



Integrating Land Governance into the Post-2015 Agenda
Harnessing Synergies for Implementation and Monitoring Impact

Annual World Bank Conference on Land and Poverty Washington DC, March 24–27, 2014

**Popular Participation in Expropriation Procedures:
A Comparative Law and Governance Study**

Björn Hoops

Groningen Centre for Law and Governance,
University of Groningen, The Netherlands
b.hoops@rug.nl

**Paper prepared for presentation at the
“2014 WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, March 24-27, 2014**

Copyright 2014 by author(s). All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.

Abstract

This contribution examines and compares how people that would be affected by a proposed expropriation can participate in the administrative procedure that precedes the expropriation decision. The examined regulatory frameworks are the 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, the South African Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as Namibian common law. Participation can contribute to the quality and the legitimacy of the expropriation decision. Furthermore, it can serve as a popular control mechanism and can improve the abilities of the people to participate in administrative procedures. In examining the participation processes the study has two objectives. First, it provides an analysis of the content of the good governance standards for expropriation procedures included in the Voluntary Guidelines. Secondly, it prepares the implementation of the Guidelines because it assesses whether the examined jurisdictions meet the standards of the Guidelines.

The contribution examines five aspects of the regulatory design of participation in expropriation procedures. These aspects are: the ability to participate effectively and the empowerment of disadvantaged people; the provision of information; the access to the procedure; the form of participation; the obligation to furnish reasons.

Key Words:

Expropriation, public participation, democratic legitimacy, land law, Voluntary Guidelines

Table of Contents

	Page
I. Introduction	1
II. The ability to participate effectively and the empowerment of disadvantaged people	3
1) South Africa	4
2) Namibia	7
III. The provision of information	8
1) Who has access to information?	8
2) Which information is provided?	9
3) The pro-activeness of the State	10
IV. The access to the procedure	10
1) South Africa	11
2) Namibia	12
V. The form of participation	12
1) South Africa	12
2) Namibia	14
VI. The obligation to give reasons	14
VII. Conclusion	15
References	17

I. Introduction

The expropriation of land entails that the State takes away (a part of) the right of ownership from the owner and transfers it to itself or a private entity. In practice, the implementation of a development project, for instance, may necessitate the expropriation of the land of one or more owners. This has substantial economic and social consequences for the owner(s) and the community in which they live, even more so in the Global South where the use of land is not only vital to food production, but also to one's privileges, status and power (See on land tenure in South Africa's rural areas: Bennett 2004, pp. 381 *et seq.*, Cousins 2008a, p. 1, Cousins 2008b, pp. 111 *et seq.*). That is the reason why constitutions around the world subject the expropriation of land to certain conditions. The German Basic Law of 23 May 1949, for instance, subjects the expropriation of land to the following constitutional requirements: the authorisation by an Act of Parliament; the requirement that the expropriation must serve a public purpose; a proportionality test; and fair compensation calculated in accordance with that Act of Parliament.¹

The most common type of expropriation throughout the world is administrative expropriation.² This means that an authority that has been authorised by Parliament to expropriate land determines whether the other constitutional requirements are met and decides whether or not to expropriate the land (Van der Walt 2011, p. 456, Papier, Maunz/Dürig, GG, Art. 14, No. 549). Ideally, the authority does this after following a fair, transparent and participatory administrative procedure. In this contribution, participation refers to the contributions to, and comments on, a proposed expropriation by the public in an administrative procedure conducted by the expropriation authority (Coglianese, Kilmartin & Mendelson 2008, p. 3). Consequently, participation does not refer to all contributions of the people or their representatives to an expropriation decision. In particular, it does not refer to deliberations among members of a directly elected body that has been authorised to expropriate.³

Such a procedure has at least four benefits. First, it provides the competent authority with more information on the subject-matter, including on the impact that the decision would have on disadvantaged members of the public (Turnhout, Van Bommel & Aarts 2010, p. 26, Hoexter 2012, pp. 362 f.). It thus enhances the quality of the decision because the competent authority can better balance the affected interests. Secondly, participation that goes beyond the mere provision of information can serve as an accountability and control mechanism that may protect the people from arbitrary expropriation (Goodwin 1998, p. 481). The people that are affected by a decision can check whether

¹ Art. 14(3) of the German Basic Law reads as follows: "Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts."

² Other types of expropriation are statutory expropriation, which term refers to expropriation directly effected by an Act of Parliament, and judicial expropriation, which means that a judge duly authorised by Parliament expropriates property rights. See: Van der Walt 2011, pp. 456 f.

³ Sections 226(1) and (8) of the UK Town and Country Planning Act 1990, for instance, authorise directly elected councils of districts, boroughs and counties to issue compulsory purchase orders that have to be confirmed by the Secretary of State. Deliberations among the elected representatives are also contributions of the people and may enhance the democratic legitimacy of the decision, but are not considered in this contribution.

the information is complete, whether the competent authority has taken due account of their interests and whether the reasoning of the competent authority is flawed.

Thirdly, participation enhances the democratic legitimacy of the decision to expropriate.⁴ The people that are affected by a decision will be more likely to accept actually the expropriation if they have received all information on the subject-matter and have had the opportunity to express their view in an expropriation procedure with sufficient safeguards (Dietz & Stern 2008, pp. 43 & 50). Participation may thus prevent unrest and interference with the use of the land after the decision, thereby promoting security of tenure. A fourth benefit of participation is capacity building. Citizens are not born capable of participating effectively in democratic and administrative processes, but rather have to learn how to do that. Participatory procedures may encourage the people to improve their knowledge on land issues and their communication skills (Turnhout, Van Bommel & Aarts 2010, p. 26, Dietz & Stern 2008, pp. 51 & 63). This may in the future prevent decisions that disadvantage already disadvantaged people.

These benefits are only partially realised in practice. This may have diverse causes, such as the costs of participation and the delay caused by participation, the insufficient intellectual quality of the process, or the dominance of some members of the affected community over economically or socially weaker members (Barnard 2001, p. 143, O'Neill 2001, pp. 484 & 486, Bekkers & Edwards 2007, p. 51, Dietz & Stern 2008, pp. 34, 54 & 64, Chess & Purcell, pp. 2686 *et seq.*). Also, the design of the expropriation procedure poses various questions. Does the authority take steps to empower disadvantaged people? Who has access to information on the proposed expropriation? Who may participate in the procedure? How can they participate?

Those challenges are difficult to overcome at global level because an expropriation procedure must be adapted to the needs of the respective country, which means that every country needs its own set of rules. Yet, the globally applicable Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as: Guidelines) may provide an answer to all these challenges.⁵ They were endorsed by the Committee on World Food Security (CFS) on May 11th, 2012. Their goal is to eliminate sources of insecurity of tenure and distrust, such as arbitrary expropriations, that inhibit sustainable economic development and entrench poverty (Guidelines document, p. V). The Guidelines contain recommendations to States and other relevant actors, both in the Global North and the Global South, on their tenure policies (Guidelines 2.3 and 2.4). They provide for good governance standards for expropriation procedures that can be adapted to the needs of different countries and communities (See Guideline 5.5). As the Guidelines are the outcome of a long and thorough bottom-up process in which relevant stakeholders

⁴ Democratic legitimacy refers to the acceptability of an exercise of authority on the basis of democratic standards. Here, the term is used in its descriptive sense, which means that an exercise of authority is legitimate if the people freely accept it on the basis of democratic values. See: Morris 1998, p. 102, Van Staden 2003, pp. 9 *et seq.*

⁵ The Guidelines can be retrieved from: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (last accessed: 28 January 2014).

discussed land tenure issues, such as expropriation,⁶ it is reasonable to presume that those good governance standards reflect the latest insights from practice. This fosters the hope that compliance with these good governance standards contributes to the realisation of the abovementioned benefits.

This contribution has two objectives. First, I analyse the content of the good governance standards for expropriation procedures included in the Voluntary Guidelines. The analysis concerns the following aspects: the ability of the people to participate effectively and the empowerment of disadvantaged people to participate effectively; the provision of information to the people; the persons who can participate in the procedure; the form of participation; the obligation to give reasons. This analysis only concerns participation in the expropriation procedure in which the public purpose is determined and the decision to expropriate is taken. It does not deal with participation in the determination of the compensation or the implementation of the expropriation. Furthermore, this contribution does not deal with judicial remedies against the expropriation decision.

Secondly, I compare the results of the analysis of the Guidelines to expropriation procedures under the South African Expropriation Act 63 of 1975 and Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as under the Namibian Expropriation Ordinance of 1978 and Namibian common law. This comparison serves two goals. First, it shows to what extent the examined jurisdictions should improve their expropriation procedure in order to comply with the Guidelines. Secondly, it presents a legal monitoring mechanism for the implementation of the Guidelines. This may assist the Food and Agriculture Organization of the United Nations (FAO), which supported the preparation process and is committed to implementing the Guidelines, in monitoring the implementation of the Guidelines (Ariat et al. 2012, pp. 72 f.).

The legal analysis of expropriation procedures, however, can only be a first step towards a comprehensive monitoring mechanism because it needs to be complemented by empirical sociological research. Non-empirical legal research is based upon the assumption that the expropriating authority has the necessary resources to comply with the law and applies the law correctly (Cf. Coglianese, Kilmartin & Mendelson 2008, p. 4, Barnard 2001, p. 143). Social scientists must ascertain whether or not the authority is able to apply the law correctly and whether or not it does so in practice.

II. The ability to participate effectively and the empowerment of disadvantaged people

Guideline 16.2 stipulates that the expropriation procedure should be participatory. Participation refers to the contributions to, and comments on, a proposed expropriation by the public in the expropriation procedure (Coglianese, Kilmartin & Mendelson 2008, p. 3). Effective participation requires knowledge on the subject-matter, the procedure, communication skills, creativity and courage (Turnhout, Van Bommel & Aarts 2010, p. 26). It is widely acknowledged in the literature that the

⁶ A summary of the outcome of the consultations that preceded the drafting of the Guidelines can be retrieved from:

http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_outcome_document_English_corrected.pdf (last accessed on 28 January 2014).

ability to participate effectively is “unevenly distributed” (O’Neill 2001, p. 484). Some people simply cannot participate effectively. Other people with less well developed abilities are, in practice, silenced by the conditions under which they have to participate or by those with better developed abilities (O’Neill 2001, p. 484, Goodwin 1998, pp. 487 *et seq.*, Kohn 2000, pp. 412 *et seq.*, Pellizzoni 2001, p. 61).⁷ If certain participants, however, are not able to participate effectively or are silenced during the procedure, they will not be able to provide the authority with information or defend their interests (Innes & Booher 2004, p. 430). Expropriation decisions are thus likelier not to be based upon sufficient information, to contain errors or not to take due account of the interests of those disadvantaged people.

The Guidelines recognise this empirical finding in Guideline 3B.3 by stating that equality between individuals may require acknowledging differences between them. The conclusion that Guideline 3B.3 draws from this finding is that positive action, including empowerment, must be taken in order to promote equitable access to land for all social groups. Guideline 3B.6 adds that the States should ensure that the contributions of participants are active, free, effective, meaningful and informed. Furthermore, Guideline 3B.6 acknowledges existing power imbalances between the participants, as they are found in practice. It further recommends taking these power imbalances into account. Guideline 6.6 confirms that States should take positive action because it recommends that States consider additional measures to support vulnerable or marginalised groups who would otherwise not be able to access administrative services. Guideline 4.10 points into a similar direction by recommending that the States facilitate participation. The conclusion would be that the States should empower the people, in particular disadvantaged groups, to participate effectively in the expropriation procedure. It should take due account of power imbalances between the people participating in the expropriation procedure, which may entail that the States prevent disadvantaged groups from being marginalised by people who are better equipped to participate in the procedure.

1) South Africa

In South Africa land can be expropriated in accordance with Section 25(2) of the South African Constitution, Act 108 of 1996.⁸ The most important statutory basis for expropriation is still the Expropriation Act 63 of 1975 (Cf. Gildenhuys 2001, p. 51). The Minister of Public Works may expropriate any property for public purposes according to Section 2(1) of that Act. The Promotion of Administrative Justice Act contains provisions for expropriation procedures under that Act. Section 3(1) of PAJA stipulates that administrative action, such as administrative expropriation, that materially and adversely affects the rights or legitimate expectations of one or more individuals must be

⁷ A procedure, for instance, may be dominated by experts and their vocabulary, which discourages people who are not specialised in a particular field from participating due to a feeling of embarrassment.

⁸ That provision reads as follows: “Property may be expropriated only in terms of law of general application

a) for a public purpose or in the public interest; and

b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

procedurally fair.⁹ The obligations and powers of the expropriation authority to ensure procedural fairness are laid down in section 3(2)(b) en 3(3). These sections contain open-ended provisions that must be adapted to what procedural fairness requires in each individual case (Section 3(2)(a); cf. Hoexter 2012, p. 366).

Procedural fairness in South African law requires a certain degree of empowerment of those whose rights or legitimate expectations are materially and adversely affected. Section 3(2)(b)(a) requires the expropriation authority to provide an adequate notice of the nature and the purpose of the expropriation. This provision is meant to ensure that the participants have enough information on the subject-matter and enough time to prepare their representations in order to defend their interests (Hoexter 2012, p. 369). A vulnerable group that would have to be empowered in this respect are illiterate or uneducated people who would not be able to understand the notice and would require more time to prepare their representations. The South African courts have proved to be responsive to the needs of those people. In some cases the notice served to illiterate or uneducated people was found to be too short to be adequate.¹⁰ The seriousness of the case may require the expropriation authority to serve each person an individual notice instead of, or in addition to a public notice, in order to ensure that the people are informed about the subject-matter.¹¹ Procedural fairness may furthermore require that the expropriation authority not only serves a written notice to illiterate people, but also makes public announcements in their mother tongue.¹²

Section 3(2)(b)(b) PAJA obliges the expropriation authority to give the affected persons a reasonable opportunity to make representations. As Sections 3(3)(b) and (c) PAJA imply, this provision does not give the affected person a right to appear in person and to dispute arguments before the authority (Hoexter 2012, p. 371). Nor does it accord a right to those in need of empowerment to be provided with (legal) assistance, as is implied by Section 3(3)(a) PAJA. This provision only serves to ensure that the affected persons can make representations, be it in the form of written or oral representations, but does not provide for any safeguards for the illiterate or those who are intimidated by the mere interactions with the expropriation authority.

Section 3(3)(a) PAJA gives the expropriation authority the discretionary power to give affected persons the opportunity to obtain assistance and, in serious cases, legal representation. The goal of this power is to give effect to the right to a fair administrative procedure. This means that affected persons who cannot participate effectively in administrative procedures depend upon the discretion of the expropriation authority for assistance. Although the discretion becomes narrower as the impact of the

⁹ In the following I refer to affected persons or individuals. The parts of this contribution that deal with Section 3 PAJA also cover cases where only one owner's property is expropriated or only one person is affected.

¹⁰ See, for instance, *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (No. 1), 2008 (3) SA 91 (E), para 73. See also the regulations on fair administrative procedures (published in Government Notice No. R. 1022 of 31 July 2002) that regulate procedures under section 4 of PAJA, in particular sub-regulations 3(3)(a) and 18(2)(a).

¹¹ *Bushula & others v Permanent Secretary, Department of Welfare, Eastern Cape*, 2000 (2) SA 849 (E), 855F-J.

¹² *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*, 2000 (2) SA 67 (C), para 15-18.

expropriation on the livelihoods of affected persons becomes greater (Hoexter 2012, pp. 378 f.), this discretionary power seems insufficient to ensure that affected persons are empowered to participate effectively in practice. In order to comply with the Guidelines, South African law would have to ensure that the affected persons are mandatorily empowered to provide insights and present their arguments on the basis of the notice that they received beforehand.

If the rights of any group or class of the public are materially and adversely affected by the administrative decision, Section 4 of PAJA, read in conjunction with Section 1(xi) PAJA, will be applicable. It has yet to be clarified when the public is affected. The most likely outcome of that debate is that Section 4 PAJA will be applicable if the decision is equally and impersonally applied or has a significant impact on the public (Hoexter 2012, p. 410). In an expropriation case Section 4 will probably be applicable if a vast amount of land has to be expropriated from different owners or if the realisation of the public purpose for which the land will be expropriated has a considerable impact on a significant part of the public (Hoexter 2012, p. 410). The competent authority can choose to order a public inquiry, to initiate a comment and notice procedure, to combine these two procedures or to follow another fair procedure.

If the expropriation authority follows a notice and comment procedure, the authority will first have to take “appropriate steps to communicate the administrative action” (Section 4(3)(a) PAJA). If a public inquiry and a public hearing, which is a mandatory element of a public inquiry (Section 4(2)(b)(i)(aa)), are to be held, the regulations on fair administrative procedures provide for an obligation to publish a notice before the inquiry or the hearing (Sub-regulations 3(1) and 11(2)). Sub-regulations 3(4)(a) and 18(3)(a) stipulate that these notices must contain so much information as to enable the members of the public to submit meaningful comments. The notices will be published in newspapers (Sub-regulations 3(1) and 18(1)). These provisions raise the same questions as Section 3(2)(b)(a) with regard to illiterate or uneducated people. The regulations on fair administrative procedures, however, provide for a solution to these problems. The expropriation authority will have to publicise information on the subject-matter in a manner that will bring the expropriation to the attention of the community at large (Sub-regulations 5(1)(a), 11(2)-(4) and 20(1)(a)). Furthermore, the expropriation authority may hold public meetings at which the proposed expropriation would be discussed and questions are answered (Sub-regulations 5(2)(a) and 20(2)(a)).

In the framework of a notice and comment procedure, the expropriation authority, having served a notice, would wait for comments. This raises the question whether people who cannot write or feel intimidated by the interaction with the authority can defend their interests in the procedure. Again, the regulations on fair administrative procedures give the answer. The expropriation authority is obliged to take special steps to solicit the views of members of the affected community (Sub-regulation 20(1)(b)). Such steps may include a survey of public opinion in the community and a secretarial facility where members of the affected community can state their views (Sub-regulations 20(2)(b) and

(c)). These measures may indeed make the procedure more accessible. Yet, it remains to be seen which steps the expropriation authority will take in practice.

What has been said about the notice and comment procedure so far also holds true for the public inquiry (Sub-regulations 3(3)(a), 5(1)(b), (2)(b), (c), 11(2)-(4)). The notice of a public inquiry, however, may also include the invitation to make oral representations or to testify (Sub-regulation 3(3)(a)(i)). Such oral representations can be made at a public hearing (Section 4(2)(b)(i)(aa) PAJA). Such hearings are, in principle, open to the public (Sub-regulation 15(1)). Contributions, however, can only be made by those who are allowed to make representations or are questioned by the presiding official (Sub-regulation 13(2)). Such public hearings pose another challenge. Affected persons who are influential figures in the community or who are better equipped to participate effectively in the administrative procedure may dominate such a public hearing and convince the expropriation authority of their opinion. The more deliberative elements the expropriation authority adds to the procedure, the greater this danger becomes.¹³

The regulations on fair administrative procedures do not contain any provisions that are specifically meant to address this problem. Affected persons can request the expropriation authority to permit them to be assisted by a representative (Sub-regulation 14(1)). The regulations, however, remain silent on how the affected persons can obtain assistance from a representative. Apart from this provision, the regulations only provide for the discretionary powers of the expropriation authority to determine the procedure, not to allow someone to make oral representations and to order certain persons to leave the public hearing in order to regulate public access or to prevent or control misconduct (Sub-regulations 11(5), 12(1), 13(2), 15(2) and 15(3)(a)). These rules heavily rely on the ability of the authority to detect the problem of dominating figures and its willingness to address that problem. On the basis of these rules, it is very doubtful whether South African law takes due account of the power imbalances between the people.

2) Namibia

Section 16(2) of the Constitution of the Republic of Namibia empowers the State to expropriate land. A state authority must be authorised by law to expropriate land. The most important statutory basis in Namibian law is the Expropriation Ordinance of 1978.¹⁴ Section 2(1) of that Ordinance authorises the Minister of Works, Transport and Communication to expropriate any property for public purposes. The Minister must act fairly (Section 18 of the Namibian Constitution). There is, however, no indication that either the Expropriation Ordinance or Namibian common law provides for any measures specifically aimed at empowering disadvantaged people. Namibian common law gives persons that are affected by the proposed expropriation, e.g. the expropriatee, the right to receive information on the subject-matter and on the procedure, to present their case, to respond to allegations

¹³ Sub-regulation 12(1) stipulates that the expropriation authority determines the procedure.

¹⁴ Other statutory bases are, for instance, Section 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995 and Section 35 of the Electricity Act 4 of 2007.

and to provide evidence (Hoexter 2012, pp. 363 *et seq.*).¹⁵ An improvement of the position of all affected persons is that they can ask for clarifications of the provided information.¹⁶ Unlike the South African PAJA Namibian law does not address the problems of the illiterate and uneducated. In order to comply with the Guidelines, Namibian law would have to oblige the expropriation authority to take measures to empower the disadvantaged and, if deliberations take place, to minimise the impact of power imbalances between the people on the expropriation procedure.

III. The provision of information

The provision of information on the subject-matter and on the characteristics of the procedure is vital to effective participation. Only if the information is easily available, will the public be able to detect incomplete information, unfair treatment and errors in the reasoning of the administrative organ and to base their views upon all the available information (Coglianese, Kilmartin & Mendelson 2008, p. 3, Gutmann & Thompson 1996, pp. 47 & 95).

1) Who has access to information?

The first aspect to be examined is the group of people that have access to information. The Guidelines adopt a mixed approach. Guideline 3B.8 recommends that the States widely publicise information on the procedure. The entire public should thus have access to the details of the expropriation procedure. The access to information on the subject-matter, however, should be regulated differently. Guideline 16.2 is the provision regulating expropriation procedures. This Guideline states that the States should ensure that the persons who are likely to be affected by the decision are properly informed. This provision thus clearly makes a distinction between persons who are likely to be affected by a decision and those who are not. The access to information on the subject-matter is thus restricted.

The South African Promotion of Administrative Justice Act lays down a few obligations of the competent authority to provide information meant to ensure a fair procedure. Section 3(2)(b)(a) stipulates that the competent authority must give adequate notice of the nature and the purpose of the proposed administrative action. Section 3(2)(b)(d) and (e) provides that the competent authority has to provide information about certain procedural rights. These obligations, however, only apply towards persons whose rights or legitimate expectations would be materially and adversely affected by the administrative action (Section 3(1) PAJA). In principle, this excludes people without a right to property or liberty or a legitimate expectation relating thereto and cases where the adverse effects on the people are of a merely trivial nature (Hoexter 2012, pp. 397 *et seq.*).

If the rights of (any group or class of) the public are materially and adversely affected, the competent authority can choose between different procedures (Section 4, read in conjunction with Section 1(xi) PAJA). An explicit obligation to provide information is only laid down in PAJA with regard to the notice and comment procedure, namely “to communicate the administrative action” (Section 4(3)(a)).

¹⁵ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 49.

¹⁶ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 118.

The regulations on fair administrative procedures, however, also provide for an obligation to publish a notice before the authority holds a public inquiry or a public hearing (Sub-regulations 3(1) and 11(2)). Although Section 4(3)(a) PAJA only prescribes the provision of information to the members of the public that are likely to be materially and adversely affected, the regulations on fair administrative procedures provide for publication of the notices in newspapers (Sub-regulations 3(1), 11(2) and 18(1)). This means that information is provided to the entire public (in a certain area). As to the characteristics of the notice and comment procedure and the public inquiry, the regulations provide that some details of the procedure, such as the closing date, must be included in the notice (Sub-regulation 3(3)(b) – (e) and 18(2)).

The South African PAJA thus mostly follows the recommendations of the Guidelines. If Section 3 PAJA is applicable, however, it should publicise the details of the expropriation procedure more widely. PAJA even goes beyond what the Guidelines require because information on the subject-matter is provided to the entire public if the rights of the public are likely to be materially and adversely affected.

By contrast, the Namibian Expropriation Ordinance of 1978 does not foresee the provision of information. Yet, the *audi alteram partem* principle, which is entrenched in Namibian common law, also applies in expropriation procedures.¹⁷ This principle entails that affected persons, first and foremost the owner of the land, must be given information on the proposed expropriation and the procedure (Burns & Beukes 2006, p. 56, Hoexter 2012, p. 363).¹⁸ Namibian common law thus complies with the Guidelines as far as information on the subject-matter is concerned. Information on the procedure, however, should be publicised more widely. This concern is even more pressing as the rights of affected persons in expropriation procedures are not codified in one Parliamentary Act, such as the South African PAJA, but are based upon uncoded common law, making it more difficult for citizens to know their legal position.

2) Which information is provided?

The second aspect to be examined is the content of the notices. Guideline 16.2 states that the States should ensure that the persons who are likely to be affected by the decision are properly informed. Guideline 3B.6 recommends that the States ensure active, free, effective, meaningful and informed participation. The deduction would be that the States have to provide all the information necessary to enable the people to make meaningful representations and to defend their interests.

On to the content of the notices, PAJA remains silent. Yet, sub-regulations 3(4)(a) and 18(3)(a) stipulate that a notice must contain so much information as to enable the members of the public to submit meaningful contributions. This sub-regulation, however, is not applicable to section 3(2) of PAJA. This meaning can nevertheless also be traced in the literature and case law on administrative decisions not affecting the public (Hoexter 2012, pp. 369 *et seq.*). It is thus reasonable to assume that

¹⁷ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 49.

¹⁸ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 48.

the notice in terms of section 3(2)(b)(a) must contain the same information. South African law thus follows the recommendations of the Guidelines.

The Namibian common law includes the *audi alteram partem* principle. This principle is meant to enable an affected person to participate effectively in the expropriation procedure. The principle therefore entails that the expropriation authority provides the affected persons with so much information that they can make meaningful representations (Hoexter 2012, p. 369). Should this information prove to be insufficient, affected persons can ask for clarifications.¹⁹ Namibian law thus complies with the recommendations of the Guidelines.

3) The pro-activeness of the State

The third aspect to be considered is the degree of pro-activeness required from the States. Guideline 3B.8 recommends that the States widely publicise the procedure to be followed. Furthermore, according to Guideline 16.2, the States should ensure that the participants make a contribution that is based upon a proper information basis. The Guidelines thus envisage a pro-active expropriation authority that provides information without being requested to do so. PAJA shares this principle. Sections 3(2)(b), 4(2) and 4(3)(a), read in conjunction with the sub-regulations 3(1) and 18(1), stipulate that the expropriation authority takes the initiative to provide information, and do not require individuals to request information. Namibian common law also envisages a pro-active State. The expropriation authority has to serve a notice of the proposed expropriation (Hoexter 2012, p. 369).

IV. The access to the procedure

The next question to be addressed is which persons can participate in the expropriation procedure. Ideally, the more people participate in a procedure, the more information and views on the proposed expropriation the competent authority will gather and consider when taking their decision. This may lead to an improvement of the quality of the decision (Dietz & Stern 2008, pp. 43 & 50). This advantage, however, is unlikely to materialise in practice. The first reason is that it is difficult to ensure that the affected groups, disadvantaged groups in particular, can participate equally and effectively or are equally and effectively represented (O'Neill 2001, pp. 484 & 486, Bekkers & Edwards 2007, p. 51). It will be even more difficult to give the views of disadvantaged groups the necessary weight if unaffected groups with vested interests also contribute to the procedure (Cf. Dietz & Stern 2008, pp. 61 *et seq.*). The second reason is that participation of more people requires more resources and more time, which may eventually result in the quality of the decision declining (Barnard 2001, p. 143, Dietz & Stern 2008, p. 34).

The Guidelines recommend restricting the access to the procedure. Guideline 16.2 states clearly that the State should identify persons who are likely to be affected, inform them properly and consult them. Guideline 3B.6 that establishes consultation and participation as leading principles of the Guidelines

¹⁹ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 118.

uses a different term, namely persons who, having legitimate tenure rights, could be affected. Guideline 16.2 is the provision applicable to expropriation procedures, which is why Guideline 3B.6 does not have direct influence on who should have access to the procedure. However, it may indicate that persons are only, or at least more likely to be affected in terms of Guideline 16.2 if they have legitimate tenure rights that would be affected by the expropriation. The conclusion is that the Guidelines recommend restricting the access to the procedure to a certain category of people.

1) South Africa

The South African PAJA also restricts the access to the procedure. According to Section 3(1), access to the procedure is only granted to persons whose rights or legitimate expectations would be materially and adversely affected by the administrative decision. Section 3(1) PAJA thus gives a general definition that needs to be applied to the specific case. In particular, the expropriatee falls under this definition because his right to the property would be (partially) taken away from him (Hoexter 2012, p. 398).

A different conclusion would be reached if the rights of any group or class of the public were materially and adversely affected by the administrative decision. If a notice and comment procedure is followed, Section 4(3)(a) suggests that Section 4(3)(b) only gives affected persons the right to submit comments. Sub-regulation 18(2)(a), however, refers to an invitation to the public to submit comments and does not distinguish between persons who would be affected and those who would not. The conclusion would be that the entire public can submit comments that have to be considered by the competent authority. If a public inquiry is ordered, the entire public can submit comments (Sub-regulation 3(3)(a)). The entire public can, in principle, also attend the mandatory public hearing (Sub-regulation 15(1)). The competent authority, however, decides upon request or *ex officio* whether or not to question persons or to give persons the right to make oral representations (Sub-regulations 13(2)(a), (b), (d) and 3(7)). If a person has requested to be heard, the competent authority will have to furnish reasons for declining the request (Sub-regulations 11(5) and 3(7)).

Section 3 of the South African PAJA restricts the access to the procedure to persons whose rights or legitimate expectations would be materially and adversely affected by the proposed expropriation. This is in line with what the Guidelines recommend. Section 4(3) of the South African PAJA allows for comments from the entire public in the framework of a notice and comment procedure. Section 4(2) allows for comments from the entire public in the framework of a public inquiry and gives the competent authority the discretionary power to allow persons to make representations at the public hearing. These provisions deviate from what the Guidelines recommend. The approach of Section 4(3) PAJA, however, allows for more input from the people and, moreover, may save resources because the authority does not need to scrutinise who would be affected. Section 4(2) combines these benefits with more flexibility for the competent authority to determine who may make representations at the

public hearing, which may also lead to more valuable input from the people. The authority's discretion, however, may have the drawback that certain groups are under- or over-represented.

2) Namibia

The Namibian Expropriation Ordinance of 1978 does not prescribe any participation. The *audi alteram partem* principle, however, entails that affected persons, such as the expropriatee, must be heard.²⁰ Namibian law thus follows the Guidelines.

V. The form of participation

The people who may participate in the expropriation procedure can contribute to the procedure in different ways. Throughout the world different forms of participation are discussed and implemented (An overview of different forms of participation: Arnstein 1969, pp. 216 *et seq.*). They allow for different degrees of popular input and have a different impact on the quality of the outcome.

The Guidelines recommend a form of participation that goes beyond the provision of information. Guideline 16.2 states clearly that the States should consult at all stages the persons who are likely to be affected by the decision. A purpose of these consultations is to gather information about possible alternatives and strategies to minimise disruptions. Consultations can be understood as a procedure in which the expropriation authority gives the people the opportunity to express their view (Nordic Council of Ministers 2002, p. 48). Consultations in terms of the Guidelines, however, also have distinct deliberative elements. Deliberation refers to reasoned dialogues between the authority and the people and reasoned dialogues among the people that may lead to a change of opinions of the participants and the authority (Nordic Council of Ministers 2002, pp. 40 f., Innes & Booher 2004, pp. 423 *et seq.*, Bulkeley & Mol 2003, p. 149). The reason for that conclusion is that Guideline 16.2 provides that the consultations should be conducted in accordance with the principles of the Guidelines. Guideline 3B.6 that establishes consultation and participation as leading principles recommends that the States engage with, and seek the support of, the people who, having legitimate tenure rights, could be affected. Furthermore, the States should respond to contributions of participants. These recommendations indicate that the contact between the States and the people should go beyond the opportunity for the people to express their view. The Guidelines suggest that the States and the people should discuss the matter thoroughly, and where possible, come to a mutual understanding. Interestingly, the Guidelines only seem to refer to interactions between the State and the participants, not among the participants.

1) South Africa

Section 3(2)(b)(b) of the South African PAJA stipulates that persons whose rights or legitimate expectations would be materially and adversely affected by the administrative decision must be given

²⁰ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 49.

a reasonable opportunity to make representations.²¹ The authority will meet this requirement if those persons can make representations in writing; a hearing is not required (Hoexter 2012, p. 371). This mechanism allows the affected persons to express their view to the competent authority, but does not allow for discussions. The legislator has only given the competent authority the discretionary power to give those persons the opportunity to appear in person and dispute arguments in order to give effect to the right to procedurally fair administrative action (Section 3(3) PAJA). That kind of participation would have a more deliberative character because it makes discussions possible between the people and the authority, but depends upon the willingness of the authority to exercise its power.

If the rights of any group or class of the public are materially and adversely affected by the administrative decision, Section 4, read in conjunction with Section 1(xi) PAJA, will be applicable. The competent authority can choose to order a public inquiry, to initiate a comment and notice procedure, to combine these two procedures or to follow another fair procedure (Section 4(1) PAJA). In the comment and notice procedure the competent authority calls for comments on the proposed expropriation. The authority has to consider the comments made during that procedure (Section 4(3)(a) and (b) PAJA). This is a consultation mechanism. The public inquiry not only gives the people the opportunity to submit written comments, but also includes a public hearing (Section 4(2)(b)(i)(aa) PAJA and sub-regulation 3(3)(a)). The procedure is determined by the expropriation authority (Sub-regulation 12(1)). The person presiding at a public hearing in particular allows persons present at the hearing to make oral representations, give evidence and to produce documents if their request for permission has been granted (Sub-regulations 13(2)(a), 11(5) and 3(7)). The chairman may also question other persons or allow them to make oral representations, give evidence and to produce documents (Sub-regulations 13(2)(b) and (d)). The public inquiry is primarily envisaged to enable people to express their view. The presiding person, however, can give the procedure a different design and may alter it into a procedure that includes discussions between the authority and the people.

The South African expropriation procedures under PAJA give affected persons the opportunity to express their view on the proposed expropriation. The recommendations of the Guidelines, however, go beyond such a consultation mechanism. They recommend that the authority engage with the affected persons and seek their support. The public hearing that the South African expropriation authority has to hold in the framework of a public inquiry seems the only forum in which such deliberative elements could be accommodated. Three hurdles, however, stand in the way of such a public hearing with deliberative elements. First, the proposed expropriation would have to affect the rights of the public materially and adversely. Secondly, the expropriation authority would have to opt for a public inquiry instead of a notice and comment procedure or another fair procedure. Thirdly, the expropriation authority would have to decide to integrate deliberative elements into the public hearing. This shows that it is unlikely that expropriation procedures under PAJA comply with the recommendations of the Guidelines on the form of participation.

²¹ Deviations from this mechanism can be based upon reasonableness or a statutory provision. See Sections 3(4) and (5).

2) Namibia

The Namibian Expropriation Ordinance of 1978 does not prescribe any consultations or deliberations. The Expropriation Ordinance rather puts the public in the position of a provider of information because the expropriation authority is obliged to ascertain whether the statutory requirements are met. The *audi alteram partem* principle, however, requires that affected persons, most notably the owner of the land, must be heard.²² It suffices that the expropriation authority invites the affected persons to make written representations.²³ The affected persons thus only have a right to express their view. The expropriation authority, however, is not obliged to engage into deliberations. In order to comply with the Guidelines, Namibian law would have to introduce deliberative elements.

VI. The obligation to give reasons

The obligation to furnish reasons can perform several functions in an expropriation procedure (Hoexter 2012, pp. 463 *et seq.*). It may enhance the quality of the decision because it forces the expropriation authority to consider all aspects of the proposed expropriation. Moreover, if the decision is properly justified in comprehensible language, the people will be more likely to accept the decision. The reasons of a decision can also provide the basis for judicial review.

The Guidelines largely remain silent on this point. Guideline 21.4, which recommends that decisions on tenure conflicts be in writing and based upon an objective reasoning, is not applicable to expropriation procedures. But the obligation to furnish reason is implied by other Guidelines. Guideline 3B.9 postulates accountability as a leading principle of the Guidelines. Guideline 6.9 states that the States should guarantee the access of the people to judicial review. It is obvious that the people can only hold the competent authority accountable and that a judicial review is only possible if the competent authority provides reasons for their decision (Hoexter 2012, pp. 463 f.). Yet, an explicit provision on a justification is nowhere to be found.

The South African PAJA provides for an obligation of the expropriation authority to give adequate reasons for its decision (Section 5(2) PAJA).²⁴ This includes the reasoning of the authority as well as the interpretation of the law and the findings upon which the reasoning is based (Hoexter 2012, p. 477). If this provision is properly implemented, the obligation will serve the abovementioned goals and PAJA will comply with the recommendations of the Guidelines.

The Namibian Expropriation Ordinance remains silent on this point. It only provides that a notice of the expropriation must be delivered to all interested parties (Sections 5(2) and (4) of the Expropriation Ordinance). Section 18 of the Namibian Constitution, however, entails that the expropriation authority has to furnish reasons for its decision (Glinz 2009, pp. 6 *et seq.*).²⁵

²² *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), paras 49 and 51.

²³ *Kessl v Ministry of Lands Resettlement and others and two similar cases*, 2008 (1) NR 167 (HC), para 118.

²⁴ Chapter 4 of the Regulations does not set out any requirements as to the content thereof.

²⁵ *Frank & Another v Chairperson of the Immigration Selection Board*, 1999 NR 257 (HC); 2001 NR 107 (SC).

VII. Conclusion

The Voluntary Guidelines on the Responsible Governance of Tenure recommend a legal framework for transparent and participatory expropriation procedures. Based upon the acknowledgement that people are not equally gifted with the ability to participate in administrative procedures and that some cannot effectively participate without assistance, the Guidelines provide that the States should empower the people to participate. The States should actively provide information on the procedure and on the subject-matter instead of merely granting access to it. Information on the subject-matter should only be provided to all persons who are likely to be affected by the decision to expropriate. Equally, the access to the procedure should also be restricted to those persons. The information should be sufficient to enable affected people to participate effectively and meaningfully. These recommendations are choices between conflicting priorities, particularly the maximisation of meaningful input from the people and the maintaining of the functionality of the authorities. Furthermore, the persons who have access to the procedure ought not only to have the opportunity to express their view on the subject-matter, but also to engage in deliberations with the competent authority. If the States comply with these Guidelines, the expropriation procedure is more likely to contribute to the legitimacy and the quality of the decision to expropriate. Moreover, it will give the people an opportunity to control the authority and will enhance the capacity of the people to participate.

Expropriation procedures under the South African PAJA mostly comply with these Guidelines. Above all, it is commendable that the South African courts have construed PAJA as giving rise to obligations of the expropriation authority to empower disadvantaged people. Weaknesses of PAJA, however, seem to be that it does not oblige the expropriation authority to engage in deliberations with affected persons and that it does not take due account of power imbalances between the people.

The Namibian Expropriation Ordinance and Namibian common law only partially meet the standards of the Guidelines. In particular, they do not provide for the provision of information on the procedure to the public. This concern is even more pressing as the rights of affected person are not laid down in an Act of Parliament, but in uncoded common law. Moreover, they do not foresee any obligations of the expropriation authority to empower disadvantaged people or to take into consideration power imbalances between the people. A weakness that Namibian law has in common with South African law is that it does not oblige the expropriation authority to engage in deliberations with affected persons.

The Guidelines are a non-binding instrument. They will only have a significant impact if the FAO, other international organisations as well as stakeholders at national and local level engage in the dissemination and the concretisation of the Guidelines as well as in capacity building (Cf. Arial et al. 2012, pp. 67 *et seq.*).

Another challenge is the monitoring of the implementation of the Guidelines. This contribution is meant to give an example of a legal, non-empirical analysis of the existing regulatory framework in

certain countries. Yet, this is only the first stage. The second stage is empirical research into what actually happens in practice. Legal and social scientists could then jointly write a country report. The task to evaluate expropriation procedures, however, is not fulfilled after the first report has been submitted. It is rather a continuous challenge as the monitoring of the implementation of the Guidelines constantly requires information on whether the States improve their regulatory frameworks.

References

Arial et al. 2012

Arial, A. et al., 'Governance of Tenure, Making it happen', *Land Tenure Journal*, 2012, pp. 63-75.

Arnstein 1969

Arnstein, S.R., 'A Ladder of Citizen Participation', *Journal of the American Planning Association*, 1969, pp. 216-224.

Barnard 2001

Barnard, F.M., *Democratic Legitimacy: Plural Values and Political Power*, Montreal: McGill-Queen's University Press, 2001.

Bekkers & Edwards 2007

Bekkers, V. & Edwards, A., 'Legitimacy and Democracy: A Conceptual Framework for Assessing Governance Practices', in: V. Bekkers, G. Dijkstra & A. Edwards (eds.), *Governance and the Democratic Deficit: Assessing the Democratic Legitimacy of Governance Practices*, Oxford: Ashgate, 2007, pp. 35-60.

Bennett 2004

Bennett, T.W., *Customary Law in South Africa*, Cape Town: Juta, 2004.

Bulkeley & Mol 2003

H. Bulkeley & A.P.J. Mol, 'Participation and Environmental Governance: Consensus, Ambivalence and Debate', *Environmental Values* 2003, pp. 143-154.

Burns & Beukes 2006

Burns, Y. & Beukes, M., *Administrative Law under the 1996 Constitution*, Durban: Lexis Nexis Butterworths, 2006.

Chess & Purcell 1999

C. Chess & K. Purcell, 'Public Participation and the Environment: Do We Know What Works?', *Environmental Science and Technology* 1999, pp. 2685-2692.

Coglianese, Kilmartin & Mendelson 2008

Coglianese, C., Kilmartin, H. & Mendelson, E., Transparency and Public Participation in the Rulemaking Process, A Nonpartisan Presidential Transition Task Force Report, 2008, retrieved on 18 October 2013 from: <http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf>.

Cousins 2008a

Cousins, B., 'Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa', in: A. Claassens & B. Cousins (ed.), *Land, Power and Custom. Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008, pp. 3-32.

Cousins 2008b

Cousins, B., 'Characterising 'communal' tenure: nested system and flexible boundaries', in: A. Claassens & B. Cousins (ed.), *Land, Power and Custom. Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008, pp. 109-137.

Dietz & Stern 2008

Dietz, T. & Stern, P.C, *Public Participation in Environmental Assessment and Decision Making*, Washington, D.C.: The National Academies Press, 2008.

Gildenhuys 2001

Gildenhuys, A., *Onteieningsreg*, Durban: LexisNexis Butterworths, 2001.

Glinz 2009

Glinz, C., 'The right to be given reasons as part of a fair administrative procedure: A comparative study of Namibian, South African and German law', *Namibian Law Journal*, 2009, pp. 3-22.

Goodwin 1998

Goodwin, P., 'Hired hands' or 'local voice': understandings and experience of local participation in conservation', *Transactions of the Institute of British Geographers*, 1998, pp. 481-499.

Gutmann & Thompson 1996

Gutmann, A. & Thompson, D., *Democracy and Disagreement*, Cambridge, MA and London: The Belknap Press of Harvard University Press, 1996.

Hoexter 2012

C. Hoexter, *Administrative Law in South Africa*, 2nd edn, Juta, Cape Town 2012, pp. 463 *et seq.*

Innes & Booher 2004

Innes, J.E. & Booher, D.E., 'Reframing public participation: strategies for the 21st century', *Planning Theory & Practice*, 2004, pp. 419-436.

Kohn 2000

Kohn, M., 'Language, Power, and Persuasion: Towards a Critique of Deliberative Democracy', *Constellations*, 2000, pp. 408-429.

Contributor, Maunz/Dürig, GG

Herzog, R., Scholz, R., Herdegen, M. & Klein, H.H. (Eds.), *Maunz/Dürig, Grundgesetz*, Munich: C.H. Beck.

Morris 1998

C.W. Morris, *An Essay on the Modern State*, Cambridge University Press, Cambridge 1998, p. 102.

Nordic Council of Ministers 2002

Nordic Council of Ministers, *Have a 'good participation': Recommendations on public participation in forestry based on literature review and Nordic experiences*, Copenhagen: TemaNord, 2002.

O'Neill 2001

O'Neill, J., 'Representing people, representing nature, representing the world', *Environment and Planning C: Government and Policy*, 2001, pp. 483-500.

Pellizzoni 2001

Pellizzoni, L., 'The myth of the best argument: power, deliberation and reason', *British Journal of Sociology*, 2001, pp. 59-86.

Van Staden 2003

Van Staden, A. *The Right to Govern: The Democratic Legitimacy of The European Union*, Netherlands Institute of International Relations Clingendael, The Hague, 2003.

Turnhout, Van Bommel & Aarts 2010

Turnhout, E., Van Bommel, S. & Aarts, N., 'How participation creates citizens: participatory governance as performative practice', *Ecology and Society*, 2010, p. 26, retrieved on 20 October 2013 from <http://www.ecologyandsociety.org/vol15/iss4/art26/>.

Van der Walt 2011

Van der Walt, A.J., *Constitutional Property Law*, 3rd edn, Juta, Cape Town, 2011.