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7 Conclusion

In this final section of my thesis, I would like to take a step back to briefly follow two broader threads that I believe run through my thesis. The first concerns the many senses of taking that have been brought into focus throughout the analysis, while the second concerns ways in which the law can help to give back some of the legitimacy that is typically lost when eminent domain is used to facilitate economic development.

7.1 Property Lost – Takings and Legitimacy

The law does not like it when things get too complex. After all, the law is not in the business of settling philosophical debates. Rather, its main responsibility is to deliver effective management of concrete disputes between legal persons and governments. Arguably, this has played a significant role in shaping the traditional approach to the legitimacy issue in the law of takings.

It is clear that focusing on individual owners and what they stand to loose is a simple starting point for further analysis in this regard. Moreover, if it is assumed that all losses can be quantified in financial terms, what looks intuitively like a complicated question can effectively be transformed into a manageable one. From now on, the question of legitimacy will be the question of how to award compensation. A large chunk of this question, in turn, can be delegated to the appraisers, allowing the courts to get on with other business.

In this thesis, I have rejected this approach. The reason, as I have argued in the first part of

this work, is that property itself cannot be drawn up as narrowly as this traditional approach to legitimacy presupposes. Hence, unless the issue of legitimacy is allowed to become more complex, there will be a significant mismatch between what property is and what the law pretends it to be, for the purposes of dealing with takings cases.

In a setting were takings are rare, taking place only in extraordinary situations, such a mismatch might be perfectly tolerable. Arguably, the strong commitment to the sanctity of property by early writers such as Blackstone, apparently conflicting with historical records about takings practice in their day, could be sustained precisely because takings were the exceptions that made up the norm. Blackstone's claim to accuracy could be simply this: that expropriation took place so seldom that certain concessions to expediency could be made when it did happen, without this detracting from the greater picture of property as a sacred right.

Such a narrative is no longer plausible in a world where the state has expanded its activities so much that interference in private property, rather than being the exception, has become the norm. Hence, it now seems necessary to also let the complexities of property in lift enter the narrative of property in the law, and, specifically, in the law of takings. This is particularly important if the idea of property as a fundamental right is to have a future.

In the first part of this thesis, I presented a theory of property which arguably gives rise to the proposition that it should. It did so, moreover, precisely by considering a broader notion of property than that which has tended to dominate in the law, particularly the law of takings. Specifically, I argued that while private property might often be found wanting, it remains a potentially powerful force for good in the world. As discussed in Chapter 1, its roles as a building block of democracy and a protector of communities is particularly important in this regard. In addition, I discussed the importance of social obligations arising from property, and how they can potentially function as a guarantee that the basis rights of non-owners will be delivered at the local level.

If these aspects are recognised and embraced as a crucial part of the concept of property in the

law, it should hopefully go some way towards restoring confidence that property is neither theft nor fraud, but a promise of a better future. By contrast, the idea of property as a financial entitlement do not appear to offer any such relief. If anything, dismissive attitudes to property will take their fuel from the idea of property as entitlement, especially if those entitlements appear undeserved.

In this way, a threat emerges to the stability of the concept of property itself, as a legitimate part of the social and political order.

As a starting point for exploring more subtle accounts of property, the bundle of rights theory did do us a small favour, in that it directed our attention at the multifaceted nature of property. It is not just one right, or one thing, or one obligation, it consists of several. However, to get any further it was necessary to further unpack the property bundle, to get at the substantive content of property in life: its social functions as opposed to its legal abstractions.

By doing this in the first chapter, the thesis could proceed from a template that recognises a multitude of different ways in which a taking impacts on owners, their communities, and society as a whole. The economic consequences of a taking might be the most easily recognisable, particularly in the economic development cases. But as my work in this thesis has shown, other consequences can be just as important, particularly those pertaining to property as an anchor for local democracy. If jointly owned property is taken from a community, with full compensation paid to all individual owners, the community suffers a distinct uncompensated loss, namely the loss of future self-governance opportunities.

In the traditional narrative on takings, social and political effects are typically only recognised on one side of the takings equation, namely the side of the taker, particularly the public interest. This has also influenced the debate on economic development takings. In order to make sense of the broader sense of unfairness often associated with such takings, critics tend to focus on the taker rather than the owner, by questioning the legitimacy of the motives behind the taking.

However, this might be tantamount to shifting a variable to the wrong side of the takings

equation. In particular, the feeling of unfairness associated with economic development takings clearly arise from a sense in which the owners are victims of an abuse of power. So why shift attention to the taker?

Perhaps it is tempting to do so simply because the sense of unfairness at work here pertains to a broader notion of justice than that normally associated with property interests. If so, the entire narrative points to a shortcoming of the liberal idea of property. If even property's staunchest defenders must turn to notions of "public interest" (and the lack thereof), then why do we need property as a concept at all? Why not simply say that a licence to undertake economic development should not be granted unless all affected parties agree, or the public interest is sufficiently strong to go ahead against some of their wishes? What makes property special in this picture, if all that is at stake is the strength of the public interest used to justify imposing the state's will on private individuals?

Clearly, the gaping hole in the opposition to economic development takings in the US has been a *positive* account of why property is worthy of protection in the first place, in cases where economic rationality dictates that it should be put to more profitable use. If the public interest is regarded as insufficient, it must be because there is something valuable inherent in property that raises the threshold for taking property above a certain level.

Such is the conventional narrative, that the owner as an individual suffers a loss in order for the taker, society as a whole, to achieve democratically determined political goals. But in economic development cases, the picture is quite different. In these cases, it is often the case that local communities are deprived of political capital in order for specific commercial interests to make a profit.

In such cases, it might well be that the balancing of different reasons for and against the taking has taken place prior to the decision to interfere with property. The plans for development themselves may well precede any specific property-oriented implementation steps, such as the use

of eminent domain. It might even be that democratically accountable bodies responsible for land use planning have already concluded that some local community interests must give way to other interests.

In these cases, it might be tempting to argue that a narrow takings narrative is appropriate because it pertains only to the final implementation step, which is the only one that involves property rights. But this argument, I believe, rests on a flawed perception of what property is, and should be, in a democratic society. Invariably, property has to do with decision-making and power. If the decision-making process does not grant significant self-determination rights to affected property owners, a taking is already in progress. It might be justified, but it is still a taking.

More worryingly, it is clear that this kind of taking carries with it a great potential for differential treatment, discrimination, and corruption. The traditional takings narrative does a good job of setting up a framework that makes it difficult to simply pay higher compensation to certain kinds of people, without offering any justification. But with respect to the aspects of taking not recognised, e.g., pertaining to what role the owner has during the planning stages, differences in treatment will not even be notices. But if property is owned by the right sorts of people, then invariably it *will* come with considerable decision-making power.

If property is owned by the marginalised, on the other hand, the most severe act of taking will sometimes have taken place even before the land use planning begins, by the fact that the owners are placed entirely on the sidelines. This, I argued in Part II of this Chapter, is how the Norwegian system for management of hydropower approach riparian owners works.

At the very outset of planning, often decades before any formal decision to expropriate has been made, a considerable portion of the substance of property is taken from the owners, who are completely excluded from the rest of the decision-making process. In Norway, such takings processes, that clearly transcend the traditional financial narrative, have progressed to the point that even the law today provides an ambiguous account of Norwegian water resources as private

property belonging to the general public.

Perhaps, then, the nature of property itself has changed, so that there is nothing left except those financial entitlements that Norwegian expropriation law recognised. If so, the change has not come about by any legislative move, nor has it been preceded by any kind of debate. It has simply emerged, gradually and unplanned, as a result of sector-based regulation and administrative practices. The process, therefore, meets neither the requirements of land reform or expropriation. It is an unacknowledged process about which the law in Norway has had nothing much to say at all, for which silence still persists.

7.2 Property Regained – Givings and Participation