnvann, 'NOU 1994:12' (Report to the Ministry of Business and Energy from a special committee appointed by the Crown Prince Regent in Council 09 November 1990, ) 152-153.

50 See, e.g., Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 16).

51 See, e.g., Christian Sontum and Einar Sofienlund, 'Ekspropriasjon av vannkraft – hvorfor den historiske metoden fra norsk rettspraksis ikke er relevant i dagens marked' (2007) 2007(4) Småkraftnytt.

52 See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82; *Otra Kraft DA, Otteraaen Brugseierforening v Bjørnarå and others* Rt-2010-1056; *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393; *BKK Produksjon AS v Austgulen and others* Rt-2011-1683; *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612.

and provide a step-by-step overview of the licensing procedure.

### 4.3.1 The Water Resources Act

The Water Resources Act 2000 contains the basic rules regarding water management in Norway.[53] This act is not only concerned with hydropower, but regulates the use of river systems and groundwater generally.[54]

In section 8, the Act sets out the basic license requirement for anyone wishing to undertake measures in a river system.[55] The main rule is that if such measures may be of "appreciable harm or nuisance" to public interests, then a license is required.[56] The water authorities themselves decide if this condition is met.[57] Moreover, the water authorities are obliged to issue such a decision if the developer, an affected authority, or others with legal standing in the matter, request it. In relation to hydropower development, it is established practice that most hydropower projects over 1000 KW will be deemed to require a license.[58]

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53 Act No 82 of 24 November 2000 relating to river systems and groundwater (unofficial translation provided by the University of Oslo, http://www.ub.uio.no/ujur/ulovdata/lov-20001124-082-eng.pdf). I also mention the Water Framework Directive of the European Union, Water Framework Directive [2000] OJ L327/1. It has been implemented in Norwegian law as the Directive Regarding Frameworks for Water Management, FOR-2006-12-15-1446. It does not directly impact on the hydropower licensing procedure, so I will not say much about it in this thesis. However, I mention that there is some concern that the Norwegian implementation of the directive has not sufficiently recognized the need for structural reforms, preferring to rely on the established approach to water management, which is centralised and sector-based. See Gro Sandkjær Hanssen, Sissel Hovik and Gunn Cecilie Hundere, 'Den nye vannforvaltningen - Nettverksstyring i skyggen av hierarki' (2014) 3 Norsk statsvitenskapelig tidsskrift 155.

54 See the Water Resources Act 2000, s 1. A river system is defined as "all stagnant or flowing surface water with a perennial flow, with appurtenant bottom and banks up to the highest ordinary floodwater level", see Water Resources Act 2000, s 2. Artificial watercourses with a perennial flow are also covered (excluding pipelines and tunnels), along with artificial reservoirs, in so far as they are directly connected to groundwater or a river system, see the Water Resources Act 2000, s 2a-2b.

55 Measures in a river system are defined as interventions that "by their nature are apt to affect the rate of flow, water level, the bed of a river or direction or speed of the current or the physical or chemical water quality in a manner other than by pollution", see the Water Resources Act 2000, s 3a.

56 See the Water Resources Act 2000, s 8. There are two exceptions, concerning measures to restore the course or depth of a river, and concerning the landowner's reasonable use of water for his permanent household or domestic animals, see the Water Resources Act 2000, s 12.

57 See Water Resources Act 2000, s 18.

58 See, e.g., http://www.nve.no/no/Konsesjoner/Vannkraft/Konsesjonspliktvurdering/ (accessed 16 August 2014). Exceptions are possible, for instance projects that upgrade existing plants, or which utilise water flowing between artificial reservoirs.

The basic assessment criterion is that a license "may be granted only if the benefits of the measure outweigh the harm and nuisances to public and private interests affected in the river system or catchment area".[59] Hence, the water authorities are empowered to decide whether a licence *should* be granted, if they find that the benefits outweigh the harms. The courts are very reluctant to censor the discretion of the administrative decision-makers on this point.[60]

The Ministry of Petroleum and Energy maintains indirect control over the assessment process by issuing directives regarding the administrative procedure in licensing cases.[61] In addition, the procedure is determined in large part by administrative practices developed by the water authorities themselves.[62] Many of the rules in the Public Administration Act 1967 also apply. However, these are general rules that tend to play a minor role compared to sector-specific practices.[63]

A few basic procedural rules are encoded directly in the Water Resources Act 2000. This includes rules to ensure that the application is sufficiently documented, so that the authorities have enough information to assess its merits.[64] Moreover, a basic publication requirement is expressed, stating that applications are public documents and that the applicant is responsible for giving public notice. The intention is that interested parties should be given an opportunity to comment on the plans.[65] More detailed rules for public notice of applications are given in section 27-1 of the Planning and Building Act 2008, which also applies to licensing applications under section 8 of the

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59 See Water Resources Act 2000, s 25.

60 This is an expression of the principle of "freedom of discretion" for the administrative branch, a fundamental tenet of Norwegian administrative law. See generally Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 71-74.

61 See section 65 of the Water Resources Act 2000.

62 I return to a presentation of administrative practice in Section 4.3.5.

63 This was a point of contention in the Supreme Court case of *Jørpeland* (n 52). The case is discussed and presented in depth in Chapter 5, Section 5.6.

64 See Water Resources Act 2000 s 23.

65 See Water Resources Act 2000, s 24. There are some exceptions to the requirement to give public notice, however. It may be dropped in case it appears superfluous, or if the application must be rejected or postponed, see Water Resources Act 2000, s 24a-24c.

Water Resources Act 2000.

Furthermore, an important rule of principle is given in section 22, regarding the relationship between applications for licenses and governmental "master plans" for the use or protection of river systems in a greater area. These plans have no clear legislative basis, but were introduced through parliamentary action in the 1980s, when the parliament decided to initiate such planning in an effort to introduce a more holistic basis for assessment of licensing applications.[66] According to section 22 of the Water Resources Act 2000, if a river system falls within the scope of a master plan that is under preparation, an application to undertake measures in this river system may be delayed or rejected without further consideration.[67] Moreover, a license may only be granted if the measure is without appreciable importance to the plan.[68] In addition, once a plan has been completed, the processing of applications is to be based on it, meaning that an application which is at odds with some master plan may be rejected without further consideration.[69] It is still possible to obtain a license for such a project, but if it harnesses less hydropower than the project indicated by the plan, section 22 states that only the Ministry may grant it.[70]

The rules considered so far apply to any measures in river systems, not only hydropower projects. However, special procedures that apply to hydropower cases are described in other statutory provisions. The most important is the Watercourse Regulation Act 1917, which is specifically aimed at a certain subgroup of hydropower schemes, namely those that involve regulation of the flow of water in a river system.[71] However, according to section 19 of the Water Resources Act 2000,

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66 Today, the planning authority is delegated to the Directorate of Natural Preservation and the NVE. See Norwegian Water Resources and Energy Directorate, 'Samlet plan for vassdrag' ⟨http://www.nve.no/no/energi1/fornybar-energi/vannkraft/samlet-plan-for-vassdrag/⟩.

67 See Water Resources Act 2000, s 22, para 1.

68 See Water Resources Act 2000, s 22, para 1.

69 See Water Resources Act 2000, s 22, para 2.

70 See Water Resources Act 2000, s 22, para 2.

71 See Section 4.3.2 below.

many provisions from the Watercourse Regulation Act 1917 also apply to unregulated, run-of-river, schemes, if they generate more than 40 GWh/year.[72] In the next section, I will present the Watercourse Regulation Act 1917 in more detail.

### 4.3.2 The Watercourse Regulation Act

In order to maximise the output of a hydropower scheme, the flow of water may be regulated using dams or diversions. Regulation was particularly important in the early days of hydropower, before the national electricity grid was developed.[73] Consumers did not want to pay for more energy than they needed when the flow was high, and they wanted to avoid power cuts in periods of drought. At this time, a few local hydropower plants were typically the only sources of electricity in any given area. This meant that regulation of the waterflow was needed to even out the level of electric output, otherwise the electricity supply would be unstable. Indeed, in the early days, it was common for electricity producers to get paid based on the stable effect they were able to deliver, rather than the total amount of energy they harnessed.[74]

This changed with the development of a wide-ranging electricity grid, which allowed electricity to be imported and exported between different geographical areas depending on the levels of output from those areas.[75] Today, producers get paid based on the total amount of electricity produced, measured in kilowatt hours (KWh). The price fluctuates over the year, and the supply-side is still influenced by instability in the waterflow in Norwegian rivers. However, the smoothing effect of the national grid means that run-of-river schemes can be carried out profitably, even if most of the electricity from the plant is produced during peak periods.

Despite the growing importance of run-of-river schemes, many key rules regarding hydropower

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72 See Water Resources Act 2000, s 19

73 See *Uleberg* (n 52) 83.

74 See Sontum and Sofienlund (n 51).

75 See *Uleberg* (n 52) 83-84.

development are still found in the Watercourse Regulation Act 1917.[76] The Act defines regulations as "installations or other measures for regulating a watercourse's rate of flow". It also explicitly states that this covers installations that "increase the rate of flow by diverting water".[77] The core rule of the act is that watercourse regulations that affect the rate of flow of water above a certain threshold are subject to a special licensing requirement.[78]

The threshold is defined in terms of the notion of a "natural horsepower", such that a license is required if the regulation yields an increase of at least 400 natural horsepower in the river. Natural horsepower is a measure of the gross estimate of the power that can be harnessed from a river stably for at least 350 days a year.[79] The mathematical definition is a very simple expression, given below:

$$nat.hp(Q, H) = 13.33 \times H \times Q$$

This formula states that the natural horsepower of a regulation project ($nat.hp(Q, H)$) is a function of two variables, $H$ and $Q$. The constant factor 13.33 is the force of gravity of Earth exerted on a mass of 1 kg (or, approximately, 1 litre of water). The variable $H$ is the difference in altitude (measured in metre) from the intake dam to the power generator. The variable $Q$ is the amount of water (measured in litre) stably available every second for at least 350 days per year. The result is then a gross estimate (assuming no energy loss) of the stable horsepower output of the hydroelectric plant that harnesses the power of $Q$ litres of water per second over a difference in altitude of $H$ metres.

Section 2 of the Watercourse Regulation Act 1917 asks us for the *increase* of this figure after

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76 Act relating to the regulation of watercourses of 14 December 1917 No. 17.

77 See Watercourse Regulation Act 1917, s 1.

78 See Watercourse Regulation Act 1917, s 2.

79 See Watercourse Regulation Act 1917, s 2.

regulation. To arrive at this number, one first uses the formula with $Q$ taken to be $Q_1$, the stable water flow prior to regulation, before calculating it with $Q$ taken to be $Q_2$, the stable water flow after regulation. The difference between the second and the first figure ($nat.hp(Q_2, H) - nat.hp(Q_1, H)$) is the increase of natural horsepower resulting from regulation.

Effectively, at a time when electricity had to be produced at a stable effect, from a stable source of power, this increase in natural horsepower was a gross estimate of the value added to the river by regulation. In the present context, suffice it to say that most watercourse regulations undertaken in the context of hydropower development will indeed yield 400 natural horsepower or more, so that they require a special license pursuant to section 2 of the Watercourse Regulation Act 1917.

The criteria for granting a regulation license are similar to those for granting a license pursuant to the Water Resources Act 2000. In particular, section 8 of the Watercourse Regulation Act 1917 states that a license should ordinarily be issued only if the benefits of the regulation are deemed to outweigh the harm or inconvenience to public or private interests.[80] In addition, it is made clear that other deleterious or beneficial effects of importance to society should be taken into account.[81] Finally, if an application is rejected, the applicant can demand that the decision is submitted for review by parliament.[82]

The Watercourse Regulation Act 1917 contains more detailed rules regarding the procedure for dealing with license applications. The most practically important is that the applicant is obliged to carry out an impact assessment pursuant to the Planning and Building Act 2008.[83] This means that the applicant must organise a hearing and submit a detailed report on positive and negative effects of the development, prior to submitting a formal application for a licence. Effectively, at

[80] See Watercourse Regulation Act 1917, s 8.

[81] See Watercourse Regulation Act 1917, s 8.

[82] See Watercourse Regulation Act 1917, s 8.

[83] Act no 71 of 27 June 2008 relating to Planning and Building Applications.

least *two* detailed rounds of assessment are therefore required before a license is granted.

In addition to prescribing impact assessments, the Watercourse Regulation Act 1917 contains more specific rules concerning the second public hearing that should take place, when the application as such is processed. First, the applicant should make sure that the application is submitted to the affected municipalities and other interested government bodies.[84] Second, the applicant should send the application to organisations, associations and the like whose interests are "particularly affected".[85] Along with the application, these interested parties should be given notification of the deadline for submitting comments, which should not be less than three months.[86] The applicant is also obliged to announce the plans, along with information about the deadline for comments, in at least one commonly read newspaper, as well as the Norwegian Official Journal.[87] In so far as the water authorities find it "reasonable", the applicant is obliged to compensate landowners and other interested parties for expenses accrued in relation to legal and expert assistance sought in relation to the application.[88]

A license pursuant to the Watercourse Regulation Act 1917 might be cumbersome to obtain, but a successful application also results in a significant benefit. Most importantly, the license holder then automatically has a right to expropriate the necessary rights needed to undertake the project, including the right to inconvenience other owners.[89]

One may ask whether this approach, making expropriation a side-effect of a regulation license, is a legitimate manner in which to organise interference in property rights. It is clear that the issue of expropriation rarely receives separate treatment in regulation cases. In particular, the assessment

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84 Watercourse Regulation Act 1917, s 6.

85 Watercourse Regulation Act 1917, s 6.

86 See Watercourse Regulation Act 1917, s 6.

87 Watercourse Regulation Act 1917, s 6. The Norwegian Official Journal is the state's own announcement periodical.

88 Watercourse Regulation Act 1917, s 6.

89 See Watercourse Regulation Act 1917, s 16.

undertaken by the water authorities is focused on the licensing issue, which does not compel them to direct any special attention towards owners' interests.[90]

In general, the issue of who owns and controls the water resources in question receives little attention in relation to licensing applications, both pursuant to the Watercourse Regulation Act 1917 and the Water Resources Act 2000. Instead, the focus is on weighing environmental interests against the interest of increasing the electricity supply and facilitating economic development. The issue of resource ownership is more prominent in relation to a third important statute, namely the Industrial Licensing Act 1917.

### 4.3.3 The Industrial Licensing Act

In the early 20th century, industrial advances meant that Norwegian waterfalls became increasingly interesting as objects of foreign investment. To maintain national control of water resources, parliament passed an act in 1909 that made it impossible to purchase valuable waterfalls without a special license.[91] The follow-up to this act is the Industrial Licensing Act 1917, which is still in force.[92] It applies to potential purchasers and leaseholders of rivers that may be exploited so that they yield more than 4000 natural horsepower.[93]

In practice, this means that the act does not apply to many run-of-river hydropower schemes, even large-scale projects. Even some regulation schemes fall outside the scope of the Industrial Licensing Act 1917, although most large-scale regulation schemes will be covered. Originally, the main rule in the Industrial Licensing Act 1917 stated that all licenses granted to private parties were time-limited, and that the waterfalls would become state property without compensation

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90 I demonstrate this, and discuss it in much more depth, in Chapter 5, Section 5.6.

91 See ....

92 Act relating to acquisition of waterfalls, mines, etc. of 14 December 1917 No. 16.

93 Unlike section 2 of the Watercourse Regulation Act 1917, this asks only for the number of horsepower in the river (after regulation), not the *increase* of this number.

when they expired, after at most 60 years.[94] This was known as the rule of *reversion* in Norwegian law.[95]

In a famous Supreme Court case from 1918, the rule was upheld after having been challenged by owners on constitutional grounds.[96] I return to this decision in Chapter 5, but mention here that the main conclusion was that the rule of reversion represented a form of regulation of property, not expropriation. Hence, it could not be challenged on the basis of section 105 of the Constitution, even though the owners were not awarded compensation.

While the rule of reversion withstood internal challenges, it was eventually struck down by the EFTA Court in 2007, as a breach of the EEA agreement.[97] This conclusion was fuelled by the fact that reversion only applied to privately owned companies, so that it represented a form of discrimination. After this ruling, the Industrial Licensing Act 1917 was amended. Today, only companies where the state controls more than 2/3 of the shares may purchase waterfalls or rivers to which the act applies.[98]

This means that such rivers and waterfalls can only be bought, leased or expropriated by companies in which the state is a majority shareholder. In practice, however, landowners are still able to sell the land from which the right to a waterfall originates, even if this also means transferring the waterfall to a new owner. The rule is only enforced when riparian rights as such are transferred, specifically for the purpose of hydropower development. Moreover, local owners

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94 See the old Industrial Licensing Act 1917, s 2, in force before the amendment on 26 September 2008.

95 This is a misnomer, however, in light of how most rivers and waterfalls were originally owned by local peasants, not the state.

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

97 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 11). The EEA (European Economic Area) agreement sets up a framework for the free movement of goods, persons, services and capital between Norway, Iceland, Lichtenstein and the European Union. The EFTA (European Free Trade Association) oversees the implementation of the EEA for those members of EFTA that are also members of the EEA (all except Switzerland). For further details, see generally Henrik Bull, 'The EEA Agreement and Norwegian Law' [1994] (12) European Business Law Review 291; Mads Magnussen, 'Traktatbruddssøksmål ved EFTA-domstolen' [2002] Lov og Rett 131; Halvard Haukeland Fredriksen, 'Er EFTA-domstolen mer Katolsk enn Paven?' [2009] Tidsskrift for Rettsvitenskap 507.

98 See the Industrial Licensing Act 1917, s 2.

may in theory still develop hydropower in rivers and waterfalls that fall under the Act, since they already own them. But this would be difficult in practice if they are denied permission to partition the water rights off from the surrounding land, to make them available as stand-alone security for debt commitments. In effect, local owners would have a hard time acquiring financing for projects in these rivers, particularly if they do not wish to put their entire land holdings down as security.

Moreover, if they succeed in acquiring financing, a development license would likely be hard to obtain. It is quite clear, in particular, that the Norwegian government takes the view that hydropower projects in waterfalls falling under the Industrial Licensing Act 1917 should only be undertaken by companies in which the state has at least 2/3 of the shares. Moreover, the state does not seem willing to differentiate between development by external commercial interests and development by local owners.

For instance, in the ongoing case of *Sauland*, the local owners of a large waterfall wish to develop a project that would fall under the Industrial Licensing Act 1917. At the same time, a large-scale development involving the same waterfall is planned by a company in which the state owns more than 2/3 of the shares. The case is still pending a final decision, but the water authorities have stated their unwillingness to assess any licensing application from the local owners, unless they ensure that the state is granted at least a 2/3 stake in the development.[99]

In this case, the authorities use section 2 of the Industrial Licensing Act 1917 to deprive the owners of control over the development of their waterfalls. This, moreover, is not regarded as expropriation under Norwegian law. Hence, it would be unlikely to result in an obligation to pay compensation to original owners.[100] The question of how to apply the Industrial Licensing Act 1917 in this situation has not yet been clarified by the courts. If local owners may be deprived

[99] Source: NVE (www.nve.no).

[100] Instead, the question may be raised whether the government acted in accordance with the Industrial Licensing Act 1917 in this case, or extended its scope in an illegitimate way. After all, the project that the water authorities refused to consider did not in fact involve transferring control over the waterfalls to any new, non-local, owners.

of the development potential under the act, it also raises the further question of what the consequences will be for the level of compensation when this development potential is subsequently transferred to a company in which the state controls more than 2/3 of the shares. If the initial act of deprivation is regarded as following from regulation rather than expropriation, it would seem to follow from general expropriation law that no compensation is payable when the hydropower potential is subsequently taken by someone to whom all the necessary licenses may be granted.[101] In this situation, the hydropower potential might not need to be compensated, since it can no longer be said to represent a foreseeable source of income for the original owners.

The policy justification for the Industrial Licensing Act 1917 is based on the idea that giving preference to state-owned actors will protect the public interest in Norwegian hydropower. However, this perspective clashes with the fact that the electricity sector itself has been liberalised. The state may be a majority shareholder in the most powerful companies, but these companies are now run according to commercial principles, with little or no direct political involvement.[102]

Hence, as the EFTA court highlights in its judgement on reversion, there appears to be a lack of convincing policy reasons why state-owned companies should be given preferential treatment.[103] Of course, the public benefits indirectly from the fact that public bodies, as shareholders, are entitled to dividends. However, it is not clear why this benefit should be considered in a different light than other indirect financial benefits which might as well be extracted from private companies, e.g., through taxation.

The preferential treatment of publicly owned market actors also contrasts with some of the key ideas behind the basic building block of the new electricity market, namely the Energy Act 1990.

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101 I note the parallel with the *Agri* case in South Africa, which concerned similar mechanisms in the context of mineral rights, as discussed in Chapter 2, Section **??**.

102 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 11) 86.

103 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 11) 84-87.

### 4.3.4 The Energy Act

Before 1990, the Norwegian electricity sector was tightly regulated by the government.[104] The responsibility for the national grid was divided between various public utilities that would also typically engage in electricity production, wielding monopoly power within their districts. The most powerful utilities were controlled by the state, who also developed large-scale hydropower to supply the metallurgical industry with cheap electricity.[105] However, the county councils and the municipalities maintained a significant stake in the hydroelectric sector, as they often controlled the utilities responsible for the electricity supply in their own local area.[106] Prior to 1990, there was not competition on the electricity market, and the local monopolists could deny other energy producers access to the distribution grid.[107]

This system was abandoned following the passage of the Energy Act 1990.[108] This act set up a new regulatory framework, where management of the grid was decoupled from the hydropower production sector.[109] In particular, the act established a system whereby consumers could choose their electricity supplier freely. At the same time, the Act aimed to ensure that producers were granted non-discriminatory access to the electricity grid. This laid the groundwork for what has today become an international market for the sale of electricity, namely the Nord Pool.[110]

In this way, the Energy Act served to establish a market where any actor, privately owned or otherwise, could supply electricity to the grid, and therefore profit commercially from developing

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104 See generally Torstein Bye and Einar Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (2005) 40(50) Economic and Political Weekly 5269; Dag Ove Skjold and Lars Thue, *Statens nett: systemutvikling i norsk elforsyning 1890-2007* (Universitetsforlaget 2007).

105 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 67-71.

106 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 85.

107 See *Uleberg* (n 52) 83-84.

108 See generally Jens Naas-Bibow and Gunnar Martinsen, *Energiloven med kommentarer* (2nd edn, Gyldendal 2011).

109 See generally Bye and Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (n 104).

110 See http://www.nordpoolspot.com/About-us/. See generally Skjold and Thue (n 104); Lars Galtung, 'Nord Pool og Kraftmarkedet' 39(6) Plan 22.

hydropower. In response to this, monopoly companies were reorganised, becoming commercial companies that were meant to compete against each other, and against new actors that entered the market.[111] In addition to commercialisation, the market-orientation of the sector has also lead to centralisation, as many of the locally grounded municipality companies have disappeared as a result of mergers and acquisitions.[112] As a result, the local and political grounding of the electricity sector, which used to be ensured through decentralised municipal ownership, has been significantly weakened.

At the same time, the fact that any developer of hydropower is now entitled to connect to the national grid gives private actors a possibility of entering the Norwegian energy market. They may do so not merely as (minority) shareholders in former utilities, but also as *competitors*.[113]

In the next section, I give a step-by-step presentation of the licensing procedure for hydropower, which serves to summarise the legislative framework and provide information about the institutional framework within which it is called to function.

### 4.3.5 The Licensing Procedure

The water authorities in Norway are centrally organised. The most important body is the Norwegian Water Resources and Energy Directorate (NVE), based in Oslo.[114] In many cases, the NVE have been delegated authority to grant development licenses themselves, but in case of large-scale development, they only prepare the case, then hand it over to the Ministry of Petroleum and En-

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111 See DH Claes and A Vik, 'Kraftsektoren: fra samfunnsgode til handelsvare' in DH Claes and PK Mydske (eds), *Forretning eller fordeling? Reform av offentlige nettverkstjenester* (Universitetforlaget 2011).

112 Today, the 15 largest companies, largely controlled by the state and some prosperous city municipalities, own roughly 80% of Norwegian hydropower, measured in terms of annual output. See Ot.prp.nr.61 (2007-2008) (n 46) 28. I remark that the process of consolidation started even before the market-oriented reform of the sector. In particular, from 1960 onwards there was a significant push towards centralisation, as the state became a more dominant actor in the hydropower sector. For the state's increasing influence on the sector generally, see Skjold (n 8); Thue and Nilsen (n 8).

113 See generally Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 16); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 16); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 16).

114 See www.nvn.no.

ergy.[115] The Ministry, in turn, gives its recommendation to the King in Council, who makes the final decision.[116] Parliament must also be consulted for regulations that will yield more than 20 000 natural horsepower.[117]

As indicated by the survey of relevant legislation given in previous sections, there are many categories of hydropower projects. Moreover, different categories call for different licenses. Hence, the first step in the application process is for the developer to determine exactly what kind of license they require. This is further complicated by the fact that some categories overlap, since they are based on different measuring sticks for assessing the scale of an hydropower project.

One important parameter is the power of the hydropower generator, measured in MW (Megawatts). There are four categories of hydropower formulated on this basis: the micro plants (less than 0.1 MW), the mini plants (less than 1 MW), the small-scale plants (less than 10 MW), and the large-scale plants (more than 10 MW). In practice, one tends to use small-scale hydropower more loosely, to refer to all projects less than 10 MW. Still, a further qualification is sometimes required. For example, the authority to grant a license for a micro or mini plant has been delegated to the regional county councils since 2010, in an effort to reduce the queue of small-scale applications at the NVE.[118] The council's decision is based on a (simplified) assessment made by the regional office of the NVE. In addition, licenses for micro and mini plants may be granted even in

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115 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705) and directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270), pursuant to Water Resources Act 2000 s 64.

116 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

117 See Watercourse Regulation Act 1917, s 2.

118 See delegation letter from the Ministry of Petroleum and Energy, dated 07 December 2009, available at http://www.nve.no (accessed 24 August 2014). The county council is an elected regional government institution situated between the municipalities and the central government. There are 19 county councils in Norway as of 01 January 2015. They are comparatively less important than both the municipalities and the central government, but have several responsibilities, particularly in relation to infrastructure, education and resource management. See generally Ole T Berg, 'Fylkeskommune' (*Store norske leksikon*, 29th April 2015) ⟨https://snl.no/fylkeskommune⟩ accessed 14th July 2015.

watercourses that have protected status pursuant to environmental law.[119]

For small-scale plants proper, the authority to grant a license is delegated to the NVE, with the Ministry serving as the first instance of appeal.[120] For large-scale plants, the granting authority is the King in Council, based on a recommendation from the Ministry.[121] However, in practice, the decision is usually closely based on assessments and recommendations provided by the NVE.[122]

While the relevant licensing authority depends on the effect of the planned plant, the kind of license required depends on a different categorisation, relating to the level of planned water regulation, measured in natural horsepower. Here, there are three categories: run-of-river schemes (less than 500 natural horsepower), non-industrial regulations (less than 4000 natural horsepower), and industrial regulations (more than 4000 natural horsepower).[123]

Almost all hydropower schemes require a license pursuant to section 8 of the Water Resources Act 2000.[124] For run-of-river schemes, no further licenses are required for the development itself, although an operating license pursuant to the Energy Act 1990 is typically required for the electrical installations.[125] For schemes involving a non-industrial regulation, an additional license pursuant to section 8 of the Watercourse Regulation Act 1917 is required. Industrial regulation schemes require yet another license, pursuant to section 2 of the Industrial Licensing Act 1917.

As is to be expected, the complexity of the licensing procedure tends to increase with the number of different licenses required. However, the licensing applications tend to be dealt with in

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119 See Decision no 240, Stortinget (2004-2005), St.prp.nr.75 (2003-2004) and Innst.S.nr.116 (2004-2005).

120 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705).

121 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

122 For a detailed guide to the administrative process for large-scale applications, published by the NVE, see Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010).

123 See Watercourse Regulation Act 1917 s 2 and Industrial Licensing Act 1917, ss 1,2.

124 As mentioned in Section 4.3, the exceptions are very small schemes (usually mini or micro) that are deemed to be relatively uncontroversial. Such schemes only require a license pursuant to the Planning and Building Act 2008.

125 See Energy Act 1990, s 3-1.

parallel, so that all licenses are granted at the same time, following a unified assessment. In practice, when the Watercourse Regulation Act 1917 applies, it structures the procedure as a whole, also those aspects that pertain to other licenses.

In addition, yet another categorisation of hydropower schemes is used to determine the relevant application procedure. This categorisation is based on the annual production of the proposed plant, measured in GWh/year. There are three categories: simple schemes (less than 30 GWh/year), intermediate schemes (less than 40 GWh/year), and complicated schemes (more than 40 GWh/year). As mentioned in Section 4.3.2, the most important rules in the Watercourse Regulation Act 1917 applies to complicated schemes, regardless of whether or not the scheme involves a regulation.[126] In addition, applications for such schemes must be accompanied by an impact assessment pursuant to section 14-6 of the Planning and Building Act 2008.

This means that the applicant is required to organise a public hearing prior to submitting their formal application, to collect opinions on the project and provide an overview of benefits and negative effects of the plans, particularly as they relate to environmental concerns.[127] In practice, if an impact assessment is required this significantly increased the scope and complexity of the application processing.

For intermediate schemes that do not involve regulation, the rules in the Watercourse Regulation Act 1917 do not apply. However, impact assessments *may* still be required.[128] Here the threshold of 30 GWh/year has been set as an additional threshold by the NVE, who have been delegated authority to require impact assessments for hydropower projects even when these yield less than 40 GWh/year.[129] For the intermediate schemes, NVE decides whether an impact assessment is

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126 See Water Resources Act 2000, s 19.

127 See directive of 19 December 2014 (FOR-2014-12-19-1758), pursuant to the Planning and Building Act 2008, ss 1-2,14-6.

128 See Stokker (n 122) 20.

129 See directive of 19 December 2014 (FOR-2014-12-19-1758).

required on a case-by-case basis. For simple schemes, on the other hand, impact assessments will not be required. Such schemes make up the core of what is described as small-scale hydropower in daily language.

The time from application to decision can vary widely, depending on the complexity of the case, the level of controversy it raises, and the priority it receives by the licensing authority. Usually, the assessment stage itself will last 1-3 years, sometimes longer.[130] While large-scale schemes involve more complicated procedures, they are also typically given higher priority than small-scale schemes. In recent years, following the surge of interest of small-scale development, a processing queue has formed at the NVE.[131] This means that small-scale applications typically have to wait a long time, sometimes several years, before the NVE begins processing them.[132]

As I will discuss in more depth in the next chapter, the issue of expropriation is rarely given special attention during the application assessment. This is so even in cases when an application to expropriate waterfalls is submitted alongside the licensing applications. The issue of expropriation is rarely singled out for special treatment, at least not in cases of large-scale development. Moreover, as mentioned in Section 4.3, an automatic right to expropriate follows from section 16 of the Watercourse Regulation Act 1917.

This rule is not understood to cover the right to harness hydropower as such, but it *is* understood to cover the right to divert water away from river systems where the applicant has no previous riparian rights.[133] This is a *de facto* expropriation of a riparian right, and it is recognised as such in relation to the issue of compensation. However, it does not count as expropriation of a right to harness hydropower. Recently, the Supreme Court held that because of this, many of the

130 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø, 'NOU 2012:9' , 84-85.

131 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 130) 84.

132 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 130) 84.

133 See *Jørpeland* (n 52).

procedural rules that ordinarily apply to expropriation of riparian rights are not relevant.[134] Rather, the procedural rules and practices related to the licensing procedure are considered exhaustive.

These rules and practices pay little attention to the interests of local owners and the immediate local community. Usually, the only locally grounded actor that is recognised as playing an active role in the process is the municipality. However, even the role of the municipality is limited. Once a license is granted according to a sector-specific statute, no regular planning license needs to be obtained from the municipality government.[135] However, the municipalities must be notified of any application that might affect their interests, and they are expected to express their views.[136] In addition, they may protest against the plans using a form of objection that requires the NVE to enter into dialogue with them about possible changes and improvements.[137] If an agreement is not reached, a license can still be approved, although then always by the Ministry, not the NVE.[138]

The local owners are in a much weaker position. The NVE is not even obliged to notify them of licensing applications concerning their riparian rights. Rather, it is expected that the applicant notifies affected owners when submitting a license application. It is not established practice for the NVE to check that the applicant has fulfilled their obligation in this regard.[139] The applicant is also responsible for several other aspects of the assessment process, including the assessment of possible alternatives.[140]

One might think that this would raise competency questions, particularly in cases involving expropriation. However, even for such cases it is established practice for the NVE to delegate to

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134 See *Jørpeland* (n 52).

135 See Planning and Building Act 2008 s 12-1.

136 See Watercourse Regulation Act 1917, s 8 and Water Resources Act 2000, s 24.

137 See Planning and Building Act 2008, ss 5-4,5-6, c.f., Water Resources Act 2000, s 24.

138 See Planning and Building Act 2008, s 5-6.

139 See *Jørpeland* (n 52), and the discussion in Chapter 5, Section 5.6.

140 See Stokker (n 122). For a concrete example of its effect in expropriation cases, I refer to *Jørpeland* (n 52) and the detailed assessment of this case offered in the next chapter.

the applicant much of the responsibility for preparing the assessment material, a practice that the Supreme Court has accepted.[141]

In cases that fall under the Watercourse Regulation Act 1917, the NVE must send its final report and recommendation to the interested parties for comments.[142] It is established practice that local owners do *not* count as interested parties in this regard.[143] This includes the owners of those rivers and waterfalls that the applicant wishes to expropriate. Hence, while the municipalities and various environmental interest groups are informed of how the case progresses and asked to comment prior to the final decision, the owners must inquire on their own accord if they wish to be kept up to date on the application process.

The lack of procedural safeguards protecting the interests of local owners is reflected in the kind of assessments that tend to be carried out. It is typical for assessments to focus primarily on the benefit of increased electricity production weighed against the negative effects on the natural environment. This, indeed, is the perspective that permeates the whole system, from the rules setting out the expected content of applications, through to the procedures followed when assessing cases, towards the criteria used to determine if a license should be granted.[144] As a result, the opinions of environmental groups and expert agencies are typically taken seriously, while the owners typically struggle to make an impact.[145]

To sum up, hydropower cases are assessed from within an expert-based system of governance, which also relies heavily on data that is collected and presented by the applicant. Political voices tend to remain fairly distant, although special interest groups can still play an important role. Municipality companies have been replaced by commercial actors on the applicant side, while the

141 See *Jørpeland* (n 52).

142 See Watercourse Regulation Act 1917 s 6.

143 See *Jørpeland* (n 52).

144 See Stokker (n 122).

145 See *Jørpeland* (n 52).

most important administrative decision-maker, the NVE, is a centralised, expert-based, directorate.

This is the procedural context of Norwegian hydropower, entrenched in law. In the next section, I will shift attention towards practical reality, focusing on the changes that resulted from the liberalisation reform of the early 1990s. I will begin by considering the established part of the sector, by presenting the ownership and management structures surrounding large-scale plants and the management of the national grid. Then I go on to consider specifically the surge of interest in small-scale hydropower, which represents an important counterweight to the process of centralisation that has followed in the wake of the reform.

## 4.4 Hydropower in Practice

The history of hydropower in Norway can be roughly divided into four stages. The first stage was the development that took place prior to 1909. During this time, private actors dominated, with public ownership playing a minor role.[146] Moreover, there were many private interests speculating in acquiring Norwegian waterfalls, anticipating the value that these would have for industrial development.[147]

After 1909, the introduction of licensing obligations and the rule of reversion meant that the state gained increased control over Norwegian water resources. At the same time, local municipalities began to invest in hydropower to provide electricity to its citizens, a service they were increasingly being obliged to provide.[148] This marked the start of the second stage of hydropower development, which saw the development of a more tightly regulated, yet still decentralised, hydropower sector.

In fact, throughout the first half of the 20th century, most hydroelectric plants were small-scale

146 See Ot.prp.nr.61 (2007-2008) (n 46).

147 See Hjemfall (n 4) 30-31.

148 See Ot.prp.nr.61 (2007-2008) (n 46).

plants that supplied local communities with electricity.[149] Moreover, as of 31 December 1943, 89% of all hydroelectric power stations in Norway were still private, many of which were mini and micro plants that were owned and operated by the local community.[150] However, many bigger plants were also under private ownership, with 57% of the total hydroelectric power available at this time supplied by the private sector. Moreover, while the micro and mini plants accounted for 72.9% of the total number of plants, they only accounted for 1.6% of the total electricity supply.[151]

By the end of 1943, 80% of the Norwegian population had access to electricity. In scarcely populated rural areas, the corresponding figure was 70%.[152] This shows that the decentralised approach to hydropower development, based on private ownership and local control, succeeded quite well in supplying electricity to the country's population.

However, the regulatory regime was soon to undergo a significant change, designed to facilitate industrial development and increased state control. This change came quite rapidly after the Second World War, when the central government began to invest heavily in hydropower, often to ensure economic development by subsidising the metallurgical industry.[153] This period saw increased marginalisation of small private electricity companies, as well as local owners.[154] Indeed, it was often demanded, as a condition for allowing local communities access to the national electricity grid, that local hydroelectric plants had to be shut down.[155] During this time, the development of hydropower was seen as an important aspect of rebuilding the nation, a task carried out in the

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149 See Utbygd vannkraft i Norge (Norges vassdrags- og elektrisitetsvesen 1946) 11. This is a report from the water directorate published in 1946, showing that as of 31 December 1943, 97.8% of all hydroelectric plants in Norway were small-scale plants. However, these plants contributed only 28% of the total hydroelectric power installed at that time.

150 See Utbygd vannkraft i Norge (n 149) 6. See also Hindrum (n 9) 111.

151 See Utbygd vannkraft i Norge (n 149) 7.

152 See Utbygd vannkraft i Norge (n 149) 7.

153 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 59-65.

154 At the same time, powerful (private) metallurgical interests benefited greatly, sometimes also at the expense of the general supply of electricity. See **tvedt96**

155 See Hindrum (n 9) p.111.

public interest, not primarily to supply the public with electricity, but rather to facilitate a specific kind of economic development that national politicians deemed desirable.[156]

The state-dominated system set up on this basis remained in place until the 1970s, when environmental concerns and discontent among the municipality governments began to emerge with greater force.[157] At the same time, the typical development project had grown both in scale and complexity, making environmental worries and local demands for increased benefit sharing more convincing.[158] Several actors would frequently oppose large-scale hydroelectric development, including environmental interest groups, local communities, as well as municipal and regional government institutions.[159] The typical response from the state was to introduce measures that sought to pacify the regional and municipal government opposition, which was structurally more serious than opposition from local people and environmental groups. The typical approach was to grant an increased share of the financial benefit to local and regional institutions of government, to instil support for state-led development plans.[160] This generally worked quite well, but also to some extent limited the centralisation process and the state's power over the hydroelectric sector.[161]

The fourth state of hydropower development began in 1990 after the passage of the Energy Act 1990. The liberalisation that followed saw the transformation of the hydropower sector into a commercial market, based on profit-maximising and competition. As a result, the structure of decentralised management withered away further, as many municipality companies were either bought up by more commercially aggressive actors or forced to merge and change their business

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156 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 59.

157 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 71-75.

158 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 73.

159 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 71-72.

160 See Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(01) Historisk tidsskrift, 73-76.

161 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 5) 85.

practices in order to remain competitive.[162] At the same time, a new decentralised force emerged in the sector, in the form of local owner-led projects.[163]

The core idea behind the Energy Act 1990 was that the electricity sector should be restructured in such a way that production and sale of electricity, activities deemed suitable for market regulation, would be kept organisationally separate from electricity distribution over the national grid, a natural monopoly. However, the act itself does not explain in any depth how this is to be achieved. In practice, moreover, the divide has not been strictly implemented. In particular, most of the large energy companies in Norway continue to maintain interests in both distribution, production and sale of electricity, a phenomenon known as "vertical integration".[164] In fact, since the liberalisation reform also caused centralisation, the degree of vertical integration in the electricity sector has increased since the passage of the Energy Act 1990.[165]

The water authorities try to respond to this, particularly by making use of their authority to give organisational directives when they grant distribution licenses.[166] Moreover, electricity companies are required to keep separate accounts for production, distribution and sale of electricity.[167] It is also required that transactions across these functional divides are clearly marked, and that they are based on market prices.[168] Moreover, the NVE serves a control function in this regard, as they review the accounts of distributors on an annual basis.[169]

The water authorities have also sometimes required that a separate company is set up to

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[162] See Bibow (n 13) 583 (commenting on the increased consolidation of power on the electricity market, following acquisitions and mergers after 1990).

[163] See Section **??** below.

[164] See Bibow (n 13) 580-583.

[165] See Bibow (n 13) 583.

[166] See Energy Act 1990, s 4-1, para 2, no 1.

[167] See directive of 11 March 1999 (FOR-1999-03-11-302), s 4-4 a and s 2-6, issued by the NVE pursuant to directive of 7 December 1990 (FOR-1990-12-07-959), s 9-1, cf., Energy Act 1990, s 10-6.

[168] See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-8.

[169] See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-1.

manage the distribution activities.[170] However, it is permitted for this reorganisation to take place through the formation of a conglomerate, under a single parent company that controls both the distribution company, the production company and the sales company. Indeed, this model has now been implemented by most of the large energy companies in Norway.[171]

It seems unclear whether this approach really achieves the stated objective. By adopting the conglomerate model of organisation, the major players on the market have successfully gained control over a larger share of both the production and distribution facilities for electricity. Hence, these actors effectively control the core infrastructure that makes up the backbone of the Norwegian electricity sector. The *intention* is that monopoly power should only be exercised with respect to the distribution grid on strictly regulated, non-discriminatory, terms. But is this realistic when the conglomerate including the grid operator has significant stakes in production and sale of electricity?

This question calls for a separate study, and I will not be able to address it in any depth here. However, I will direct attention at one aspect of this that arises with particular urgency for small-scale development of hydropower. It is quite common, in particular, that small-scale projects remain unrealised because the grid is regarded to lack sufficient capacity to accommodate new electricity.[172] The distribution company is authorised to deny access in such cases, in keeping with their responsibility for providing an efficient and stable public service.[173]

Often, the distribution company will be a sister company of an energy producer operating in direct competition with the company seeking access. This raises obvious questions about the impartiality of the assessments carried out by the distribution company. In expropriation cases, this tends to become a thorny issue, particularly in relation to the assessment of the cost of undertaking

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170 See Bibow (n 13) 581-582.

171 Bibow (n 13) 582.

172 See, e.g., Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 130) 84,161-162.

173 See Energy Act 1990, s 3-4, c.f., directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

alternative development schemes. Riparian owners are rarely pleased when they realise that the expropriating party is part of the same conglomerate as the grid company that estimates the grid connection costs associated with owner-led development.

The water authorities themselves have recognised that access rights soon become illusory if it is too easy for the grid companies to deny access based on efficiency considerations.[174] At the same time, they point to the need for responsible management of the national grid, which, as they see it, requires delegation of authority to the grid companies. Hence, the authorities are left with a dilemma. So far, they have responded to this mainly by issuing more regulation, not by attempting to reduce the level of power-concentration in the electricity sector.

The Energy Act was changed in 2009, such that grid companies are now subjected to a more wide-reaching duty to allow access for producers, even when this necessitates new investments.[175] But who should pay, and how much? This is often unclear, and while the water authorities have a supervisory function, it is the grid companies themselves that determine this in the first instance.[176] In addition, grid companies may still deny access in cases when the needed investments are not "socio-economically rational".[177] Hence, it seems that these new rules only push the question of fairness and accountability further into the details of the decision-making process, without addressing the underlying problem of power concentration.

As I have already mentioned, the market-orientation of the electricity sector has reduced the level of political control and accountability. Today, a management model based on economic rationality and expert rule has become dominant. According to Brekke and Sataøen, this serves to set the reform that took place in Norway apart from similar energy reforms in Sweden and the

174 See Ot.prp.nr.62 (2008-2009) .

175 See Act no 105 of 19 June 2009 regarding changes in the Energy Act 1990.

176 See directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

177 See Energy Act 1990, s 3-4. The authority to decide whether this requirement is fulfilled is vested with the Ministry.

UK.[178] Moreover, Brekke and Sataøen argue that this might be an underlying cause of some recent controversies, particularly with regards to the development of the national grid.

The most serious case so far is that of *Sima - Samnanger*, a new distribution line that will cut through the area known as *Hardanger*, a scenic part of south-western Norway. The local population vigorously protested the plans.[179] It would destroy a valuable part of Norwegian nature, they argued, without providing the people living there with anything in return.[180] Despite an extensive campaign against the plans, the government still pushed ahead, arguably demonstrating both the power of the central government and its willingness to use it in cases involving management of the national grid.[181]

The growth of the small-scale hydropower sector acts as a counterweight to centralised management and expert rule, giving local communities and owners a new voice, as market participants. Since the mid- to late 1990s, the small-scale sector has grown significantly. It has been estimated that about one third of the remaining potential for hydropower in Norway, measured in annual energy output, will come from small-scale projects.[182]

Many established energy companies have entered into the small-scale market, but they are facing serious competition from new actors, several of which are owner-controlled and locally based. This development has been a counterweight to the increasingly centralised ownership pattern in the hydroelectric sector. In many ways, owner-led and owner-cooperating companies have replaced the municipality companies as the local anchor of Norwegian hydropower.

In a recent report, the potential for profitable small-scale hydropower projects was estimated to

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178 See Ole Andreas Brekke and Hogne Lerøy Sataøen, 'Fra Samkjøring til Overkjøring' (2012) 44(6) Plan 22.

179 See Brekke and Sataøen (n 178) 22-23.

180 Brekke and Sataøen (n 178) 26-27.

181 Brekke and Sataøen (n 178) 27.

182 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n 130) 231.

be around 20 TWh/year.[183] On this basis, the authors of the report estimate that the total present-day value of the waterfalls suitable for small-scale hydropower is about 35 billion Norwegian kroner, i.e., about 3.5 billion pounds.[184] This calculation is based on a model where the waterfalls are exploited in cooperation with a commercial company, *Småkraft AS*. It might be an underestimate of what small scale hydropower could represent for local communities if they remain in charge of development themselves.

Small-scale hydropower has become socially and political significant in Norway. In the report mentioned above, it is estimated that the value of rivers and waterfalls amount to just under 50 % of the total equity in Norwegian agriculture.[185] Moreover, hydropower is increasingly seen as a possibility for declining regions to counter depopulation and poverty. It promises to give these communities a chance to regain some autonomy and influence with respect to how local natural resources should be managed. In some regions, small-scale hydropower is the only growth industry. Hence, it takes on great political and social importance, not just for the owners of waterfalls, but for the community as a whole.

For an example of a community where small-scale hydropower has played such a role, I point to Gloppen, a municipality in the county of Sogn og Fjordane, in the western part of Norway. 19 schemes have already been successfully carried out, all except one by local owners themselves, amounting to a total production of over 250 GWh/year. This prompted the mayor to comment that "small scale hydro-power is in our blood".[186] When interviewed, he also directed attention at the fact that hydropower had many positive ripple effects, since it significantly increased local

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183 See Normann Aanesland and Olaf Holm, Verdiskapning av Småkraft (Rapport Nr. 31, Universitetet for miljø- og biovitenskap 2009). For comparison, suggesting the scale of this potential, I mention that the total consumption of electricity in Norway in 2011 amounted to 114 TWh, see http://www.ssb.no/en/energi-og-industri/statistikker/elektrisitetaar.

184 See Verdiskapning av Småkraft (n 183) 1.

185 Verdiskapning av Småkraft (n 183) 1.

186 See Andreas Starheim, 'Kommunen med Småkraft i Blodet' [2012] (3) Småkraftnytt.

investment in other industries, particularly agriculture, which had been severely on the decline.

To achieve such effects, it is important to organise development in an appropriate manner. Moreover, to explain how waterfalls came to be as valuable as they are today, it is crucial to direct attention to the way in which waterfall owners initially asserted themselves on the market. In the following, I do this by giving an in-depth presentation of an early model for local involvement in hydropower development, published at a seminar in 1996.[187] This model contains an early expression of several ideas that would prove influential to the development of the small-scale hydropower sector.

However, certain other aspects of the model have not been widely adopted. These are aspects that pertain to the balance of power between owners and developers, as well as the relationship that should be established with larger communities of non-owners, including environmental groups and other water users. Hence, considering the model in some depth, and assessing its impact, will allow me to shed light on desirable social functions of waterfall ownership, and the extent to which such functions are fulfilled on the market today.

## 4.5 *Nordhordlandsmodellen*

In five brief points, the *Nordhordlandsmodellen* sets out a framework for cooperation between waterfall owners, professional hydroelectricity companies, local communities, and greater society.[188] The first point makes clear that the aim of cooperation should be to ensure local ownership and control: external interests should never be allowed to hold more than 50 % of the shares in the development company. If this company is organised as a limited liability firm, then the plan stipulates that local residents – not necessarily owners – are to be given a right of preemption in the

[187] See Dyrkolbotn and Steen (n 17).

[188] See Dyrkolbotn and Steen (n 17). The model was presented at a seminar in 1996, as the result of a collaboration between Otto Dyrkolbotn, a farmer and a lawyer, and Arne Steen, the director of *Nordhordland Kraftlag*, a municipality-owned energy company.

event that shares come up for sale. The possibility of organising the development company as a local cooperative is also mentioned.[189]

The second point of the model sets out a method for valuing the riparian rights prior to development. It stipulates that the appraisement should reflect the real value of such rights, normally estimated on the basis of lease capitalisation. That is, one assumes first that the riparian owners are entitled to rent based on the level of annual production in the planned hydropower project. Then, for the purpose of appraisement, the expected rent is capitalised to find the present value of the riparian rights, relative to the development project in question.[190]

After such a value has been calculated, the model stipulates that owners are to be given a choice of either leasing out their water rights to receive rent, or to use the capitalised value of (part of) this rent as equity to acquire shares in the development company. The third point in the model then offers a clarification, by stating that the development company should not in any event acquire ownership of riparian rights, but only a time-limited right of use. After 25-35 years, this usufruct should fall away and full dominion over the river should revert back to the landowners, free of charge. This is the proposed rule even in cases when the landowners themselves initially control the majority of the shares in the development company.

The model goes on to demonstrate the commercial viability of this organisational model, by pointing to a concrete municipality-owned energy company that stated its willingness to cooperate with owners on such terms, to help with financing and share the risk.[191] The fourth and fifth points of the model describe the intended role of the local development company in society, by making

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189 References needed.

190 This approach stands in stark contrast to the earlier valuation method used in the electricity sector, which relied on a purely theoretical assessment based on the aforementioned notion of a natural horsepower. See Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015); *Bergenshalvøens Kommunale Kraftselskap v Neset and others* Rt-1997-1594.

191 The company in question is Nordhordland Kraftlag, where one of the authors of the model, Arne Steen, was a director.

clear that hydropower development should not take place in isolation from other interests and potential uses of the affected river. Rather, potential developers should take on formal obligations towards other user groups. Moreover, obligations should not only be negatively defined, as duties to minimise or avoid harms. Positive obligations should also be introduced, such as duties to improve other qualities of the river system, and to engage in active cooperation with other users.

It is explicitly stated that environmental concerns should be given due regard. As an illustration of a positive obligation arising from this, the model goes on to make clear that less invasive projects may have to be considered, even if this is not prescribed by the authorities. In some cases, environmental concerns can suggest solutions that are not economically optimal. In addition, fishing and tourism are mentioned as concrete examples of other water uses that the hydropower company should actively seek to promote.

The overall aim, it is made clear, is to ensure sustainable management of the river system as a whole. Interestingly, the model predicts that local ownership will make this easier, by making a structural contribution to sustainability that exceeds what can be achieved through governmental regulation alone. This claim is then illustrated by a concrete example of a case in which the local owners decided to pursue a scheme that was less invasive than the project endorsed by the water authorities.[192]

The model goes on to emphasise the need for integrated processes of resource planning and decision-making, to ensure that hydropower development is not approached as an isolated economic and environmental concern, but looked at in a broader social and political context. To achieve this, it is argued that local communities need to play an important role in the management of water resources. Another concrete example follows, regarding the master plan for *Romarheimsvassdraget*, a river system in the municipality of Lindås, in the county of Hordaland.

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[192] Today, this project has become Svartdalen Kraftverk, finalised in 2006. It produces 30 GWh annually, enough electricity for about 1500 households, see http://no.wikipedia.org/wiki/Svartdalen_kraftverk.

This river system was originally intended for large-scale development undertaken by BKK AS, with no involvement of local owners.[193] The project would involve a total of three river systems, such that the water from *Romarheimselva* and another river would be diverted to a neighbouring municipality for hydropower development there. After local owners got involved in the planning, they argued against these plans. Eventually, they were successful, as the NVE agreed to endorse an alternative consisting of 7 distinct run-of-river projects undertaken in cooperation with local owners.[194]

It is important to note that when *Nordhordlandsmodellen* was formulated, owner-led development of hydropower was still a recent phenomenon, driven forward by individual owners and local groups that saw the potential and had enough know-how to get organised. Later, however, commercial companies emerged that specialised in cooperating with local owners.[195] Today, many such companies operate, making it relatively easy to initiate a process of owner-led development. Moreover, owners that are not themselves aware of the potential inherent in their riparian rights may be approached by interested commercial actors. These actors will then tend to compete for the chance of striking a deal with the owners. Most of them rely on cooperation on terms that reflect the main ideas expressed in the first three points of *Nordhordlandsmodellen*.

However, several adjustments have become standard, adjustments which systematically benefit the external partner: the requirement that locals should at all times control a majority of the shares is dropped, the period of usufruct is typically longer than 35 years, the reversion to the landowners after this time is made conditional on payment for machines and installations, and no preemption rights are granted to local residents. Importantly, however, the core idea that riparian rights are

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193 BKK AS is one of the 15 biggest hydropower companies in Norway, and would later also purchase Nordhordland Kraftlag.

194 See *Vassragsrapport nr. 25*, Direktoratet for Naturforvaltning, 1999.

195 For a good survey of later developments, I point to Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 16); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 16); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 16).

to be valued based on a capitalisation of future rent is accepted. This means, in turn, that local owners rarely need to raise any additional capital to acquire shares in the development company. Moreover, the rent itself can become a significant source of income.

There are two main approaches to calculating this rent. The first approach, introduced already in *Nordhordlandsmodellen*, specifies the rent as a percentage of the gross income from sale of electricity, today often around 10-20 %.[196] In this way, passive owners need not take on any risk related to the performance of the hydropower company. The second approach has been developed by the company Småkraft AS, which is now the leading market actor specialising in cooperation with local owners.[197] According to their model, riparian owners are paid a share of the annual *surplus* from hydropower generation.[198]

This share is usually higher than the rent payable based on the net income; often, the owners are entitled to 50% of the profit.[199] Hence, if the project is a success, the riparian owners might be better compensated. However, they do accept some risks as though they were shareholders, and they do so even though they might not have much of a say in how the company is run.[200]

To illustrate the financial scale of the rent agreements that have now become standard, let us consider a typical small-scale hydropower plant that produces 10 GWh annually. With an electricity price of 0.3 NOK/KWh, this gives the hydropower plant an annual gross income of NOK 3 million. If the rent payable is 20 %, the waterfall owners will receive NOK 600 000 annually, approximately

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196 Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723 (available from the author upon request). See also Katrine Broch Hauge, 'Erstatningsnivået ved tvangsovertaking av fallrettar' (PhD Thesis, 2015) 55-57.

197 It is owned by several large-scale actors on the energy market, see www.smaakraft.no.

198 See Hauge (n 196) 57-60 (also discussing variants of this contractual idea, based on how the surplus is actually defined in the contract).

199 Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 196) (available from the author upon request). See also Hauge (n 196) 58.

200 To limit the risk for owners, companies such as Småkraft AS also operates a system of "guaranteed" rent, but this rent is usually quite a lot less than what the owners could expect from an agreement based solely on rent based on gross income. Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 196) (available from the author upon request).

GBP 60 000. By contrast, if the rights were expropriated, the traditional method of calculating compensation would be unlikely to result in more than NOK 600 000 as a *one-time payment* for a waterfall that yields 10 GWh/year.[201]

Hence, the financial consequences of the ideas expressed in *Norhordlandsmodellen* have been dramatic. At the same time, it is clear that the latter two points of the model, addressing the importance of responsible and inclusive management of river systems, have not had the same degree of influence on the market. In the next section, I address this in more depth and comment on some recent developments that threaten to undermine the status of small-scale development as a sustainable alternative to large-scale exploitation. I argue, in particular, that the future of hydropower will likely leave local owners and their communities marginalised once again, unless a social function approach to small-scale development is adopted and entrenched in the law.

## 4.6 The Future of Hydropower

In recent years, there has been a growing tension between the small-scale hydropower sector and environmental groups. There is talk of a brewing "hydropower battle", as environmentalists grow increasingly critical of what they regard as predatory practices.[202] Reports on small-scale producers who violate regulations help fuel the negative impression of the industry.[203] At the same time, the

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201 For further details on the compensation issue, see **dyrkolbotn14**; **dyrkolbotn15a**; Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 190). Sometimes, the difference in valuation would be even greater, since the natural horsepower of a development project is highly sensitive to the level of regulation of the waterfall, much more so than the value of the development. For an demonstration of how this affected compensation according to the natural horsepower method, one may consider the case *Bergenshalvøens Kommunale Kraftselskap v Neset and others* (n 190), which went to the Supreme Court. Here the owners were paid just over NOK 1 million for a waterfall that would yield 100 GWh/year.

202 See 'Det yppes til ny vassdragsstrid!' (2012) 44(03-04) Plan 34.

203 In 2010, the NVE conducted randomised inspections and announced that 4 out of 5 mini and micro plants operated in violation of regulations pertaining to the amount of water they may use at any given time. See 'Små kraftverk driver ulovlig' (*Teknisk Ukeblad*, 13th December 2010) ⟨http://www.tu.no/kraft/2010/12/13/sma-kraftverk-driver-ulovlig⟩ accessed 15th July 2015. In the largest newspaper in Norway, this was reported under the heading that four out of five small-scale plants break the law, see 'Fire av fem småkraftverk driver ulovlig' (*Verdens Gang*, 13th December 2010) ⟨http://www.vg.no/nyheter/innenriks/stroemprisene/fire-av-fem-smaakraftverk-driver-ulovlig/a/10020264/⟩ accessed 15th July 2015. This is misleading, since mini and micro plants are distinct from small-scale plants proper. Most importantly, the former kinds of plants do not usually require a sector-specific

price of electricity has been much lower in recent years than what had previously been forecast, causing severe financial difficulty for many small-scale developers.[204] This has also revealed that some of the actors on the market have engaged in speculative practices, by aggressively entering into agreements with local owners, without carrying out much actual hydropower development.[205]

On the regulatory side, the water authorities have announced that they will adopt stricter procedures to assess licenses for small-scale hydropower.[206] In addition, different planning routines have been adopted to ensure that small-scale schemes are no longer considered individually, but in so-called "packages", collecting together applications from the same area. As a consequence of these changes, the number of rejected applications have increased dramatically in recent years.[207]

Many powerful market actors, who still favour a traditional mode of exploitation, have seized the opportunity to revive the idea of large-scale exploitation.[208] This, they argue, is preferable also from an environmental point of view. It might be more damaging to the affected area, the argument goes, but at the same time, a few large-scale projects mean that many other areas can be left undisturbed with no loss of total energy output. This argument has proven influential in many quarters, particularly among state agencies, such as the NVE and the Norwegian Environ-

development license. Because of this, it also seems plausible that the reported violations might in large part be due to a lack of knowledge and professionalism, not predation. I remark that questions later emerged regarding the accuracy of the report itself. Apparently, one of the plants that was reported to have violated regulations did not even exist, see Øyvind Lie, 'NVE inspiserte kraftverk som ikke finnes' (*Teknisk Ukeblad*, 20th December 2010) ⟨http://www.tu.no/kraft/2010/12/20/nve-inspiserte-kraftverk-som-ikke-finnes⟩ accessed 15th July 2015.

204 See Linda Sunde, 'Småkraft: Kong Midas i revers' (*Bondebladet*, 8th May 2014) ⟨http://www.bondebladet.no/midten/smakraft-kong-midas-i-revers/⟩ accessed 15th July 2015.

205 See Rune Endresen, Jostein Løvås and Stig Tore Laugen, 'Solgte før kraftflopp' (*Dagens Næringsliv*, 20th March 2014) ⟨http://www.dn.no/nyheter/2014/03/20/Energi/solgte-for-kraftflopp⟩ accessed 15th July 2015.

206 See Øyvind Lie, 'NVE varsler flere småkraftavslag' (*Teknisk Ukeblad*, 18th January 2012) ⟨http://www.tu.no/kraft/2012/01/18/nve-varsler-flere-smakraft-avslag⟩ accessed 15th July 2015.

207 In 2013, the number of rejections tripled compared to previous years, while the number of accepted applications remained stable. See Linda Sunde, 'Rekordmange småkraft-avslag' (*Bondebladet*, 6th February 2014) ⟨http://www.bondebladet.no/nyhet/rekordmange-smakraft-avslag/⟩ accessed 15th July 2015.

208 See, e.g., Rune S Alexandersen, 'Troms kraft lobber for å stoppe konkurrent - vil bygge kraftverk til 649 mil' (*Nord 24*, 16th August 2014) ⟨http://www.nord24.no/nyheter/article7531155.ece⟩ accessed 15th July 2015.

mental Agency.[209] It has also been claimed that this perspective is backed up by research done on environmental effects of small-scale and large-scale projects.[210]

The argument used to back up this conclusion is that small-scale plants indirectly affect a greater total area of land, per energy unit produced.[211] This is no doubt true, since small-scale development is a decentralised approach to hydropower. In particular, this form of development requires plants at many different sites to match the energy produced by a single larger plant. But is the accumulative effect on the environment of small-scale development on many sites more damaging than the effect of a much more invasive project on a single site?

This seems to depend on one's starting point when it comes to qualitatively assessing the negative impacts arising from small-scale development compared to large-scale projects. The research so far has provided little or no information or discussion to shed light on this question. In particular, the parameters used to compare small-scale and large-scale developments are mostly defined quantitatively, in terms of generic buffer zones that do not take into account differences in the severity of different kinds of environmental intrusions.[212]

The only buffer zone that is not defined in this way is the *scenic* buffer, the area from which some installation can be seen. Here the model takes into account that a large installation should be assessed using a larger buffer zone than a small one, since the former is visible over a greater area. But even for this parameter, no distinction is made based on the actual visual impression; a large dam that dries up a river and makes it possible to regulate the water level in a lake by

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209 See Jannicke Nilsen, 'Vil ha større vannkraftverk' (*Teknisk Ukeblad*, 14th October 2011) ⟨http://www.tu.no/kraft/2011/10/14/vil-ha-storre-vannkraftverk⟩ accessed 15th July 2015.

210 See generally Tor Haakon Bakken and others, 'Development of Small Versus Large Hydropower in Norway– Comparison of Environmental Impacts' (2012) 20 Energy Procedia 185; Tor Haakon Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (2014) 140 Journal of Environmental Management 93.

211 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 210) 96-99.

212 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 210) 95.

several meters counts the same as a small cabin with a generator inside, as long as both can be seen.[213] For the other parameters, the data analysis is even more dubious, since the buffers are set uniformly according to general rules of thumb.[214] For instance, a conflict with a threatened species is assumed to arise whenever a technical installation occurs within a certain distance from its natural habitat.[215] Importantly, nothing is said about the severity of conflict, and no distinction is made between a minor installation and a massive disturbance.

Despite the shortcomings of the research presently available, the observation that more land is affected by small-scale hydropower, per produced unit of electricity, has struck a cord with administrative decision-makers. In particular, the idea that large-scale development is better for the environment is fast gaining ground in Norway, representing a complete reversal compared to the political narrative that has dominated for the last 15-20 years.

In his New Year's speech 01 January 2001, the Prime Minister went as far as to declare that the age of large-scale development was over.[216] The same phrase was then repeated in the policy platforms of two successive national governments, in 2005 and 2009 respectively.[217] But as administrative practices and case law on hydropower shows, the end of large-scale exploitation has proved impossible to implement. Despite being official policy at the highest level of government for almost 15 years, large-scale development interests continue to dominate the hydropower sec-

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213 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 210) 95.

214 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 210) 95.

215 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 210) 95.

216 See, e.g., (n 202) 34.

217 See the "Soria Moria" declaration from 2005, p 57, and "Soria Moria II", from 2009, p 52 (available at www.regjeringen.no).

tor.[218] Interestingly, the leading national politicians are now changing their position as well.[219] This seems to suggest that politicians have yielded to pressure exerted by expert planners and commercial interests in this matter.

This political shift is likely to result in a further weakening of property rights and the rights of local communities. For example, it provides indirect political legitimacy to the NVE, who now pursue an explicit policy of prioritising applications for large-scale projects when these come into conflict with small-scale schemes in the same rivers.[220] In effect, the NVE will refuse to consider applications from owners as long as there are applications pending that might result in the expropriation of their property.

All in all, it seems that small-scale hydropower is currently loosing both commercial force and political credibility as a sustainable alternative for development. The underlying causes of this deserve more attention than I can devote to them in this thesis. It would be particularly interesting to conduct a further examination into the effects of lobbying and the relationship between commercial interests and bureaucratic elites.

In addition, I would like to emphasise a different aspect, namely how many of the recent misfortunes for the small-scale sector seem to underscore the importance of adopting a broader, non-commercial, perspective on privately held rights to waterfalls. It seems that the small-scale sector needs to be challenged with its failure to comprehensively address social and environmental concerns. Moreover, it seems plausible to hypothesise that part of the reason why the small-scale industry has been so easily undermined has to do with the fact that the industry itself has failed to broadly mobilise property owners and local communities in decision-making processes.

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218 I believe the material presented in this thesis warrants making this claim. Moreover, it is underscored by the two recent Supreme Court decisions in *Jørpeland* (n 52) and *Otra II* (n 52).

219 See Øyvind Lie, 'Energiministeren etterlyser mer regulerbar kraft' (*Teknisk Ukeblad*, 28th October 2014) ⟨http://www.tu.no/kraft/2014/10/28/energiministeren-etterlyser-mer-regulerbar-vannkraft⟩ accessed 15th July 2015 (reporting on recent public statements made by the Minister in support of large-scale development).

220 See letter from the NVE of 21 March 2012 regarding new routines for the assessment of hydropower applications.

In fact, the small-scale industry has on occasion actively sought to undermine property rights, possibly in an effort to mimic the successes of their large-scale competitors. The industry has argued, in particular, that expropriation should be made more easily available as a tool for small-scale developers and owners who wish to take property from reluctant neighbours.[221] The argument rests on a peculiar form of anti-discrimination reasoning; as long as large-scale developers are allowed to take property by force, small-scale developers should be allowed to do the same. In a world where takings are endemic, this might make some sense. However, it is hardly an attitude that helps the small-scale industry preserve its image as the more sustainable hydropower option.

These critical remarks should not detract from the fact that the growth in small-scale hydropower has led to dramatically increased benefit sharing with many local owners of rivers and waterfalls. However, it is important that this effect is not looked at in isolation, as a matter completely separate from the broader societal consequences of new commercial practices. If one fails in this regard, the pernicious image of owners as socially passive "profit-maximisers" gains a firmer hold both on the political and legal narrative. The negative consequences of this for property as an institution appears to be apparent already in Norway, as I will discuss in the next chapter when I consider recent case law on expropriation for hydropower development.

The call for a broader understanding of the role of small-scale hydropower and owner-led development echoes the theoretical discussion presented in Chapter 2. There I argued that an entitlements-based perspective on property rights fails to do justice to the issues that arise in the context of economic development. In relation to hydropower development, this insight is strongly implicit in *Nordhordlandsmodellen*. However, in the current debating climate in Norway, it seems to be at risk of disappearing from view.

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221 See Ola Brekken, 'Småkraftverk og ekspropriasjon' [2007] (4) Småkraftnytt; Ola Brekken, 'Småkraftverk og ekspropriasjon – replikk til NVE' [2008] (1) Småkraftnytt 21. The articles are written by a leading Norwegian energy lawyer, apparently in his capacity as legal representative of "Småkraftforeningen", an interest organisation for small-scale hydropower (the articles are published in the newsletter of this organisation).

To counter this, I believe the social function view of property must be developed further, so that concrete policy recommendations can be formulated on its basis. The aim, I believe, should be to arrive at frameworks for participatory decision-making regarding hydropower that allows local owners and communities to contribute constructively when society desires commercial development based on their water rights.

I return to this issue in Chapter 6, where I argue that the Norwegian institution of land consolidation can be used to achieve this. First, I will zoom in on the issue of expropriation, where the mechanisms identified in this section often lead to concrete legal disputes. This will bring into focus important issues surrounding the status of economic development takings under Norwegian law.

## 4.7 Conclusion

In this Chapter, I introduced my case study and provided background information that places it in a broader context with respect to Norwegian law. I presented the legal and regulatory framework surrounding hydropower development, while also tracing its history back to pre-industrial times. I noted that local rights to hydropower has a long tradition in Norway. However, I also observed that after the advent of the industrial age, and particularly following the Second World War, the state took the view that hydropower was a public good that should be exploited for industrial development in the public interest.

The tension that followed now permeates the law on hydropower, particularly following the liberalising reform of the early 1990s. This reform reorganised hydropower development as a commercial pursuit. At the same time, local owners were empowered by the reform, as they were now able to engage in commercial hydropower development themselves. This was made possible by the fact that a market for electricity was set up, founded on the idea that all actors should have access to the electricity grid on non-discriminatory terms.

I discussed the resulting system in some depth, addressing also the question of whether or not the market functions as intended. I noted that the energy reform led to increased concentration of power in the electricity sector, where commercial companies partly owned by the state now wield more power than before. This, I argued, threatens to undermine the intentions behind the reform. I also looked at the extent to which the regulatory framework is able to accommodate new actors and true competition on non-discriminatory terms. I focused particularly on the status of locally led projects as well as the companies that specialise in cooperating with owners. I also discussed controversies that have resulted, particularly relating to the perceived discrimination of smaller actors on the market.

Then I went on to present a prototype for the model by which the smaller actors now tend to organise themselves. I observed that they too appear to have adopted a strongly commercial outlook on the meaning of local hydropower development. I discussed how this departs from earlier ideas, which were based on seeing local development as an expression of local democracy and local management of resources. This earlier vision actively sought to ensure sustainability and incorporate other water interests in the decision-making, a perspective that now seems to be largely missing.

I concluded by arguing that this might be a contributing reason why small-scale development is now falling out of 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. Moreover, issues relating to ownership, control, benefit sharing and local participation, appear only at the fringes, both of the current debate and the current regulatory framework.

This state of affairs, I think, foreshadows many of the issues that will be brought into focus in the next chapter. There, I will look specifically at expropriation of waterfalls, by tracking the position of owners under the current regime. I will argue that the law as it stands is based on a perspective that blocks out both the significant commercial interests of the taker, as well as the

significant social functions and obligations of the original owners. The issue of expropriation, in particular, will invariably raise questions that seem difficult to address without adopting a broader view, which also takes into account the owners' communities and their role within it.

# 5 Taking Waterfalls

## 5.1 Introduction

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

In Norway, the water authorities tend to consider expropriation of riparian rights as a natural component of hydropower development. In particular, a license to expropriate from local owners is typically considered a more or less automatic consequence of a development license. Moreover, as discussed in the previous chapter, the administrative licensing assessment tends to focus on the environmental consequences of development, with little attention devoted to how the loss of property rights affects the owners and their local communities.

A concrete manifestation of this is the presumption whereby a license to undertake large-scale development is regarded by the water authorities as an indication that an expropriation order should also be granted.[1] Importantly, this presumption has remained in place even though the regulatory and economic context of riparian expropriation has changed dramatically as a result of the liberalisation of the electricity sector in the early 1990s.

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

[1] The leader of the hydropower licensing division of the NVE expressed this presumption in Rune Flatby, 'Småkraftverk og ekspropriasjon – NVEs praksis' [2008] (1) Småkraftnytt 20.

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

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

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

In Section 5.6, I use the case of *Jørpeland* to show how the administrative framework surrounding expropriation marginalises owners. Their standing is very weak under administrative law, particularly as a result of how the expropriation issue is overshadowed by the licensing question. Moreover, the Supreme Court appears to adhere to a narrow perspective on the meaning of property protection, taking it to be an issue that begins and ends with the question of compensation. Arguably, this fails to do justice to the most important issue that arises when waterfalls are

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

taken for profit, namely the question of democratic legitimacy.

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

## 5.2 Norwegian Expropriation Law: A Brief Overview

As mentioned in Chapter 3, the right to property is entrenched in section 105 of the Norwegian Constitution. There it is made clear that when property is taken for public use, full compensation is to be paid to the owner. The formulation bears a striking resemblance to the formulation of the US takings clause in the fifth amendment. However, there is no active public use debate in Norway. The meaning of public use is hardly ever discussed by the courts, and according to legal scholars, the public use formulation places no limit at all on the state's authority to expropriate.[3]

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

Historically, there was no general act relating to expropriation, and a range of different acts provided the necessary authority to expropriate for specific purposes such as roads, public buildings,

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3 See Jørgen Aall, *Rettsstat og menneskerettigheter* (Fagbokforlaget 2004) 249. For a comment to more or less the same effect, made by the court of appeal, see *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723.

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

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

and schools.[6] Today, many of these authorities have been collected, broadened, and included in the Expropriation Act 1959.[7] Some specific expropriation provisions remain, however, such as section 16 of the Watercourse Regulation Act 1917, which authorises expropriation for watercourse regulation.

Until the turn of the century, expropriation of riparian rights was subject to special legislative provisions, and there was no generally applicable authority for expropriating waterfalls.[8] However, after the introduction of the Water Resources Act 2000, the general authority used to expropriate waterfalls has been included in the general expropriation act.[9]. After an amendment, this act now includes the statement that expropriation of real property and use rights (including waterfalls) may take place in order to facilitate "hydropower production". In addition, it is made clear that expropriation can only be authorised if the benefits undoubtedly outweigh the harms.[10]

This sets expropriation orders apart from the various hydropower licenses discussed in Sections 4.3.1-4.3.4 of Chapter 4. For an applicant to obtain development licenses, it is sufficient to show that the benefits outweigh the harms, it need not be ascertained that this is *undoubtedly* the case. However, the practical significance of this difference is limited. According to the Supreme Court, the additional requirement in expropriation cases means only that it should be clear that the benefit is greater, it does not imply that the benefit has to be qualitatively more significant than in the licensing cases.[11]

The authorising authority is the King in Council. However, this authority can be delegated

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

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

8 See the discussion in Section X below.

9 Expropriation Act 1959, s 2 no 51.

10 See Expropriation Act 1959, s 2.

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

to ministries or other state bodies that the King in Council can instruct.[12] The compensation to the owner is determined following a judicial procedure administered by the so-called appraisal courts.[13] This is the name given to the regular civil courts when they hear appraisal cases, observing the special procedure set out in the Appraisal Act 1917. The appraisal procedure emphasises the importance of factual assessment and lay discretion (the appraisal court typically sits with four lay judges).[14] In addition, there are special rules regarding costs, indicating that the expropriating party is usually required to pay for the procedure, include the owners' legal expenses.[15] In other regards, the appraisal procedure resembles a typical adversarial process before a civil court.[16]

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

For many purposes, directives have been issued that extend the class of possible beneficiaries to any legal person, including companies operating for profit. In 2001, such a directive was issued for the authority to expropriate in favour of hydropower production.[17]

In addition to providing a general authority for expropriation, the Expropriation Act 1959 also contains several procedural rules. These are collected in Chapter 3 of the Act. Here the Act sets out minimal requirements for what an application for an expropriation license must include, stating that it should make clear who will be affected, how the property is to be used, and what

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12 See Expropriation Act 1959, s 5.

13 Expropriation Act 1959, s 2.

14 See Appraisal Act 1917, s 11-12.

15 See Appraisal Act 1917, s 54.

16 See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

17 See Directive no 391 of 06 April 2001.

the purpose of acquisition is.[18] In addition, the Act requires the applicant to specify exactly what property they require, and to include information about the type of property in question and the current use that is made of it.

The owners must be notified, and the starting point is that every owner should be given individual notice, although this obligation is loosened when it is "unreasonable difficult" to fulfil[19] In such cases, it is sufficient that the documents of the case are made available at a suitable place in the local area. In addition, a public announcement must then be made in the official notification publication of the government, as well as in two widely read local newspapers.[20]

The licensing authority is required to ensure that the facts of the case are clarified to the "greatest extent possible".[21] This formulation seems very strict, but is also highly non-specific. In practice, the level of scrutiny given to the expropriation question under Norwegian law varies greatly depending on the relevant sector-specific administrative practices.

Established practice from several fields, including the hydropower sector, suggests that when expropriation takes place to implement a public plan or a licensed development, little attention is devoted to expropriation as a special issue.[22]

A decision to grant an expropriation license must be justified, and the parties should be informed of the reasons for the decision.[23] This expropriation-specific rule is largely superfluous, however, as the obligation to give reasons would in most cases follow independently from general administrative law, c.f., Section 5.2.1.

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18 See Expropriation Act 1959 s 11.

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

20 See Expropriation Act 1959, s 12.

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

22 For zoning plans, see *Namsos Kommune v Braaholmen sameie* Rt-1998-416; *Harald Bø v Radøy kommune* Rt-1999-513. For hydropower, see *Jørpeland* (n 2).

23 See Expropriation Act 1959 s 12, para 3.

The applicant must cover costs incurred by owners in relation to a pending application for expropriation.[24] The exact formulation is that the applicant is obliged to cover the costs that "the rules in this chapter carry with them". That is, the applicant is obliged to cover the costs that are related to the owners' rights pursuant to Chapter 3 of the Expropriation Act 1959. In practice, an owner will be denied costs if the competent authority takes the view that they are unreasonable or disproportionate to their interests in the case.[25]

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

### 5.2.1 The Public Administration Act

Starting in the late 19th century, the importance of public administration gradually increased in Norway.[26] This development gained momentum after the Second World War, when administrative bodies also came to be placed more directly under centralised political control. At the same time, the traditional administrative ideal based on strict adherence to the letter of the law was replaced by a form of management that actively sought to pursue political goals.[27] The ambit of administrative decision-making power widened significantly. Many new administrative bodies were set up, while many of those already established were empowered greatly as new statutory rules were introduced that specified the competence of administrative bodies in broader and broader strokes.

As administrative bodies became increasingly powerful, concerns arose regarding the relative lack of procedural safeguards to protect the individuals affected by administrative decisions. This

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24 See Expropriation Act 1959, s 15.

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

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

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

concern was also fuelled by the fact that as the importance of state regulation increased, so did the power of the administrative branch to make decisions that would directly affect the rights and obligations of specific individuals.[28]

In response to this, minimum standards of administrative due process were encoded in the Public Administration Act 1967.[29] This Act sets out the fundamental procedural principles that government bodies must follow when preparing to make administrative decisions. Some rules apply to any such decision, but a particularly important class of rules apply specifically to so-called *individual decisions*, namely those that affect the rights and responsibilities of one or more specific legal persons.[30] Clearly, owners of property targeted by an expropriation application fall into this category, so the Public Administration Act 1967 applies in expropriation cases.

Many of the rules in the Public Administration Act 1967 mirror those of the Expropriation Act 1959. However, the Public Administration Act 1967 tends to include broader and more detailed formulations. For instance, the duty to give advance notice is accompanied by more information about what kind of information such a notice must contain.[31] In particular, it is said that "the advance notification shall explain the nature of the case, and otherwise contain such information as is considered necessary to enable the party to protect their interests in a proper manner".[32]

Hence, it is not enough simply to inform the party that a case is under way, the Act also stipulates that the notice has to meet a minimum standard of quality. In relation to expropriation of waterfalls this becomes potentially significant, especially in light of the practice I discussed in Chapter 4, whereby applicants send out these notices themselves. One may ask, in particular, what

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28 See Innstilling fra Komiteen til å utrede spørsmålet om mer betryggende former for den offentlige forvaltning (n 26) 12-16.

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

30 Public Administration Act 1967, s 2.

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

32 Public Administration Act 1967, s 16.

owners are supposed to think when they receive a letter from a commercial company stating that unless a friendly settlement can be reached, their waterfalls and rivers will be expropriated.[33]

The duty to assess cases also follows from the Public Administration Act 1967, mirroring the rules of the Expropriation Act 1959. The formulation is similarly imprecise, as it is declared that cases must be "clarified as thoroughly as possible" before a decision is made.[34] Importantly, the Public Administration Act 1967 includes specific rules that oblige the authorities to inform parties about information they retrieve during their assessment of the case, and to actively solicit further comments from the parties.[35]

The duty to justify and give reasons for administrative decision is also expressed in the Public Administration Act 1967. The duty applies to most individual decision, with some narrowly defined exceptions concerning cases when no party can be assumed to be dissatisfied, or when giving grounds would involve disclosing privileged information.[36] As to the content of the reasons given, the authorities should mention the relevant rules authorising the decision, outline the factual assessment, and describe the main considerations that have been decisive for the use of discretionary power.[37] In case law, the duty to give reasons has some practical significance, since the Supreme Court has declared that insufficient reasons can be taken as an indication that the decision itself suffers from a shortcoming.[38] In hydropower cases, however, the duty to give reasons is understood to pertain to the licensing question as a whole, so that the authorities are not obligated to give

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33 Such a formulation is typical, used for instance by the expropriating party in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 3). In general, according to my own experience, a generic letter is sent by the developer to those private individuals who may be affected, with no individuation based on their interests in the case (e.g., based on whether they stand to loose a small-scale hydropower potential or are affected in some (minor) ways by building works). Clearly, this approach can discourage riparian owners from engaging in the administrative process in a manner commensurate with the fact that they own the natural resource in question.

34 Public Administration Act 1967 s 17.

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

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

37 Public Administration Act 1967, s 25.

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

individuated reasons to riparian owners, pertaining specifically to the expropriation question.[39]

Sometimes, the parties to an administrative decision are ill-equipped to look after their interests, even if the safeguards mentioned above are respected. This situation often occurs in hydropower cases, as riparian owners often lack the technical, commercial, and legal knowledge necessary to understand the value of their property and their own legal position as owners. The Public Administration Act 1967 establishes a general duty to provide guidance, to ensure that the parties are able to look after their interests in the "best possible way".[40] However, it is explicitly stated that the level of guidance must be adapted to the circumstances and the capacity that the government agency has for offering such assistance. At the same time, it is made clear that the decision-making agency must assess, on their own motion, the parties' need for guidance.

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

## 5.3 Taking Waterfalls by Obtaining a Regulation License

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

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39 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 3); *Jørpeland* (n 2) (discussed in more depth in Section 5.6).

40 Public Administration Act 1967 s 11.

somewhere else.

This is of course a *de facto* license to expropriate waterfalls, since the water as such is taken by the expropriating party. Moreover, it has always been treated as expropriation of riparian rights in relation to the compensation issue.[41] Formally, however, the interference is not considered a riparian expropriation, but rather seen as an expropriation of a right to deprive rivers of water, a sort of easement whereby the developer acquires the right to interfere with the rights of riparian owners in source rivers.

In theory, the rules in the Expropriation Act 1959 and the Public Administration Act 1967 still apply in such cases. Indeed, the rules in the Public Administration Act 1967 express general principles of administrative law, pertaining to all kinds of individual decisions, including both expropriation and licensing decisions. The Expropriation Act 1959, for its part, explicitly states that it applies to property interferences authorised under the Watercourse Regulation Act 1917.[42] However, it is also stated that the rules in the Expropriation Act 1959 only apply in so far as they are "suitable" and do not "contradict" sector-specific rules.[43] This points to the potential caveat that while a range of procedural rules apply in theory, there is a risk that they will be ignored in practice, if they are deemed unsuitable by some government body.

This is practically significant in hydropower cases. In particular, the established practice among the water authorities is to regard the procedural rules in the Watercourse Regulation Act 1917 as exhaustive.[44] In addition, the material assessment requirement in the Expropriation Act 1959 is not considered to have any independent significance alongside the assessment criterion in the

41 See *Jørpeland* (n 2).

42 See Expropriation Act 1959 s 30.

43 Expropriation Act 1959, s 30.

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

Watercourse Regulation Act 1917.[45] This is so even though case law on the former assessment criterion emphasises the interests of affected property owners in a way that case law on the licensing issue does not.[46]

As a consequence of how the law is understood on this point, it is very hard for owners to challenge the legality of a decision to allow expropriation of their riparian rights, especially when expropriation takes place pursuant to the Watercourse Regulation Act 1917.[47] Moreover, even if section 16 of the Watercourse Regulation Act 1917 does not apply, the water authorities tend to approach the affected owners in a similar way. In particular, the practices observed with regard to the issue of property interference is largely the same in all cases when the administrative branch classifies the license application as pertaining to a large-scale project.[48]

For such projects, the water authorities rely on a presumption that the conditions to permit expropriation are fulfilled whenever a development license may be granted.[49] Hence, in order to defend themselves, owners must proceed in a roundabout manner by addressing the licensing question as such. In practice, there is little or no room for arguing on the basis of rules that protect private property. Moreover, in order to argue that the expropriation is unlawful on procedural grounds, the owners must effectively demonstrate that the water authorities dealt with the case in contravention of sector-specific rules and practices pertaining primarily to the licensing question.

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45 Again, see *Jørpeland* (n 2).

46 In addition, the formulation in Expropriation Act 1959 s 2 contains the additional qualification that the benefit of interference must "undoubtedly" outweigh the harm, meaning that this clearly must be the case (pertaining to the evidence, not the weight of the benefit compared to the harm), see *Løvenskiold* (n 11). No corresponding requirement is included in the Watercourse Regulation Act 1917 s 8. Instead, the formulation there is that a license should "normally" not be given unless the benefits outweigh the harms. See also Odd Stiansen and Kjell Haagensen, 'Vannkraftutbygging' in *Vassdrags- og energirett* (2nd edn, Universitetsforlaget 2002) 325-236 (arguing that the "normally" qualification is without practical significance).

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

48 See Flatby (n 1).

49 See Flatby (n 1).

This is a daunting task, particularly in light of case law developed during the period of monopoly regulation. This body of case law suggests that the courts will largely defer to the administrative branch, even when it comes to interpreting the relevant procedural rules.[50]

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

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

## 5.4 Taking Waterfalls for Progress

Historically, Norwegian law did not contain a general authority for expropriation of riparian rights.[51] In the Water Systems Act 1888, a range of provisions authorised appropriation of water rights and land for specific purposes, but the criteria were narrow.[52] Rivers and waterfalls as such could never be made subject to expropriation, and expropriation of other water rights could only be permitted in so far as the affected owners were not thereby deprived of any water power that they could reasonably make use of themselves.[53]

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

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

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

53 See Dahl (n 52) 58,60.

Specifically, expropriation for hydropower development was not permitted, except to the benefit of riparian owners who needed to acquire surrounding land in order to exploit their existing water rights.[54] At the same time, riparian owners could apply for licenses to engage in various industrial exploits, in some cases also when this would prove damaging to other landowners, for instance through deprivation of water or flooding.[55] These rules are similar to many of the rules found in contemporaneous mill acts from the US, c.f., the discussion in Chapter 3, Section 3.5.1. As in the US, the kinds of takings in question here could be classified as economic development takings. However, the source of the economic development potential was never taken from the owners in these cases. Rather, the takings only targeted additional rights that were needed in order for the existing owners to realise the full potential of their own resources.

In fact, an important principle of expropriation law at this time was that no property could be taken if the taker's interest in that property was the same as that of its current owner.[56] This applied regardless of whether or not the owners, subjectively speaking, were likely to pursue those interests optimally. Hence, expropriation of water power was ruled out already as a matter of principle. In particular, as the regulatory system of the day made private hydropower development possible, a private riparian owner was regarded as possessing a hydropower interest. As a result, such owners could not be deprived of their rights by a taker whose interest was also to undertake hydropower development.

Following industrial advances, the interest in hydropower exploded in the late 19th century.[57] As a result, the state increasingly came to see it as a political priority to sensibly regulate the hydropower sector. As discussed in Chapter 4, the most important expressions of this came in the

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

55 See Water Systems Act 1888, s 14. See also the commentary in Dahl (n 52) 54-60.

56 See Dahl (n 52) 168-170.

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

form of two new licensing acts, namely the Watercourse Regulation Act 1917 (Section 4.3.2 and the Industrial Licensing Act 1917 (Section 4.3.3).

Following up on this, parliament soon passed legislation that authorised expropriation of riparian rights for the benefit of public bodies, also when the purpose was hydropower development.[58] In 1940, these authorities were consolidated and integrated in the general water resources legislation, through the Water Systems Act 1940.[59] According to this act, the authority to expropriate waterfalls could be granted only to the state and the municipalities. Moreover, the municipalities could only expropriate waterfalls when the purpose was to provide electricity to the local district.[60]

Private parties could only expropriate in exceptional circumstances, when they already owned more than 50 % of the riparian rights they sought to exploit.[61] Moreover, whenever expropriation took place, it was felt that benefit sharing with local owners was required. Hence, special rules were introduced to ensure that takers would have to pay *more* than full compensation (typically a 25 % premium, but in some cases the owner was also given a right to opt for compensation in the form of a proportion of the electricity output of the plant).[62]

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

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58 Legislation that made it possible to expropriate waterfalls to the benefit of the municipalities was introduced in 1911, and a similar authority that authorised expropriation in favour of the state appeared in 1917, see Amundsen (n 51) 29.

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

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

61 See the Water Systems Act 1940, s 55. See also the commentary in Hugo-Sørensen and Olafsen (n 60) 70-74. I remark that this was a novel rule in the 1940 Act, which contradicted earlier theories about the legitimacy of allowing expropriation for private benefit.

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

a relatively rare occurrence.

However, the use of expropriation to facilitate hydropower development increased greatly after the war, as the state itself became engaged much more actively with hydropower development, also for commercially oriented industrial purposes.[63]

Hence, despite the spirit and wording of the Water Systems Act 1940, this was the time when expropriation of rivers and waterfalls became a measure to facilitate economic development. At first, this would still take place on non-commercial, politically governed, terms. But the increased prevalence of expropriation seen during this time had little to do with a pressing need to supply electricity to the people. Rather, it was a consequence of an increased political demand for industrial hydropower, combined with the fact that the hydropower sector was reorganised and brought under increasingly centralised political control.[64]

As I mentioned in the previous chapter, many local, privately owned, hydropower plants were shut down during this period, as a result of an explicit policy meant to create government monopolists.[65] The interpretation of the supply requirement in the Water Systems Act 1940 was also significantly relaxed, especially following the development of the national electricity grid. It was no longer obvious, from a technical point of view, when exactly a hydropower development could be said to qualify as making a contribution to the local electricity supply. The electricity was not necessarily used locally. Indirectly, however, one could still argue that the local supply situation would improve whenever more electricity was supplied to the national grid.

Finally, a growing share of the financial benefits from development would accrue to urban areas, as local development companies were replaced by state companies and companies dominated by

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

64 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 63) 69-71.

65 See Chapter 4 Section **??**.

prosperous city municipalities.[66] This development was not only fuelled by centralisation, but also in large part due to the idiosyncratic method adopted for compensating waterfalls following expropriation.

### 5.4.1 The Natural Horsepower Method

In Section **??**, I presented the notion of a natural horsepower, used to determine when a development project requires development licenses pursuant to the Watercourse Regulation Act 1917 and the Industrial Licensing Act 1917. As mentioned there, the natural horsepower of a development scheme is a gross measure of the stable electric effect harnessed following the development. Specifically, it measures the electric output available for at least 350 days each year, a figure that is sensitive to fluctuations in the supply of water. In case of run-of-river schemes, which do not aim to regulate the flow of water, the output stably available for 350 days can be as little as 3-5 % of the *average* electric output of the plant.

Hence, the number of natural horsepower in a development project says little about the total amount of energy that the development harnesses in a year. As a result it also says very little about the value of the development project, as energy producers today get paid for all the energy they produce, not just that which they can guarantee in advance. Prior to the establishment of a national grid, this was different. Without a grid, fluctuations in electric output would not be evened out by supply from other parts of the country, so the importance of maintaining a stable supply was much greater. Hence, energy producers would often get paid based on the amount of electric effect they could deliver stably over the year.

Indeed, early in the 20th century, the notion of natural horsepower gave a good indication of the value of a development project. Hence, it was also a good measure of how much a developer

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

would be willing to pay for access to riparian rights. Moreover, it was used by the market for waterfalls that existed prior to state regulation. The price of a waterfall, specifically, was typically calculated on the basis of the price that the developer was willing to pay per natural horsepower that the planned development would yield. The total payment offered to the owners, consequently, would be found by multiplying the natural horsepower of the development with the price offered per unit of natural horsepower.

This method was also adopted by appraisal courts to fix the level of compensation following expropriation. Moreover, when the notion of natural horsepower fell into disuse among energy producers, because it no longer reflected the actual value of development projects, the courts did not modify their compensation practices. They stuck with the natural horsepower method, which was now applied on a customary basis, not as a way of calculating realistic market values. Indeed, the market for waterfalls had more or less disappeared at this time, due to the prevalence of expropriation. Voluntary transactions might take place, but they did so in a monopolised field, on the basis of a price level that was fixed by the appraisal courts.

Over time, this price level became more and more unrealistic as a measure of the value of waterfalls as a natural resource. After the liberalisation of the hydropower sector in the early 1990s, the discrepancy between the value of hydropower and the prices paid for waterfalls had become quite extreme. For instance, in the case of *Hellandsfoss* from 1997, the natural horsepower method resulted in NOK X in compensation for a waterfall that yielded X GWh/year. By comparison, in the case of *Sauda* from 2005, where a market-based valuation method was used, the owners of the waterfalls received NOK X in compensation for a waterfall that yielded GWh/year. That is, the owners in *Sauda* received more than a hundred times as much in compensation per GWh, compared to the owners in *Hellandsfoss*.

However, the mismatch between the level of compensation awarded to owners and the actual value of their waterfall rights had been noted much earlier. Indeed, the inadequacy of the natural

horsepower method was pointed out as early as in 195x, by the head of the water directorate. In an article published in an internal newsletter, he commented that current compensation practices did not reflect true values, and speculated that they were sustained in part by exploiting the lack of knowledge about hydropower development among typical owner communities.

One might think that the continued use of the natural horsepower method, in a situation when the water authorities themselves were fully aware that it was unsuitable, would result in controversy. However, at this time, the local owners of waterfalls did not attack the method in court. Active resistance on this point would not be seen until much later, after the liberalisation of the electricity sector. A possible explanation for this is that the owners had already been marginalised by earlier conflicts, which had demonstrated the state's great willingness to interfere with property rights relating to water resources. In addition, the fact that hydropower development was not considered as a commercial pursuit at this time, at least not openly, may have contributed to reducing the level of resistance among local communities. Still, conflicts arose with respect to other aspects of the regulatory framework regarding hydropower, as discussed in the following.

### 5.4.2 The Supreme Court on the Rule of Reversion

The first major assertion of state control over hydropower came with the licensing acts of the early 20th century. These acts themselves resulted in significant controversy. At this time, in particular, there was a feeling of unease regarding the extent to which the state could regulate the hydropower sector without offending against the property clause in the Constitution.

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

The question that arose was whether this should be regarded as a form of expropriation. If so, compensation would have to be paid pursuant to section 105 of the Constitution. This question resulted in fierce conflict, with some influential legal scholars attacking the rule as a ploy by the state to confiscate Norwegian rivers without compensating owners.[67] However, in a 4-3 decision, the Supreme Court held that section 105 did not apply, since reversion was a licensing condition, not an independent act of property deprivation.[68] No owner was compelled to hand over their rights to the state.[69] Moreover, no owner was compelled to sell their rights. Rather, their willingness to do so was a precondition for the rule of reversion to apply.

One of the judges summed up the majority reasoning by commenting that he would not regard it as expropriation if the state were to forbid sale of riparian rights to private parties altogether.[70] Why then, he asked, should it be regarded as expropriation if such a sale was allowed to take place only on specific conditions? Against this, the minority argued that reversion as a licensing requirement was so severe that it had to be regarded as a *de facto* expropriation, known as a regulatory taking in US terminology.[71] In addition, the minority argued that as the purpose of the reversion rule was to ensure that water rights were eventually brought under state ownership, this rule itself could not be understood merely as an act of regulation. According to the minority, the rule also invoked the power of eminent domain.[72] By contrast, the majority chose to regard the eventual transfer to state ownership as a secondary purpose only, which could justifiably be pursued on the basis of the state's regulatory power alone.[73]

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

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

69 See *Konsesjonsdommen* (n 68) 406.

70 See *Konsesjonsdommen* (n 68) 407.

71 See *Konsesjonsdommen* (n 68) 412-413. For a brief discussion on regulatory takings, see Chapter **chap:1** Section **??**.

72 See *Konsesjonsdommen* (n 68) 415-416.

73 See *Konsesjonsdommen* (n 68) 407.

### 5.4.3 Increased Scale of Development and Increased Tension

After the Supreme Court upheld the rule of reversion, the legal foundation for tight state regulation of the hydropower sector solidified. As discussed in the previous chapter, the state pursued increasingly complex hydropower projects after the Second World War. At this time, technological and economic advances also made it feasible to divert large amounts of water over great distances (typically through tunnels), to collect water from several different rivers in a common reservoir for joint exploitation. Such projects became known as "gutter" projects, and they grew greatly in scope during the post-War years. Since the relevant licensing procedure was covered by the Watercourse Regulation Act 1917, the practical importance of the expropriation authority in section 16 of this act also increased dramatically.[74]

As discussed in Section **??** of the previous chapter, the opposition to hydropower grew proportionally to the scale and complexity of typical development projects. The critical focus was often on environmental effects, but the interests of local people also featured in these debates. Moreover, local interest were often aligned with the environmental interests. In a situation when local owners could not themselves benefit commercially from hydropower, their response was often to oppose it. Moreover, there was a widespread feeling among owners that the increased scale of development, and increased negative impact it would have, should give rise to increased levels of compensation.

In the first few cases that reached the Supreme Court from this era, the question of legitimacy was not raised in full breadth. Instead, the early cases concerned specific legal points, such as the

[74] See Innst.O.I. (1959) 11. This was a proposition to parliament regarding an amendment of the Watercourse Regulation Act 1917. The amendment proposed to remove an earlier rule that applied only to diversion regulations, whereby a license to divert water from a river should *normally* only be granted when the riparian owners in the source river agreed to the measure. This rule made licenses harder to obtain in the diversion cases. However, following the department's recommendation, the rule was removed in 1959. The department argued that the rule had an "unfortunate effect" on the administrative procedure in large-scale diversion cases, noting also the vastly increasing complexity and scale of typical diversion regulations. The minority in the parliamentary committee recommended against the amendment, noting that it would "greatly increase" the authority to expropriate waterfalls, contrasting with the expropriation rules in the Water Systems Act 1940, see Innst.O.I. (n 74) 14. The majority countered this argument by maintaining that the regulatory power of the state would be used to prevent any abuse of power, and that the practical significance of the amendment would be limited to ensuring a "more rational" procedural approach to large-scale applications, see Innst.O.I. (n 74) 14.

issue of to what extent (informal) agreements and understandings between owners, municipalities and the central government were binding on future decision-making processes regarding development.[75] In addition, the question arose to what extent additional compensation should be paid for "damages" and "inconveniences" cause by large-scale development, in addition to the price paid for the waterfalls according to compensation practices developed at a time when the typical negative effects would have been more limited. In addition, questions arose over the status of land owners that did not own waterfalls, but which owned land that was otherwise crucial to the development, for instance because it would be flooded or used to construct regulation installations.

With regard to the compensation issue, the Supreme Court upheld the earlier practice for calculating compensation. It was noted that this practice could appear somewhat arbitrary, but there was no willingness to adapt it to the changed circumstances of development. Specifically, it was held that land owners were not in general entitled to compensation based on the value of their rights as an asset for hydropower development. Moreover, it was held that if special compensation was awarded to waterfall owners, according to the natural horsepower method, then this would preclude additional compensation for harms and nuisances associated with large-scale watercourse regulation.[76]

With regard to the question of legitimacy of interference, this period also saw increasing critical attention directed at the administrative practices of the water authorities. In the case of *Aura*, the owners argued that they had originally agreed to sell their riparian rights to the government on the understanding that a specific form of development would take place. When the government later decided to deviate from the original plans in favour of a much more intrusive project, the owners argued that they were entitled to additional compensation. This claim was rejected by the Supreme Court, which held that since the agreements did not explicitly introduce any limitations

[75] See **61**; **mard"IeC –"o ˝la73**

[76] See, particularly, **....**

on the development rights of the new riparian owner, the informal understanding that might have existed was of not legal significance.[77]

In the highly controversial case of *Mardøla*, the situation was that local owners and some municipalities had agreed to support the central government on the basis that a specific development plan would be adopted. Later, however, this plan was abandoned in favour of a project that was deemed by some local owners to be both less beneficial and more intrusive. These disaffected owners and their municipality government went on to argue that the resulting development license was invalid because it contradicted a prior agreement. The Supreme Court did not agree, but conceded that prior statements made by the water authorities had indeed been striking, serving to create a clear expectation among the locals for a specific development plan.

However, the Supreme Court chose to rely on what it described as a "general presumption" against the position that the central government is bound in its decision-making by prior dispositive statements.[78] According to the Supreme Court, the statements made by the water directorate in *Mardøla* were not clearly endorsed by the Ministry and the Parliament, and could therefore not be regarded as binding on the final decision.[79]

More broadly, the case of *Mardøla* illustrates the increasing tensions that arose regarding large-scale hydropower in the 1970s. Indeed, the case stirred up a high level of controversy that also resulted in civil disobedience and criminal prosecution of environmental activists.[80] The case also illustrates how the central government attempted to minimise tensions by entering into dialogue with local authorities and owners. Crucially, however, this dialogue was not premised on a legal framework that ensured local participation, and, despite appearances, did not result in any new

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77 See **61**

78 See **mard"IeC –"o ˝la73**

79 See **mard"IeC –"o ˝la73**

80 See, e.g., **71**

entitlements for local people.

In effect, the *Mardøla* Court sanctioned an approach whereby the water authorities could limit local opposition by expressing commitments early on, which could then simply be ignored at a later stage of the decision-making process. At this later stage, it would be too late for the local population to launch an effective opposition, e.g., it would be too late for them to aligning themselves with environmental activists. More generally, however, the increased tension during this time did result in additional benefits being bestowed on local power groups, but then typically municipalities and regional government bodies, not local owners.[81] Moreover, despite some new compensation mechanisms, controversies continued to arise. The culmination came with the case of *Alta*, where the question of procedural legitimacy was raised in full breadth, with local interests tightly aligning themselves with environmental activist groups throughout the proceedings To this day, the *Alta* case remains the most important Supreme Court precedent in the area of hydropower law.

### 5.4.4 The *Alta* Controversy

The *Alta* case went before the Supreme Court in 1982 after a long period of high-intensity conflict going back to the mid-seventies.[82] In *Alta*, the affected local population largely lacked formal title to the property they sought to defend. This was because the development in question would take place in the northernmost part of Norway, in the native land of the Sami people.[83]

Norway has a history of discrimination against the Sami, and as their culture is largely nomadic, their land rights were never formalised in private law.[84] As a result, land and natural resources in

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81 See ....

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

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

84 See Øyvind Ravna, 'Samerett og samiske rettigheter i Norge' in Tore Henriksen og Øyvind Ravna (ed) (Gyldendal

the county of Finnmark are largely owned by the state, at least in the sense of the state appearing as the nominal *in rem* owner.[85]

Due to the sensitive context of interference, the *Alta* plans met with particularly strong criticism, both from environmental groups and groups fighting for aboriginal rights. A broad political movement was mobilised in opposition to the plans, eventually resulting in several serious cases of civil disobedience.[86] The case also came before the courts, as the local population and environmental groups claimed, primarily on the basis of administrative law, that the development licenses that had been granted were invalid.[87]

The *Alta* case did not involve expropriation of the right to harness hydropower. Hence, one might think that the case has limited relevance to the issues addressed in this thesis. However, because of the priority given to the licensing procedure over specific expropriation procedures, the principles expressed in *Alta* also largely determine the legal position of waterfall owners whose rights to hydropower are expropriated.[88]

*Alta* was admitted to the Supreme Court in plenum, directly on appeal from the district court.[89] The presiding judge commented that as far as he knew, it was the longest and most extensive civil

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85 In the past 30 years, partly as a response to the controversy of the *Alta* case, there has been a gradual change in attitude, whereby the rights of the Sami people receives greater legal recognition. In 2007, formal title to most of the land in the county of Finnark was transferred to a special state agency which is regulated by a special statute that obliges it to manage the land with due regard to customary and prescriptive rights of aboriginal groups and local people. See generally Kirsti Strøm Bull, 'Finnmarksloven: finnmarkseiendommen og kartlegging av rettigheter Finnmark' (2007) 46(9) Lov og rett.

86 This included hunger strikes and attempts at sabotage, see Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(01) Historisk tidsskrift, 80-83. For the Alta controversy generally, see 'Alta Controversy' (*Wikipedia, the free encyclopedia*, 23rd January 2015) ⟨https://en.wikipedia.org/wiki/Alta_controversy⟩ accessed 16th July 2015; Lars Martin Hjorthol, *Alta. Kraftkampen som utfordret statens makt* (Gyldendal akademisk 2006).

87 See Eckhoff (n 82).

88 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 3); *Jørpeland* (n 2).

89 This is a special arrangement available in cases that raise important questions of principle, cf., Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes s 30-2 and Courts of Justice Act 1915, Act No 5 of 13 August 1915 relating to the Courts of Justice, s 5.

case that the Court had ever heard.[90] In an opinion totalling 138 pages, the Court considers a long range of objections against the development licenses, all of which are either rejected or held to provide insufficient reasons to declare the licenses invalid.

The opponents of the *Alta* development also argued on the basis of human rights and international law.[91] As noted by Eckhoff, these arguments raised subtle legal questions about how to apply the relevant principles of international law to a concrete dispute over hydropower development.[92] However, the Court refused to consider such questions, finding that the negative effect of the hydroelectric plant was not so severe as to raise human rights issues.[93]

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

First, it had been argued that the original licensing application did not meet the requirements stipulated in section 5 of the Watercourse Regulation Act 1917. Essentially, the original application contained little more than technical details about the planned development, with hardly any identification or assessment of deleterious effects.[94] This shortcoming had been openly acknowledge by

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90 *Alta* (n 82) 254.

91 First, on the basis of articles 1 and 27 of the International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI) [1966]. Second, on the basis of Indigenous and Tribal Populations Convention, ILO Convention No 107 [1957] (later replaced by Indigenous and Tribal Peoples Convention, ILO Convention No 169 [1989]). Third, on the basis of P1(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, as amended by Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 13 May 2004, entered into force 1 June 2010) CETS No 194 (ECHR).

92 See Eckhoff (n 82) 351-352. One of the most important international instruments, namely ILO Convention No 107, was not ratified by Norway at the time of *Alta* (Norway later ratified its replacement, ILO Convention No 169). However, it was argued that it had the status of customary international law. See generally Asbjørn Eide, 'Menneskerettigheter og samenes rettigheter' [1980] Lov og Rett 139.

93 See *Alta* (n 82) 299-300. See also Eckhoff (n 82) 351-352.

94 See *Alta* (n 82) 264-265.

the water authorities themselves, who had nevertheless initiated a public hearing.[95]

The Supreme Court concluded that this was "clearly unfortunate".[96] However, several reports and assessments had subsequently been provided, to fill the gaps left open by the initial application. For this reason, the Supreme Court held that the initial mistakes were irrelevant, since it was the licensing process as a whole that should be assessed.[97] Shortcomings at specific stages in the assessment would not be given weight unless they could be seen to imbue the process with a dubious character overall.[98]

The Court then moved on to assess whether the process as a whole fulfilled procedural requirements, particularly those laid down in sections 5 and 6 of the Watercourse Regulation Act 1917. In addition, it had to be considered whether the assessment of the licensing criteria in section 8 of the Watercourse Regulation Act 1917 had been sufficiently detailed.[99]

In this regard, those who objected to the licenses pointed to a range of negative effects that they believed had not been considered, or had not been considered in enough depth. In relation to nomadic reindeer interests, it was argued that the water authorities had failed to adequately consider the indirect negative consequences of hydroelectric development on reindeer farming in the local area.[100] These effects were described as "practically catastrophic" by some expert witnesses.[101] By contrast, the water authorities had not devoted much attention to the possibility of indirect consequences, citing the difficulty (described as an "impossibility") of attempting to quantify such effects.[102]

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95 See *Alta* (n 82) 265.

96 *Alta* (n 82) 265.

97 See *Alta* (n 82) 265-266.

98 *Alta* (n 82) 265.

99 Compare also section 16 of the Public Administration Act 1967, requiring assessments to be as detailed as possible.

100 See *Alta* (n 82) 176-179.

101 See *Alta* (n 82) 278.

102 See *Alta* (n 82) 277.

After considering the reports and assessments in some depth, the Supreme Court did not find fault with the procedure in this regard. Importantly, the Court stressed that the water authorities had been well aware of the possibility of indirect negative consequences. The water authorities had simply chosen, as a matter of expert discretion, not to place much weight on such consequences.[103] This, according to the Supreme Court, could be regarded as an expression of disagreement with those claiming that the effects would be catastrophic.[104] As a result, the grounds for claiming procedural error disappeared, as the lack of attention directed at indirect consequences was held to reflect an (implicit) factual assessment to the effect that they where not particularly severe.

The structure of the argument used here is more interesting than the factual question. The argument structure, in particular, serves to recast a lack of assessment, a possible procedural error, as an exercise of factual discretion.

The *Alta* Court also made some apparent statements of principle in this regard. In particular, the Court held that since the licensing decision itself is discretionary, it is appropriate to grant the executive some margin of appreciation also with regard to the question of how to interpret vague requirements of administrative law.[105]

The Court made a second decision of principle when it supported the state's contention that the administrative licensing assessment did not have to be as thorough as that required in a subsequent appraisement dispute.[106] Hence, the meaning of the obligation to clarify cases to the best possible extent is put into perspective: assessments of deleterious effects may sometimes be omitted at the decision-maker's discretion, also in circumstances when such assessments will be needed later to clarify the owners' actual loss for the purpose of calculating compensation.

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[103] See *Alta* (n 82) 279.

[104] See *Alta* (n 82) 278.

[105] See *Alta* (n 82) 262-264.

[106] See *Alta* (n 82) 279.

In relation to the negative effects on fishing, the Court conceded that the assessments could have been better, but went on to point out that the purpose of assessment was only to answer yes or no to development, not to give a detailed presentation of its effects.[107] Crucially, the Court noted that if additional negative effects were uncovered after the licences had been granted, this could be addressed through compensation payments and future regulatory measures.[108]

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

In *Alta*, the Court agreed that erroneous information had been provided in relation to some issues, particularly regarding alternative ways to meet the need for electricity in Finnmark.[109] However, the Supreme Court did not regard the factual errors in this regard as relevant to the licensing decision.[110]

Here a third clarification of principle took place. The Court held, in particular, that the duty to consider alternatives – different ways in which the public purpose could be satisfied – is very limited in hydropower cases.[111] This position of principle, in turn, was the key building block that the Court used to argue that errors and inadequacies in the information provided about alternatives were irrelevant.[112]

The Court's perspective in this regard was at odds with how parliament has actually approached the case. There was little doubt that the favourable political assessment of the *Alta* development

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107 *Alta* (n 82) 330.

108 *Alta* (n 82) 330.

109 See *Alta* (n 82) 346-357.

110 See *Alta* (n 82) 346.

111 See *Alta* (n 82) 346.

112 *Alta* (n 82) 346.

depended heavily on the perceived electricity crisis in Finnmark and the supply situation in Norway generally, as well as the perceived inadequacies of alternative solutions.[113]

In relation to this question, the legal counsel acting for the state in *Alta* openly argued that as these aspects came into focus only at the political stage of the decision-making, they were largely irrelevant.[114] This line of argument is rather striking, since the decision to grant the license was made by parliament, which had indeed dealt with the case on three separate occasions.[115]

The Supreme Court did not address the state's arguments in this regard explicitly. However, it is worth noting how briefly the Court comments on the issue of factual errors concerning alternatives.[116] By contrast, the Court goes into painstaking detail regarding issues that seem to have been far less important to the political decision-makers.

The dismissive attitude towards the duty to correctly assess alternatives is a controversial aspect of the *Alta*-decision.[117] More generally, the decision in *Alta* has met with criticism from commentators arguing that the decision shows the extent to which the courts in Norway tend to identify themselves with other organs of state.[118]

Due to the perceived weaknesses of the decision, some argued that *Alta* would have a limited impact as a precedent.[119] This has not proved to be the case. Indeed, *Alta* continues to receive favourable citations by the Supreme Court. It appears to enjoy significant influence, not only in hydropower law, but in administrative law more generally.[120]

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113 See *Alta* (n 82) 338-347.

114 *Alta* (n 82) 341.

115 See *Alta* (n 82) 342.

116 See also the surprise expressed in Eckhoff (n 82) 349-351.

117 See Stiansen and Haagensen (n 46) 311. For criticism of the Supreme Court on this point, see Inge Lorange Backer, *Naturvern og Naturinngrep* (Universitetsforlaget 1986) 580-584.

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

119 SeeBacker, *Naturvern og Naturinngrep* (n 117) 580-584.

120 See *Naturvernforbundet i Oslo og Akershus med flere v Staten v/Miljøverndepartementet og Oslo Kommune* Rt-

It should be mentioned, however, that after the *Alta* decision, the legal position of the Sami people have greatly improved.[121] Moreover, the controversy surrounding *Alta* has been regarded as a catalyst for change in this regard.[122] Hence, it is unlikely that the courts today would be as quick as the *Alta* court to dismiss arguments based on aboriginal rights.[123]

With regard to the position of local owners, on the other hand, the *Alta* decision is regarded to express key principles that still apply.[124] That said, administrative practices have changed since *Alta*, arguably also in direct response to the criticism that was directed at this decision.[125] Today, the assessment of licensing applications typically involve a more extensive assessment of environmental effects and possible alternatives that are less environmentally intrusive.[126] However, as I will discuss in more depth below, the position of local owners during the assessment stages appears unaltered by the increased intensity of assessment regarding the environment.

In particular, the key administrative procedures in hydropower cases have not been adapted to account for the liberalisation of the electricity sector. Today, key characteristics both of the typical taker and the typical owner are very different than they were at the time of *Alta*. First, as discussed in the previous chapter, takings of waterfalls now have the effect of depriving original owners of a resource that they could potentially develop themselves. Second, as I discuss in the next section, takings of waterfalls have become takings for profit.

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2009-661; *Jørpeland* (n 2).

121 See generally Jon Gauslaa, 'Utviklingen av sameretten de siste 25 årene og betydningen for arealforvaltning og rettspleie' in Øyvind Ravna (ed), *Areal og Eiendomsrett* (Universitetsforlaget 2007). Gauslaa presents the emergence of *Sami law*, a collection of rules and principles serving to protect established land use patterns and the Sami way of life while also giving the Sami people a better opportunity to partake in decision-making processes that affect them as group.

122 See Ravna, 'Samerett og samiske rettigheter i Norge' (n 84) 156.

123 See Gauslaa (n 121) 180.

124 See *Jørpeland* (n 2). See also Stiansen and Haagensen (n 46) 312.

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

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

## 5.5 Taking Waterfalls for Profit

After the legal and regulatory reforms of the 1990s, takings of waterfalls for hydropower have become takings for profit. However, this change in the function of expropriation received little attention when these reforms were introduced. Moreover, when the Water Resources Act 2000 was proposed, the new expropriation authority was not singled out for political consideration. In fact, the increased scope of expropriation was not mentioned at all when the Ministry presented their proposal to parliament. Rather, the new expropriation authority was described merely as a "simplification" of existing law.[127]

This was grossly inaccurate. For the first time in Norwegian history, private commercial interests would be able to expropriate waterfalls. The original proposal to this effect stemmed from the report handed to the Ministry by a commission appointed to prepare a new act relating to water resources. The commission report mentions briefly that the proposed expropriation authority would imply increased scope for expropriation. However, it does not discuss the desirability of this in any depth.[128]

The report totals almost 500 pages, but devotes only three of those pages to discussing the new expropriation authority. Here the committee notes that a range of different authorities for expropriation has long co-existed in the law, with many of them positing strict and concrete public interest requirements as a precondition for granting a license. This, the commission argues, is not a very "pedagogical" way of providing expropriation authorities.[129] Moreover, the commission notes that it runs the risk of omitting important purposes for which expropriation should be possible. Hence, the commission proposes to replace all older authorities by a sweeping authority that makes

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

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

129 Lov om vassdrag og grunnvann (n 128) 235.

expropriation possible for any project that involves "measures in watercourses".[130]

The commission comments that their formulation might seem wide, but remark that this is not a problem since the executive can simply refuse to issue an expropriation order when they regard expropriation as undesirable.[131] The commission does not reflect on the constitutional consequences of such a perspective, neither in relation to property rights nor in relation to the balance of power between the legislature, the executive and the courts. Instead, the commission offers a brief presentation of the rationale behind dropping the local supply restriction for municipal expropriation. They comment that these rules complicate the law and might make desirable expropriations impossible.[132] Nothing is said to clarify what kind of desirable expropriations the committee think might be left out.

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

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

The main justification given by the commission for introducing a general private takings au-

130 Lov om vassdrag og grunnvann (n 128) 235-236.

131 Lov om vassdrag og grunnvann (n 128) 235.

132 Lov om vassdrag og grunnvann (n 128) 235.

thority is that the special redemption rule had not been much used.[133] Why this is an argument in favour of opening up for private expropriation in general is not made clear. It seems just as natural to regard it as an argument *against* doing so. Why extend the possibility for private expropriation if the demand for such expropriation has been limited?

Presumably, the commission thought there would be a demand for private expropriation in the future, but this is not stated explicitly, nor is the appropriateness of it discussed. As to the requirement that private takers must already control a majority of the waterfall rights in the local area, the commission only remarks that it regards such a restriction as old-fashioned.[134] No discussion is offered regarding the consequences for local communities, if this requirement is dropped.

Since the passage of the Water Resources Act 2000, it has become clear that the new authority for expropriation is a highly significant and controversial aspect of the act. Today, practically all cases of waterfall expropriation imply that local owners are deprived of a small-scale development potential in favour of a commercial company.

### 5.5.1 *Sauda*

In *Sauda*, a case before the court of appeal, the riparian owners formally protested a license that granted a private company the right to expropriate their rivers and waterfalls.[135] The owners' principal argument was that the executive could not grant such a right to a private party, since the legislation authorising private expropriation of waterfalls had not been properly authorised by Parliament.

This argument appeared weak, since the Expropriation Act 1959 had been amended to ensure

[133] Lov om vassdrag og grunnvann (n 128) 236.

[134] Lov om vassdrag og grunnvann (n 128) 236.

[135] See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 3).

that the executive would be authorised to decide what legal persons could expropriate for hydropower purposes. However, the owners argued that the executive had not appropriately informed Parliament that this would be the consequence of the amendment. In particular, the amendment itself had been passed as a mere formality following the adoption of the Water Resources Act 2000.

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

On this basis, the owners argued that the purported expropriation authority was not constitutionally valid, since parliament had not intended it. Unsurprisingly, this argument was rejected. According to the court, it had to be assumed that parliament understood the consequences of their own legislative actions. The owners in *Sauda* also raised procedural objections. They argued, in particular, that the expropriation question had been insufficiently assessed by the water authorities and that the administrative expropriation decision was therefore invalid. The court did not agree. The procedural argument at stake here foreshadow the later case of *Jørpeland*, as discussed in more depth in Section 5.6.

While the owners in *Sauda* lost the validity dispute, the level of compensation they received was dramatically increased compared to earlier practice. Because of this, the development company appealed the decision to the Supreme Court, with the owners lodging a counter-appeal regarding the question of legitimacy. The Supreme Court decided not to hear the case.

### 5.5.2 *Uleberg*

Just before the *Sauda* case was decided by the court of appeal, the Supreme Court had addressed the compensation question in the case of *Uleberg*.[136] Here a new principle of market-value compensation was introduced, for those cases when small-scale development by owners should be deemed to have been "foreseeable" in the absence of expropriation.

If this requirement is met, the owners can now expect at least 10-20 times more in compensation than they would get under the traditional approach, which was based on a purely theoretical estimation of the value of the riparian rights.[137]

In *Uleberg*, however, the Supreme Court found that the relevant date of valuation was in 196x, when the waterfall rights in question had been transferred to the developer by a voluntary agreement. This agreement stated that the payment to the owners should be fixed by the appraisal courts at the time when the development took place. Both the appraisal court and the appraisal court of appeal took this to mean that the valuation should also be based on the value of the waterfall at the time when the compensation was to be paid. However, the Supreme Court disagreed, holding instead that the intended reading was that the valuation should be based on the value of the waterfall at the date when the voluntary agreement was made (with interest paid for the delay).

Furthermore, the Supreme Court then stated, without any substantive argument, that since this was the date of valuation, the natural horsepower method should be used. Presumably, this was based on the opinion that it was obvious that owner-led development would have been 'unforeseeable' at this time. The exact meaning of the foreseeability requirement has since become a much contested issue, resulting in several Supreme Court cases pertaining specifically to the

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

137 For a more in-depth presentation of compensation issues, I refer to Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 16) 71-76.

compensation question.

### 5.5.3 Recent Developments on Compensation

Since *Uleberg*, there have been many controversial cases involving expropriation of waterfalls. In most of these, the issue of compensation has occupied center stage. Sometimes, the issue of legitimacy had also been raised, but in most cases this issue has been largely brushed aside by the courts, without receiving much substantive consideration.[138] With respect to the compensation issue, however, owners initially appeared to be gaining significant ground, as the appraisal courts started to apply a market-based method quite systematically, resulting in dramatically increased compensation payments.

The large energy companies consistently resisted this development, typically by arguing that small-scale hydropower was unforeseeable and therefore not compensable according to the principle expressed in *Uleberg*. Importantly, the large energy companies would tend to argue that a license to undertake large-scale development was by itself conclusive evidence in support of the claim that small-scale development was unforeseeable. The large-scale development license showed, according to the large energy companies, that a license to undertake small-scale development could not be regarded as foreseeable.

This line of argument clearly conflicts with the so-called no-scheme principle, whereby compensation for expropriated property is to be based on the situation such as it would have been in the absence of the expropriation scheme. In the absence of a large-scale hydropower scheme, it is typically quite clear that the owners would have succeeded in obtaining a license to undertake small-scale hydropower, had the expropriation not taken place. However, the large-scale energy companies maintained that small-scale hydropower should be considered unforeseeable even in these cases, since large-scale development was the preferred option for the licensing authorities.

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In most early cases before the lower courts, this argument failed. Moreover, in the case of *Otra I*, it appeared as though it was rejected also by the Supreme Court. However, the Court did not focus specifically on the no-scheme principle, and the large energy company succeeded in having the appraisal court of appeal's decision overturned on the basis that inadequate reasons had been provided to justify the amount of compensation awarded to owners. The court of appeal therefore had to hear the case again. This time, the takers succeeded in their argument that small-scale hydropower was unforeseeable, so no market value compensation was awarded. The owners duly appealed the decision to the Supreme Court, but they lost the case.

In this case, *Otra II*, the Supreme Court appeared to endorse the understanding of the no-scheme principle of the large energy companies. Specifically, the Court refused to censor the appraisal court of appeal's assessment of foreseeability, even though it was based explicitly on the premise that the expropriation project was preferable from the point of view of the licensing authorities. The decision therefore marked a clear violation of the no-scheme principle, but was nevertheless upheld by the Supreme Court.

If the precedent set by *Otra II* stands, it seems that market value compensation will never be awarded in future cases when waterfalls are expropriated in favour of large-scale schemes. However, it bears noting that the Supreme Court has been very vague on how exactly it understands the no-scheme principle in these cases. Instead of tackling this issue directly, the Court has chosen to rely largely on indirect arguments in favour of deference to the foreseeability determinations carried out by the appraisal courts.

This deferential approach is also clearly illustrated by the case of *Kløvtveit*. Here the Supreme Court agreed with the appraisal court of appeal that it might in principle be foreseeable that owners, in the absence of expropriation, could have cooperated with the takers to implement the expropriation project. This too contradicts the no-scheme principle, but unlike the reasoning of *Otra II*, it also provides an alternative route to market value compensation, on the basis of a

valuation of the expropriation project itself. In effect, it points to an approach that promises to deliver a form of *benefit sharing* between owners and takers.

For this reason, *Kløvtveit* is an interesting decision, connected also with the more general idea that owners should have a right to participate in economic development taking place on their property. However, it seems quite unlikely that this case will become an important precedent for the future. Its importance was undermined already by *Otra II*, where the presiding judge explicitly denied that the principle discussed in *Kløvtveit* could be applied (ostensibly because cooperation between owners and takers would have been "impractical").[139] Moreover, *Kløvtveit* itself was eventually sent back to the appraisal court of appeal, because the Supreme Court held that the date of valuation had been incorrectly determined. On the second hearing in the appraisal court of appeal, cooperation between owners and taker was regarded as unforeseeable, so market value compensation was denied.

In fact, every single case that has reached the Supreme Court has ended in a compensation award based on the natural horsepower method rather than market value. This, no doubt, sends a clear signal to the appraisal courts. Moreover, it seems that the appraisal courts have taken the signal to heart. It now appears unlikely that local owners will receive market value compensation when waterfalls are taken for large-scale development.[140] In light of this development, the issue of legitimacy becomes increasingly important. The financial entitlements of owners and communities, which seemed to be more strongly protected after *Uleberg*, are again at great risk of being undermined.

Moreover, as the social function theory of property indicates, the issue of legitimacy goes well beyond the individual financial entitlements of owners. It also pertains to the status of the local communities, the duties of owners in this regard, sustainable management, and the democratic

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140 See **smibelg15** (appeal to the Supreme Court denied).

legitimacy of decision-making regarding natural resources. These aspects have so far not received any attention from Norwegian courts, as they are considered of little or no importance when adjudicating expropriation cases against the property clause in the Norwegian constitution. However, as I have already mentioned, the case of *Jørpeland* saw the procedural legitimacy of hydropower takings come to the forefront, for the first time since the case of *Alta*. In addition to clarifying legal points in this regard, the case also sheds light on the practices adopted by the water authorities in expropriation cases. To bring this aspect out, I will present the case in quite some detail, in the following section.

## 5.6 A detailed case study: *Ola Måland v Jørpeland Kraft AS*

The expropriating party was a public-private commercial partnership, Jørpeland Kraft AS. This limited liability company is jointly owned by Scana Steel Stavanger AS, with 1/3 of the shares, and Lyse Kraft AS, with the remaining shares.[141] The former is a private steelworks company located in the small town of Jørpeland in Rogaland county, south-western Norway. Historically, this company was a major employer in Jørpeland, which is located by the sea, next to a mountainous area.

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

Recently, Norwegian steel companies have become less profitable, due largely to increased foreign competition and a significant increase in costs of operation associated with this type of industry in Norway.[142] This has led to many such companies shifting their attention away from

[141] See *Jørpeland Kraft AS v Ola Måland and others* TSTAV-2007-185495, 2.

[142] Salary costs, in particular, have become prohibitive. See, e.g., *Information Booklet about Norwegian Trade and*

labour-intensive steel production, focusing instead on producing electricity, selling it directly on the national grid. Jørpeland Kraft AS was established as part of such a move to exploit the energy resources in Jørpeland.

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

As attention shifts from harnessing rivers for the purpose of industrial production to the purpose of producing electricity to sell on the national grid (and, increasingly, to export abroad), new variables determine the degree of profitability. On the cost side, what matters most is the one-time investment required to construct the hydropower plant. Maintaining and operating a hydropower station tends to be comparatively inexpensive. On the income side, what matters is the price of energy on the electricity market, a market that is no longer anchored in local conditions of supply and demand. Moreover, the business no longer depends in any significant way on the local labour force. Hence, increasing the scale of exploitation can be very profitable, even when there is no prospect for a corresponding growth in the general level of local economic activity.

Thus, it was in keeping with a general trend in Norway when Jørpeland Kraft AS, following their new commercial strategy, proposed to undertake measures to increase their energy output. This could be achieved relatively cheaply, by further constructions aimed at diverting water away from nearby rivers into dams that were already built to collect the water from the Jørpeland river.

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*Industry*, published by the Ministry of Trade and Industry in 2005.

### 5.6.1 The Facts of the Case

One relatively small river from which Jørpeland Kraft AS suggested to extract water was not located in Jørpeland. Rather, it runs through the neighbouring municipality of Hjelmeland, on the other side of a mountain range, until it eventually reaches the sea at Tau, another neighbouring municipality.

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

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

A rough estimate of the potential of this project was made by the NVE itself, stating that the energy yield would be 7.49 GWh per annum.[143] This is about five times more energy than the water from Brokavatn would contribute to the project proposed by Jørpeland Kraft AS.[144]

Importantly, the estimate was not made in relation to the expropriation case, but as part of a national project to survey the remaining energy potential in Norwegian rivers.[145] Ola Måland and the other owners of the river were not identified as significant stakeholders and were not notified

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143 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 16.

144 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

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

of the assessment that had been made. Moreover, even after Jørpeland Kraft AS had submitted a formal application for permission to divert the water, the owners were not notified by the water authorities.[146]

Moreover, the procedural approach to the case was the traditional one, with an assessment directed at evaluating the environmental impact. Many interest groups were called on to comment on environmental consequences, and public debate arose with respect to the balancing of commercial interests and the desire to preserve wildlife and nature.[147]

One of the local owners, Arne Ritland, also commented on the proposed project. He did this in an informal letter sent directly to Scana Steel Stavanger AS.[148] In this letter, he inquired for further information and protested the proposed diversion of water from Brokavatn. He also mentioned the possibility that an alternative hydropower project could be undertaken by original owners, but he did not go into any details, stating only that a locally owned hydropower plant had previously been in operation in the area.

The plant he was referring to dates back to the time before there was a national grid. It ensured a local supply of electricity, but has since been shut down, in keeping with the general trend mentioned in Chapter 4.

Arne Ritland received a reply from Scana Steel Stavanger AS, which stated that more information on the project and its consequences would soon be provided. Ritland did not pursue the matter further at this time. Meanwhile, Scana Steel Stavanger AS submitted his letter to the NVE, who in turn presented it as a comment directed at the application.[149]

This prompted the majority owner of Jørpeland Kraft AS, Lyse Kraft AS, to undertake their

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146 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 16. However, a generic orientation letter was apparently sent by Jørpeland Kraft AS, a letter that the owners themselves could not remember having received. See *Jørpeland Kraft AS v Ola Måland and others* LG-2009-138108, 5.

147 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

148 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 17.

149 *Jørpeland Kraft AS v Ola Måland and others* (n 141) 18.

own survey of alternative hydropower in Sagåna.[150] The conclusions were sent to the water authorities, but the owners were not informed that such an investigation was being conducted.[151] Moreover, the water authorities did not take steps to investigate the commercial potential of local hydropower on their own accord. Instead, they referred to the conclusion presented by Jørpeland Kraft AS, stating that if the local owners decided to build two hydropower plants in Sagåna, then one of them, in the upper part of the river, would not be profitable, neither with nor without the contested water. The other project, in the lower part, could apparently still be carried out, even after the diversion.[152]

No mention was made of what the original owners stood to loose, nor was there any argument given as to why it made sense to build two separate small-scale power plants in Sagåna. Nevertheless, the NVE handed the expropriating party's findings over to the Ministry, without conducting their own assessment and without informing the original owners.[153]

In addition to the report made by Jørpeland Kraft AS, the municipality government of Hjelmeland also commented on the possibility of local hydropower. In their statement to the NVE, they directed attention to the data in the NVE's own national survey, which suggested that a single hydropower plant in Sagåna would be a highly beneficial undertaking.[154] On this basis, they protested the diversion, arguing that original owners should be given the possibility of undertaking such a project.

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

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150 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

151 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 23.

152 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 23.

153 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 22-23.

154 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

it at Jørpeland.[155]

In addition to the statement made by Ritland, one other property owner, Ola Måland, commented on the plans.[156] He did so without having any knowledge of the commercial potential of the waterfall and without having been informed of the statement made by the municipality of Hjelmeland. Therefore, Måland expressed his support for Jørpeland Kraft's plans, citing that the risk of flooding in Sagåna would be reduced.[157] He also phrased his letter in such a way that it could be interpreted as a statement on behalf of the owners as a group.[158] However, Måland was the only person who signed.

In the final report to the Ministry, the NVE refer to Måland's letter and state that the original owners are in favour of the plans.[159] For this reason, the NVE concludes that the opinion of the municipality of Hjelmeland should not be given any weight.[160] The NVE neglects to mention that Arne Ritland's statement strongly opposed expropriation. Moreover, earlier in the report, where all incoming statements are reported, Ritland is referred to as a private individual, while Ola Måland is referred to as a property owner who speaks on behalf of the owners as a group.

The report made by the NVE was not communicated to the affected local owners at all, so the owners had no chance of correcting mistakes. However, the report was sent to many other stakeholders, including the municipality of Hjelmeland.[161] In light of the report, the municipality changed their original position and informed the Ministry that they would not press for local hydropower, since this was not what the affected owners (i.e., Ola Måland) wanted.[162]

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155 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

156 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 17.

157 He later joined the other owners in opposition to the expropriation.

158 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 17.

159 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

160 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 19.

161 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 24.

162 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 24.

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

As all the owners, including Ola Måland, had now come to realise the commercial value of the water from Brokavatn, they approached the NVE, inquiring about the status of the plans proposed by Jørpeland Kraft AS. They were subsequently informed that an opinion in support of the transfer had already been delivered to the Ministry. This communication took place in late November 2006, summarised in minutes from meetings between local owners, dated 21 and 29 November.[163] On 15 December 2006, the King in Council granted a concession for Jørpeland Kraft AS to transfer the water from Brokavatn to Jørpeland.[164]

At this point, it had become clear to the original owners that the water from Brokavatn would be crucial to the commercial potential of their own project. They also retrieved expert opinions that strongly indicated that the NVE was wrong when they concluded that diverting the water would be the most efficient use of the water.[165] In light of this, the owners decided to question the legality of the licence (with the corresponding permission to expropriate). They argued, in particular, that the administrative decision to grant the license was invalid.

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

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163 Presented to the courts, available upon request.

164 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 3.

165 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 23.

### 5.6.2 Legal Arguments

First, the owners argued that procedural mistakes had been made by the water authorities when preparing the case.[166] This, in turn, had resulted in factual mistakes forming the basis of the decision to grant the development license. Since the outcome might have been different if these mistakes had not been made, the owners concluded that the development license could not be upheld.

Second, the owners argued that expropriation of their rights would result in a disproportionate loss of an economic development potential.[167] Moreover, they argued that the economic loss would clearly be greater than the gain also from the point of view of the public, since the owners were in a position to make more efficient use of the contested water. Therefore, allowing expropriation would only serve to benefit the commercial interests of Jørpeland Kraft AS, to the detriment of both local and public interests.

Third, the owners argued that the government had not fulfilled its duty to consider the case with due care.[168] In particular, the assessment of local community interests and the interests of local owners had not been satisfactory. Particular attention was directed at the fact that local owners had not been informed about the progress of the case, and had not been told of assessments pertaining to their interests.

Fourth, the owners argued that irrespective of how the matter stood with respect to national law, the expropriation was unlawful because it would be in breach of the provisions in P1(1) of the ECHR regarding the protection of property.[169]

Jørpeland Kraft AS protested, arguing that there were no factual errors in the report from

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166 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 12.

167 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 5.

168 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 12.

169 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 07-08.

the NVE.[170] The relevant assessments were those pertaining to the licensing question as a whole, and it would be incorrect to focus on specific elements.[171] Moreover, it was likely that Måland had discussed the diversion of water with other affected owners, and that they had all agreed to support it.[172] Furthermore, it was argued that all the procedural rules of the Watercourse Regulation Act 1917 had been observed. Other procedural rules might be relevant, but only when they are compatible with the rules in the Watercourse Regulation Act 1917.[173] Jørpeland Kraft AS also argued that it was not for the courts to subject the assessment of public and private interests to any further scrutiny, since this was a matter for the administrative branch.[174] Finally, Jørpeland Kraft AS argued that diverting the water did not represent a breach of the owners' human rights.[175] They argued for this by pointing to the fact that the procedural rules had been followed and that the material decision was beyond reproach. Moreover, Jørpeland Kraft AS argued that since the owners would be compensated financially for whatever loss they incurred, it was clear that no human rights issues were at stake.[176]

The matter went before the district court in the city of Stavanger, which decided in favour of the owners on 20 May 2009.[177] In the following, I offer a presentation of the reasons given by this court, leading to the conclusion that the expropriation was unlawful and that the diversion of Brokavatn could not be carried out.

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170 See *Jørpeland* (n 2) 16.

171 See **jorpeland11a)**

172 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 2.

173 See *Jørpeland* (n 2) 16.

174 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 2.

175 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 2.

176 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 2.

177 See *Jørpeland Kraft AS v Ola Måland and others* (n 141).

### 5.6.3 The District Court

The district court of Stavanger agreed with the original owners that the decision to grant the license was based on an erroneous account of the relevant facts.[178] Moreover, the court concluded that it was evident that allowing the applicants to use the water from Brokavatn in their own hydroelectric scheme would be the most efficient way of harnessing the hydropower potential.[179] This, the court noted, directly contradicted what the NVE had stated in their report.[180]

The court backed up its decision by giving several direct quotes from the report made by the NVE. For instance, it quoted how the NVE had commented on the statement from the municipality of Hjelmeland:

> The municipality of Hjelmeland would like the hydroelectric potential in the waterfall to be exploited by local property owners. This contrasts with the statement submitted by the property owners themselves, who wish that the transfer of water takes place, so that damage due to flooding can be somewhat reduced. NVE thinks that the best use of the water with respect to hydroelectric production is to allow a transfer, since this means that the water can be exploited over the greatest distance in elevation. When this is also the property owners' own wish, we will not attribute any weight to the views of the municipality of Hjelmeland.[181]

The district court concluded that as this was a factually erroneous account of the situation, the decision made to allow transferral of the water could not be upheld. In light of this, the district court concluded that the decision to grant concession for diversion of water was invalid. Here the court relied on a well-established principle of administrative law: while the exercise of discretionary

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[178] See *Jørpeland* (n 2) 25.

[179] See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 22-23.

[180] See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 23.

[181] See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 12.

powers is usually not subject to review by court, a decision based on factual mistakes is invalid if it can be shown that the mistakes in question were such that they could have affected the outcome.[182] Since the small-scale alternative would in fact represent a more effective use of the water in question, the court was not in doubt that this principle applied here.[183]

Since the district court held that the license to allow diversion was invalid because it was based on factual mistakes, there was no need to consider claims regarding the legitimacy of the diversion with respect to human rights law. However, the district court did comment that the traditional procedure used to deal with diversion cases was inadequate and had to be supplemented by looking to the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967.[184]

Moreover, the court made a crucial statement about expropriation of riparian rights in general, regarding the duty of the water authorities to properly assess whether or not an expropriation license should be granted.[185] This duty, the court held, included a duty to properly consider negative effects on small-scale development potentials.[186] According to the court, this was the natural consequence of the increasing interest in small-scale development. If this principle had become part of Norwegian hydropower law, it would have had significant implications for the water authorities, directly confronting their traditional lack of interest in the expropriation question. However, it was not to be, as the court's decision was overturned on appeal.

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[182] See Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 407-410. For the requirement that the mistakes must have been such that they could have affected the outcome, see Public Administration Act 1967, s 41

[183] See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 25.

[184] See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 21.

[185] The duty is a general principle of administrative law, expressed both in Expropriation Act 1959, s 12 and Public Administration Act 1967, s 16.

[186] See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 22.

### 5.6.4 The Court of Appeal

The court of appeal approached the case very different than the district court. Specifically, its decision does not rely on any close assessment of the facts and the report made by the NVE. Instead, the court of appeal largely based its decision on the opinion that the rules in the Watercourse Regulation Act 1917 exhaustively regulate the administrative procedure in watercourse regulation cases.[187] According to the court of appeal, the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967 do not apply at all to diversions of water authorised under section 16 of the Watercourse Regulation Act 1917.[188]

This finding was based on the argument that the more specific rules of the Watercourse Regulation Act 1917 have priority under the so-called *lex specialis* principle, which applies in case of conflict between different sets of rules, giving priority to those that are more specific.[189] Apparently, the court thought that there was a conflict between principles of administrative law and the rules that apply specifically in hydropower cases.[190] With regard to the procedural rules of the Watercourse Regulation Act 1917, the court does not go into much detail, but concludes that the assessment of the water authorities met all general requirements and was clearly adequate. Regarding the factual basis for the license, the court is very brief, commenting only the following:

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

187 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 7.

188 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 7.

189 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 7.

190 The decision is not entirely clear on this point, however, as the court also makes a sweeping remark to the effect that the rules in the Watercourse Regulation Act 1917 conform to all "basic and general" procedural demands of administrative law. This, however, seems to be a reference to unwritten principles, not those specific provisions included in the Public Administration Act 1967 and the Expropriation Act 1959 which were found not to apply.

> refers to a current hydroelectric plant that exploits a waterfall of 13.5 meters.[191]

Here the court mentions a hydroelectric plant further downstream which would be only marginally affected by the transfer of water away from *Brokavatn*. The owners of this plant were not parties to the dispute (their interests were obviously quite negligible). Moreover, the downstream plant had nothing to do with the statement made by the municipality of Hjelmeland, which precipitated NVE's comments on the effectiveness of small-scale hydropower.[192] The court of appeal never mentions the statement made by the municipality, nor the fact the small-scale alternative suggested there involved exploiting the contested water over a difference in altitude of about 550 meters.

Instead, the court of appeal points out that the NVE was well aware of the possibility of developing small-scale hydropower, was well-informed about such development, and had considered it during their assessment.[193] The court of appeal admits that the NVE's written assessment on this point was brief, but argues that this must be understood as a natural response to the lack of input from local owners.[194]

The owners appealed the court of appeal's decision to the Supreme Court, which decided to hear the juridical aspects of the case.[195]

### 5.6.5 The Supreme Court

The Supreme Court approached the case in much the same way as the court of appeal. Regarding the facts, the Court emphasises that the majority owner of Jørpeland Kraft AS had considered

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191 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 8.

192 This is clear from decision of the district court, which quotes from the statement submitted by the municipality, see *Jørpeland Kraft AS v Ola Måland and others* (n 141) 16.

193 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 9.

194 See *Jørpeland Kraft AS v Ola Måland and others* (n 146) 9.

195 See *Jørpeland* (n 2) 8. Specifically, the Supreme Court would not engage in any independent factfinding, but only consider legal questions, including how the law should be applied to the facts.

the possibility that a hydroelectric scheme could be undertaken by local property owners.[196] As mentioned, this resulted in a report based on the premise that the owners could have built two separate small-scale plants in the same river. The conclusion is that one of these would be unprofitable regardless of the diversion, while the other one could still be carried out.[197] However, the report does not explain why anyone would want to build two consecutive small-scale plants in the same river, an approach that diverges from all other expert reports retrieved about small-scale potentials.[198]

In any event, the most relevant question would be what the owners stood to loose when the water from Brokavatn was diverted away from Sagåna. Both the report and the Supreme Court remained silent on this point. Moreover, the Court does not mention that the report was never handed over to the applicants, nor that the details of the calculations were never independently considered by the NVE. Just like the court of appeal, the Supreme Court also neglects to mention that small-scale development would be a more efficient use of the water, according to the national survey of small-scale potentials carried out by the NVE itself.[199] Furthermore, no mention is made of the fact that the NVE claims that the opposite is true in the report to the Ministry, contradicting also the statement made by the municipality of Hjelmeland.

Regarding the legal questions raised by the case, the Supreme Court rejects the view that the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967 do not apply to the case.[200] However, the Court holds that these procedural rules do not imply a more extensive duty to assess the expropriation question, compared to established practices in

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196 See *Jørpeland* (n 2) 53.

197 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 23.

198 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 16.

199 See *Jørpeland Kraft AS v Ola Måland and others* (n 141) 16.

200 See *Jørpeland* (n 2) 32-34.

hydropower cases.[201]

There is no rule in the Watercourse Regulation Act 1917 which states that the authorities are required to consider specifically the question of how the regulation affects the interests of property owners. Moreover, administrative practice suggests that this is not done, except perhaps to some extent when the issue is explicitly raised during the hearing.[202] However, a rule explicitly demanding this is found in section 2 of the Expropriation Act 1959. This is not regarded as a procedural rule, however, as it pertains to the material considerations that the administrative branch is required to carry out in expropriation cases.

Indeed, according to the Supreme Court, the rule does not apply at all when expropriation takes place on the basis of section 16 of the Watercourse Regulation Act 1917.[203] This is the conclusion despite the fact that section 30 of the Expropriation Act 1959 explicitly states that the provisions of that act apply to expropriations pursuant to the Watercourse Regulation Act 1917, in so far as they are compatible with the rules therein. It would appear to follow, by implication, that the Supreme Court does *not* think that directing more attention at owners' interests, as prescribed by section 2 of the Expropriation Act 1959, is compatible with the Watercourse Regulation Act 1917.

This is a clear rejection of the principled position taken by the district court, whereby the water authorities should generally be obliged to consider small-scale alternatives before allowing expropriation. According to the Supreme Court, no special procedural obligations arise at all in such cases, which can still effectively be processed as thought the riparian rights already belong to the applicant. In short, expropriation is to remain a non-issue during the licensing process pursuant

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201 See *Jørpeland* (n 2) 51-52 (citing also the *Alta* case, *Alta* (n 82)).

202 See Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010). This is the water authorities' own guideline for the assessment of large-scale applications. The previous version of this guideline (which also fails to mention the interests of owners) was presented to the Supreme Court. The Court also refers to it explicitly when it comments that existing practices are beyond reproach. See *Jørpeland* (n 2) 51.

203 See *Jørpeland* (n 2) 30.

to the Watercourse Regulation Act 1917.

Formally, this implication of *Jørpeland* only applies to expropriations carried out on the basis of section 16 of that act. However, in practice, there is reason to believe that the impact will be the same for all cases involving large-scale hydropower development. Indeed, the water authorities themselves do not appear to make any significant distinction between large-scale applications based on whether or not a separate license to expropriate waterfalls is formally required.[204]

To further illustrate the extent to which *Jørpeland* signals a dismissive attitude towards owners and local communities, I will conclude by offering a quote from Harald Solli, director of the hydropower licensing section at the Ministry. Sollie submitted written evidence to the Supreme Court regarding the practices observed in cases involving expropriation of water power. Below, I quote two exchanges that demonstrate how current practices leave local owners in a precarious position.

> Q: In cases pursuant to the Watercourse Regulation Act 1917, is it common for the water authorities to send prior written notices to the private owners that may be affected by a loss of a small-scale hydropower potential?
>
> A: The procedural rules that apply to cases pursuant to the Watercourse Regulation Act 1917 are found in section 6. To give such a written notice to private owners is not required. As far as I am aware, it is also not done, but I have no first-hand knowledge of this, since the NVE is responsible for the case at this stage.
>
> Q: In cases such as this, should owners affected by the loss of a small-scale hydropower potential be kept informed about the factual basis on which the authorities plan to make their decision? I am thinking especially about cases when the authorities do in fact provide an assessment of the potential for small-scale hydropower on private properties.

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[204] See Flatby (n 1).

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

By their reasoning in *Jørpeland*, it appears that the Supreme Court gave this dismissive attitude towards local owners a stamp of approval. In light of this, I believe the study of the law in a socio-legal setting becomes all the more relevant. For while the dismissive attitude might be a part of the national legal order, it seems pertinent to ask if it is a reasonable attitude to take towards local owners of valuable natural resources. Also, one may ask if a case can be made with respect to human rights, by arguing that the protection awarded is insufficient with regard to P1(1). This point was raised in *Jørpeland*, but did not receive any attention from the Supreme Court.[205]

## 5.7 Predation?

How should takings of waterfalls be assessed according to the normative theory developed in Chapters 1 and 2 of this thesis? There I presented the Gray test, a set of key assessment points for determining whether a taking violates important property norms. In the following, I briefly assess takings of waterfalls against the criteria of the Gray test, to shed further light on the normative status of current practices observed in Norway.

#### 5.7.0.1 The Balance of Power

In light of the presentation so far, it is safe to conclude that typical large-scale waterfall expropriations in Norway are marked by a severe imbalance of power between the taker and the owners. The economic and political power of local communities is clearly very limited compared to that of the large energy companies. Moreover, it is interesting to observe that this imbalance is accentuated by procedural arrangements and practices presided over by the water authorities. As demonstrated by

[205] The *Jørpeland* case resulted in a complaint to the ECtHR which has yet to be considered by the Court.

the case of *Jørpeland*, the formal position of owners and local communities under administrative law is very weak in hydropower cases. Hence, in addition to shedding doubt on the legitimacy of current practices in Norway, assessing waterfall takings against the balance of power criterion also underscores that this criterion is intimately related to administrative law.

Ideally, procedural rules should function so as to maintain an appropriate balance of power between the different actors involved in an administrative dispute. At least, the rich and powerful should not be allowed to dominate decision-making processes within the polity, at the expense of those most intimately affected by the decisions reached. If the administrative branch fails in this regard, or acts in such a way that existing imbalances are worsened, this is surely a cause for additional criticism with respect to the balance of power criterion. I believe the case study so far shows that the framework for management of Norwegian hydropower warrants exactly such a criticism.

#### 5.7.0.2 The Net Effect on the Parties

The immediate financial effect that a taking for hydropower has on the owners depends on how the compensation is calculated. As discussed in Section **??**, the law on this point has been in turmoil in recent years. In the late 2000s, there were signs that a commercially realistic valuation method might become dominant, leading in turn to a dramatic increase in compensation compared to earlier practice based on the natural horsepower method. This trend now appears to have been reversed, as the large energy companies have successfully argued that compensation based on commercial values should not be awarded, because it can not be regarded as 'foreseeable' that local owners could have undertaken hydropower development themselves. Hence, the argument goes, they suffer no losses in this regard when their resources are taken from them.

The local owners are in an even weaker position when it comes to indirect financial effects, as well as social and political effects, such as harms done to the local community. In this regard,

losses are not only under-compensated, they are typically not acknowledged at all, neither by the executive nor by the courts. The effects that go unnoticed range from the concrete, such as financial losses incurred because the expropriation proceedings drag out in time, to the abstract, such as the damage that is done to democracy when owners and local municipality governments are replaced by commercial energy companies as the primary resource managers in the local district.

#### 5.7.0.3 Initiative

It follows from the regulatory framework that almost all cases involving expropriation for hydropower development originate from applications submitted by commercial companies. The energy company draws up the plans and initiates the expropriation proceedings, by submitting a request for licenses to the water authorities. Hence, it is usually hard or impossible to argue that takings of waterfalls for hydropower development in Norway is motivated by public interests. The initiative test alone usually suffices to conclude that the primary motive is profit-making. Exceptions to this are possible, in so far as the energy companies themselves embody public service functions. In some cases it might be possible to argue that they do, but such arguments are becoming increasingly unconvincing due to the fact that most energy companies have been reorganised as for-profit enterprises whose activities are largely unconstrained by institutions of local government.[206]

#### 5.7.0.4 Location

Compared to notorious US cases such as *Kelo* and *Poletown*, the stakes for the owners appear lower in hydropower cases from Norway. However, as mentioned in Chapter 4, riparian rights are often of great importance to Norwegian farming communities and the subsistence of its members. Indeed, the taking of riparian rights from a local community might well contribute significantly

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to depopulation, although indirectly rather than by physical displacement.[207] Moreover, in many rural communities, small-scale hydropower appears to be the only growth industry, as farming is becoming increasingly unprofitable and communities are threatened by stagnation and decline.[208]

Hence, the location criterion suggests that takings of waterfalls merit heightened critical scrutiny, especially due to the importance of the property that is taken to the subsistence of the local communities forced to give it up.

#### 5.7.0.5 Social Merit

There is no shortage of electric energy in Norway, and electricity prices are very low compared to the rest of Europe. Indeed, development projects such as *Jørpeland* are not motivated by any particular need to supply more energy to the Norwegian people, but openly pursued as commercial endeavours. They usually do not appear to have any social merit beyond this.

On the contrary, waterfall takings can contribute to creating social ills. In south-western Norway, for instance, where *Jørpeland* is located, the average income for a sheep farmer corresponds to about half of the minimum wage that farmers are required to pay to full-time farm workers.[209] During harvesting season, sheep farmers wishing to hire 16 year old vacation workers are required to pay the kids about 30 % more per hour than they themselves can expect to earn per hour from running their own farms. Unsurprisingly, sheep farming communities in western Norway, such as that affected by the taking in *Jørpeland*, are struggling.

In this context, it seems that the social harm created by expropriation, whereby disadvantaged

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[207] Today, it is very unlikely that the Norwegian government would sanction physical displacement of people from their homes in order to facilitate hydropower development. However, this state of affairs cannot be taken for granted; the current political attitude on this point appears to have arisen in large part due to extensive and forceful anti-development activism during the 1970s, especially in relation to the *Alta* case (which initially involved plans to physically displace a local Sami community).

[208] For an example, I refer again to the case of the Gloppen municipality, discussed in Section **??**.

[209] According to the Norwegian Bioresearch Institute, the average sheep farmer could expect to earn about NOK 60 per hour from working at their farm in 2012. The minimum wage for farm workers during the same time was NOK 120 per hour. The minimum wage for 16-17 year old vacation workers was about NOK 80 per hour.

rural communities are deprived of the opportunity to manage their own water resources, should be a pressing concern. Because of the traditional approach to hydropower, focusing solely on environmental harms, the social merit of maintaining local ownership and control over resources receives little or no attention from the water authorities in expropriation cases. This, in itself, indicates very clearly that typical cases of waterfall expropriation in Norway will tend to fail the social merit test.

#### 5.7.0.6 Environmental Impact

It is clear that hydropower development can have negative environmental impacts. Hence, it is important that the value of development is appropriately balanced against environmental interests. To ensure this is a core aspect of the regulatory system. As discussed in Chapter 4, local initiatives for small-scale hydropower are now typically scrutinized quite intensely in this regard, particularly after reforms in recent years. By contrast, large-scale projects appear likely to receive preferential treatment. Since 2000, only one such project has been denied a license by the water authorities.[210] Moreover, the large companies are clearly in a better position to exert pressure on the regulator and to invest in lobbying in order to overcome regulatory hurdles. The fact that large gutter projects and extensive regulations are now coming back into favour, appears to be an indication of the severity of this effect. Hence, while the debate continues regarding the comparative environmental merits of different kinds of hydropower, it appears safe to conclude that the dynamics of power on display in relation to environmental issues raise further doubts about the legitimacy of waterfall takings.

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#### 5.7.0.7 Regulatory Impact

When riparian rights are expropriated, they also become a separate commodity, divorced from the surrounding land rights. They are also typically removed from the sphere of municipal control on land use, falling instead under the regulatory jurisdiction of the centralised water authorities. Hence, the regulatory context shifts from one emphasising holistic resource management and local community needs to one which focuses mainly on facilitating hydropower development on commercial terms.

In addition to the changed formal context of regulation, the very act of transferring property to more powerful actors suggests that it might be more difficult for regulators to do their job. The parties who stand to loose from stricter regulation are the large, state-supported, companies, who wield considerable power and influence. They are likely to oppose it, and to do so in a manner that is much more forceful than what could be expected from local community owners of waterfalls. Hence, takings in this sector appear likely to cause systemic imbalances and a push for less government regulation, or government regulation on terms dictated by the major market players. A sign of this effect can be found in recent controversial decisions recently made with regards to the national grid, where the interests of the electricity industry appears to have completely overshadowed broad public opposition against further environmental intrusions in valuable nature areas in the west of Norway.

#### 5.7.0.8 Impact on Non-Owners

As a group, non-owners can exercise some influence during the licensing procedure. However, this requires them to be organised or aligned with special interest groups. This is because organisations, not individuals, are entitled to protection under the Watercourse Regulation Act 1917. The non-owners most directly affected by hydropower development are usually local residents, from the same community as the waterfall owners. These owners have little chance of being heard in the process,

except if they find that their interests are aligned with those of more powerful stakeholders, such as national environmental groups. Indeed, except for some special rules targeting the municipalities, local people have no special means for engaging with the decision-maker in a manner commensurate with their stake in hydropower cases.

The transfer of property to a large-scale owner, moreover, changes the dynamic of interaction between owners and non-owners. Formally, the transfer of riparian rights away from the jurisdiction of municipal governments is particularly significant, since it significantly reduces the level of (local) democratic control over the use of the water resource. In addition, it is important to consider the informal effect of transferring property away from local community members to large corporations. Unlike local owners, corporations that take waterfalls appear highly unlikely to interact with local non-owners on equal terms.

#### 5.7.0.9 Democratic Merit

Following *Jørpeland*, it is clear that owners' right to participate in decision-making processes regarding the use of their rivers and waterfalls is still very limited under Norwegian law. The regulatory system effectively negates private property rights by making expropriation an automatic consequence of any large-scale development license granted to any non-owner. The background for this might be found in the idealistic sentiment that the regulatory power of the state should take precedence over proprietary entitlements. However, after the liberalisation of the energy sector, this has become tantamount to a systematic prioritisation of commercial property interests at the expense of local communities. It is hard to see how this development can have any democratic merit, leading to the conclusion that takings of waterfalls fails the Gray test also with respect to this criteria. Overall, it seems clear that according to this test, current practices found in Norway are indeed predatory in nature.

## 5.8 Conclusion

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

I noted, however, how the increasing centralisation of the energy sector and the increasing scale of projects following the Second World War led to increased worry about the legitimacy of interference in property and the natural environment. I concluded that the ensuing conflicts failed to make much of an impact on the law relating to hydropower, which was still organised as a public service at this time. The degree of political control over the sector, which was perceived to be great, meant that courts shunned away from adopting a strict view on legitimacy.

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

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

in conjunction with the Water Resources Act 2000.

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

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

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