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RECONCEPTUALISATION OF EXPROPRIATION

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Abstract

A sustainable society requires that laws and legal procedures meet good governance standards. This is necessary for economic growth, democratic development and the prevention of social conflict in general. One may argue that the best governance of an institution is where a maximum of efficiency is combined with a maximum of democracy, transparency, accountability, sustainability, and respect for human rights as well as the rule of law. This also applies to expropriation.

In my paper, I will give an overview of three of the most eminent topics with regard to expropriation from a legal governance perspective:

- Types of expropriation
- What constitutes a public purpose?
- Fair compensation

I ask whether we need to reconceptualise expropriation in light of the provisions on expropriation laid down in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests and the findings of GLTN's Working Paper I on evictions, acquisition, expropriation and compensation. It is not enough to require that expropriation must be justified by a public interest and that there should be compensation. We might need to include some more elements, especially with regard to the notion of good governance, like procedural requirements.

Key Words:

Expropriation, public purpose, compensation, land governance, Voluntary Guidelines

Inhoud

1. INTRODUCTION

A sustainable society requires that laws and legal procedures meet good governance standards. This is necessary for economic growth, democratic development and the prevention of social conflict in general. One may argue that the best governance of an institution is where a maximum of efficiency is combined with a maximum of democracy, transparency, accountability, sustainability, and respect for human rights and the rule of law. This also applies to expropriation. The Groningen Centre for Law and Governance of the University of Groningen and the International Alliance on Land Tenure and Administration (IALTA) wish to contribute to sustainable societies – both in the Netherlands and abroad – by adopting this governance perspective.

Private law in the Western world is based upon two basic principles of legal freedom: full legal capacity of every person to perform legal acts and the private ownership of property. Limiting those basic rights affects freedom and thus the striving for individual self-fulfilment and prosperity. However, expropriation encroaches on the latter for a good reason: a public purpose that is considered to be more important than the private interests of a property owner. The action of any State authority must be based upon statutory authorisation. The legality principle is a fundamental part of the protection of rights because it limits the capacity of the State to act. The State, subject to the principle of legality, appropriately exercises the power of eminent domain.[1]

Expropriation is a fine example of an instrument of the State in which public interests meet and compete with private interests. This is why expropriation can be regarded as a litmus test for fair balancing of private and public interests in regulatory systems. A governance perspective could provide useful criteria for this test. For that reason expropriation of property is an absorbing topic that includes both private and public interests.

In my paper I give an overview of the most important topics of expropriation, while touching on some interesting issues with regard to expropriation.

[1] Eminent domain refers to the authority of the sovereign to seize an individual's private property without the consent of that individual, Kohl v. United States, 91 U.S. 367, 373-74 (1875). The political implications and the justifications concept of the principle of 'eminent domain', seem to have been discussed relatively little; it has been left to the lawyers according to Reynolds 2010, p. 138.

2. WHAT IS EXPROPRIATION?

Every scholarly debate starts with asking the definition question in order to determine the scope of the discussion. So, the question is when State action amounts to expropriation. This is partly a semantic debate. Words are different, but they have the same or nearly the same content. Expropriation has synonyms like for example: a. compulsory acquisition; b. taking; c. condemnation, d. seizure of land or e. deprivation. Expropriation is usually based upon the State's power of eminent domain.

The distinction between expropriations and forced evictions is that forced evictions usually concern cases where the evicted have no formal title. Forced evictions can be described as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land that they occupy, without the provision of, and access to, appropriate form of legal or other protection.[2] So, there seems to be no overlap with deprivation or expropriation, technically speaking.

Now, we must not construe the term expropriation so broadly that it would include paying taxes as well. But only focusing on deprivation of ownership might be too narrow. Other actions of the state can have an equally severe impact on property ownership as expropriation does. There is a grey area of decisions of the government and regulatory measures that even can amount to expropriation if certain conditions are met. Also, for these types of deprivation, which are very closely related to expropriation, specific terms exist, like: a. regulatory taking; b. constructive expropriation; c. material expropriation; d. inverse condemnation; e. indirect expropriation; or f. creeping expropriation. This kind of regulatory deprivation is usually based upon the police power of the State.

Overall, the distinguishing element might be that in cases of pure expropriation a specific person loses property rights involuntarily to the government or a third party due to a specific decision of the government, whereas in cases of regulatory deprivation, generally applicable regulations affect the interests of - in most cases – an indefinite large class of property or owners, without people losing their property ownership as such and without acquisition of property ownership by the government or third parties. It is not always necessary to deprive the whole property for public purposes, nor is it always necessary to deprive the owner of all his

[2] General Comment No. 7 (1997), adopted by the Committee on Economic, Social and Cultural Rights, HRI/GEN/1/Rev. 3, p. 94.

rights. Partial expropriation or deprivation should be considered as a less encumbering alternative (Kriebaum 2007, p. 69 ff). However, the question remains whether in such cases expropriation law is applicable. If that is the case, we call it regulatory expropriation. In general, the word deprivation can be considered as the term that includes all kinds of expropriation and more.

According to case law, for regulatory expropriation, there must be a substantive deprivation. This can be the case, for instance, when the renewal of necessary licences or permits for the investment of the investor are denied on the basis of, for example, a new zoning plan. But some jurisdictions use a narrow approach. In Canada, for instance, the three requirements that determine whether regulatory acts result in the expropriation of property – and thus compensable – are according to common law:

- the loss of virtually all the rights held by the individual;
- the transfer of these rights to the expropriating authority; and:
- the lack of a clear intent not to compensate for the rights in the governing legislation.

Variants of these rules have been stated in several cases and commentaries. These regulatory expropriations have had a mixed history in Canada and, in spite of the ideas of fairness prevalent in the common law, the law has developed in deference to legislatures and with few successful claims to compensation by property owners (Macek 2003).

What is the importance of these distinctions? If a certain act of the state can be called 'expropriation' the safeguards of expropriation within a legal system will be applicable. Acts, decisions or regulations of the government, although not presented as expropriation, can amount to expropriation. Governments should take into account how these actions, decisions or regulations relate to expropriation in their regulatory systems.

UNCTAD Series on Issues in International Investment Agreements II[3], distinguishes two types of expropriation:

- Direct expropriation, being a mandatory legal transfer of title to the property or its outright physical seizure. Normally, the expropriation benefits the State itself or a State-mandated third party.
- Indirect expropriation, involving total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.

It is noteworthy that the latter distinction does not contain the lack of compensation as a criterion for indirect expropriation. Compensation might not be a useful criterion to distinguish

[3] United Nations, New York and Geneva 2012.

deprivation by expropriation from other kinds of deprivation. In some countries, such as the Netherlands, even regulatory deprivation normally is accompanied by compensation. I would rather consider the obligation of the State to offer compensation as an effect of the fact that an act, decision or regulation of the government must be considered as expropriation or – broadly – as a substantial deprivation of rights.

The reason why regulatory deprivation is rather popular instead of expropriation is obvious: government seeks to avoid the difficulties of expropriation procedures, as well as the costs involved due to the obligation to compensate. This can be seen especially in the context of international investments. The protection of an alien's property in a host country against direct expropriation has long existed in the international arena. Examples of direct expropriation include nationalisation, physical seizure of assets or legislated transfer of assets to the state. However, such physical takings are no longer common practice. Nowadays, expropriation in an international context comes mainly in the form of 'indirect expropriation': acts, decisions or regulations of the government that interfere with the right to the property or diminish the value of the property. These indirect expropriations appear more and more in the international system, in Bilateral Investment Treaties and Investment Chapters of Free Trade Agreements (Schreuer 2007; OECD 2005, p. 44).

The UNCTAD Series on Issues in International Investment Agreements II address the fact that the evolution of the economic and regulatory environment has brought to the forefront questions regarding indirect expropriations, especially with regard to bilateral investment treaties. They concern the appropriate criteria that allow (a) to determine whether an indirect taking has occurred and (b) to distinguish indirect expropriation from regulation in the public interest, which is non-compensable despite the economic impact on particular investments. The nature and characteristics of a particular measure has emerged as a key factor in drawing a line between indirect expropriation and non-compensable regulation. A bona fide regulatory act (or its application to an individual investor) that genuinely pursues a legitimate public-policy objective (such as the protection of the environment and public health and safety) and complies with the requirements of non-discrimination, due process and proportionality may not be designated as expropriatory, despite an adverse economic impact (Kriebaum 2007, p. 69 ff). But there is a lot of uncertainty as to whether such regulatory actions of government amount to regulatory expropriation (Marlles 2007). There is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a 'taking' and having to compensate for this act. (OECD 2005, p. 44) There is a lot of

case law, especially from arbitration tribunals, and a lot of literature on the problem that foreign investors face when they are deprived in one way or another of their investment.

OECD extracts from case law some criteria to distinguish indirect expropriation and non-compensable regulatory governmental measures: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations. Purpose and proportionality of the governmental measures are also important to determine whether compensation was due. The right to protect, through non-discriminatory actions, inter alia, the environment, human health and safety, market integrity and social policies without providing compensation for any incidental deprivation of foreign owned property (OECD 2005, p. 71-72). There is also a development in the new generation of investment agreements, using specific terms and establishing criteria to assist in determining whether an indirect expropriation requiring compensation has occurred. However, this shall not make case law redundant.

Although one could distinguish between expropriation involving only domestic actors from expropriation involving foreign investors, I prefer rather not to do so, since the only difference from a legal point of view might be that in the latter bilateral investment treaties might apply. However, it is interesting to see how much has been written on the issue of protecting international cross-border investments in land on the one hand and protecting the interests in land of local people and communities against such investments on the other hand. Although both claim the same kind of interests, international investors have improved their position because of those aforementioned international investment agreements and treaties, whereas the poor and vulnerable do not benefit from these instruments. They often even cannot benefit from the protection their domestic law can offer if they have no formal title to their property.

3. EXPROPRIATION IN MODERN TIMES

Grotius was probably the first scholar to provide us with the basic elements of expropriation:

"*...The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended*

that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property." (Grotius 1625)

He distinguishes in his famous work 'On the Law of War and Peace' in 1625 two main categories:

- Expropriation in extreme or extraordinary circumstances;
- 'Ordinary' expropriation, in the absence of extraordinary circumstances.

There are at least three main developments that fed the growing importance of 'ordinary' expropriation in modern times. First, the individualisation of property. Nowadays, less land and other common resources are held by communities than centuries ago. Over decades, one can clearly see a development towards individualisation of property ownership, meaning that property of land is held by individuals or legal entities, not so much by local communities. There is no need to expropriate when the way the jointly owned land is used, needs to change. It takes a decision of the community. The second development is the fact that since the railways were constructed in the industrialisation era, people began to travel and things had to be moved from one place to another. This means that there is an ever growing need to build infrastructure (airports, harbours, railways, roads, networks, etc.), which requires land, a lot of land. The third development is the enormous growth of population. This makes land a scarce commodity, especially in and around expanding cities, for example in China. Change of land use in a densely populated area means dealing with a lot of property owners. For that very reason expropriation seems to be the only option in many cases.

This categorisation – expropriation in ordinary and extraordinary circumstances - is important because any dramatic change of circumstances, such as natural disasters or financial crises, has a profound impact on all the key elements and the process of expropriation. Take the example of the nationalisation of banks during the most recent financial crisis. The Dutch Government expropriated all shares and other participations in a bank (SNS Reaal NV and SNS Bank NV) on behalf of the State, whereas the debts of the Bank were also 'expropriated' on behalf of a foundation which has the task to settle them.[4] The decision was taken almost overnight and had effect immediately as from 8:30 that day. There was only one possibility to appeal, within 10 days. This is one of the purest forms of cherry picking by the State that I have seen for decades,

[4] Decision of the minister of Finance February 1st 2013, on the basis of Article 6:1, first paragraph, Article 6:2, first, fourth and fifth paragraph, and Article 6:4, first and second paragraph, of the Law on financial supervision. The decision was also based on the so called Intervention Law. The Law on financial supervision entails a compensation clause.

obviously cherry picking for good reasons. It demonstrates that the normal procedure does not apply in abnormal circumstances.[5]

4. WHAT CONSTITUTES A PUBLIC PURPOSE?

One of the key issues of expropriation is the term 'public purpose'. Similar terms are: a. public interest; b. public use; c. public benefit. What does 'public' in the term 'public purpose' or 'public interest' mean? The people of the State or some people living in a certain area? Or: those who seek jobs, entertainment, fresh air or just a decent home? Is public purpose or public interest something like health, safety, environment or economy?

There are, of course, numerous cases where the public purpose is quite clear. Building bridges or railways, infrastructure for energy, gas or water supply, etc. But there are others that are not at first sight to be considered as classical public purposes. For example:

- the development of economy;
- the prevention and elimination of unemployment;
- assistance for, and retaining, industrial or commercial enterprises;
- urban revitalisation;
- big events (Olympic games, world championship football etc.).

A purpose is not intrinsically ('by nature') a public purpose. It all depends on the situation and the intentions in time and place. What would you think if government uses the power of eminent domain to seize your land on behalf of a private company who wants to build casinos on your land? Would this constitute a public purpose? Would it differ if this happened in downtown Manhattan or in a declining industrial districts of Detroit?[6] Must we interpret 'public purpose' narrowly or rather broadly? What can case law tell us?

More than a decade ago, in the landmark decision Poletown Neighborhood Council v. City of Detroit, the Michigan Supreme Court authorised a municipality to take private property for the development of a General Motors plant. Poletown opened the door for municipalities to take private land under its eminent domain power and turn it over to private entities for economic development when it results in 'alleviating unemployment and revitalizing the economic base of the community.' The Poletown decision expanded the permissible reach of what is a public

[5] An association for the interests of investors filed a complaint with regard to this nationalization to the European Court of Human Rights for violation of Article 1 of the first Protocol of the European Treaty on Human Rights.
[6] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

purpose by allowing public-private takings not only in Michigan, but also across the United States.

And there is, of course, the famous Kelo vs. City of New London case[7] in - again - the United States. The City of New London, Connecticut, condemned privately owned real property, so that it could be used as part of a 'comprehensive redevelopment plan.' The Supreme Court of the United States decided in a 5-4 decision that the general benefits a community enjoyed from economic growth qualified private redevelopment plans as a permissible 'public use' under the Takings Clause of the Fifth Amendment. So, the government can use eminent domain to transfer land from one private owner to another private owner to further economic development. However, in this case the private developer was unable to obtain financing and abandoned the redevelopment project, leaving the land as an empty lot, which was eventually turned into a temporary dump. As I understand it, this case triggered a lot of new legislation in the US. Kelo has drawn a more extensive legislative reaction than any other single court decision in American history (let alone the enormous amount of literature dealing with this decision) (Somin 2009, pp. 2102).

The conclusion must be that the US Supreme Court is likely to favour the broad vision on what constitutes a public purpose. The US Supreme Court simply defers to the legislature and executive with regard to the public purpose requirement. There seems to be a big difference between this approach and the rather strict approach of the courts in European countries like Germany and probably also the Netherlands, where courts leave less margin of appreciation to administrative bodies in cases of expropriation.

In the Netherlands, zoning plans play a crucial role. In practice, the most important requirement set by the Expropriation Act is that each expropriation must be necessary in order to implement the specific plans of the municipal government. The zoning plan describes the intended use of an area. Only when the intended use according to the zoning plan differs from the actual use will the government be allowed to expropriate. One could say that the public purpose is enshrined in the zoning plan. The democratic legitimacy is given because making or changing a zoning plan is only possible after an extensive technical and legal assessment procedure in which the government is obliged to involve the people whose interests are at stake and to consider thoroughly their interests. The procedure is concluded by a decision of the democratically elected council of the municipality. In addition, on several occasions, it is possible to let the judiciary review the process as well as the decision.

[7] Kelo v. City of New London, 545 U.S. 469 (2005).

Many purposes could constitute a public purpose for which expropriation is permitted. But if more possible public purposes are at stake which do not point to the same direction but compete, like economic development of a certain region and affordable housing, do we have to prioritise or compromise? What is the influence of the gravity of each of these concurring interests?

One of the strongest incentives for expropriation is rent-seeking. Many times, the realisation of certain public purposes coincide with new opportunities for government or business to make a profit out of newly developed businesses. For government, more business in a certain region means more tax income. Many cities receive a significant portion of their budget through sales of land and property tax revenues that can be spent on e.g. roads, bridges and social welfare. For business, developing a certain region means more contracts and thus more profit. The more possible benefits flow to government and business, the stronger the incentive will be to push forward those projects that are most likely to generate money. How does this influence prioritising or compromising competing public purposes?

Parlow describes the case in City of Los Angeles v. Superior Court[8], in which case the promises of government to the poor dwellers of a certain region in Los Angeles (Chavez Ravine) to build social housing were broken. Instead of social housing, a stadium for the Brooklyn Dodgers was built: "What started as the City's crusade to reshape a run-down neighborhood into an exemplary public housing community turned into a quintessential example of how cities can use their power of eminent domain at the expense of poor, and often ethnic minority, communities for the interests of private developers or the city as a whole." (Parlow 2006, p. 846). And: "This obvious dilemma raises the question of whether cities are open to the poor or whether cities are transforming into havens only for the rich or tax-revenue generating developments." (Parlow 2006, p. 865).

In my opinion, much of the discussion on the public purpose requirement can be tackled in a satisfactory way, when one looks at the extent to which the people are involved in decision-making processes on expropriation. If the people themselves decide what a public purpose is, this is a public purpose *ipso facto*. The more direct the influence of the people in the decision making process is, the more guarantees there are that the purpose indeed is a public purpose.

This is in accordance with conclusion I of GLTN's Working Paper I on evictions, acquisition, expropriation and compensation (Van Eerd and Banerjee 2013):"'Public interest' should be defined at policy level. Broad agreement is needed among the different stakeholders on the working definition of legitimate 'public interest' projects that may justify expropriation and

[8] City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 433-36 (1959).

evictions. This can be achieved through international expert group meetings, roundtable discussions, and the involvement of society as a whole. Very important stakeholders are the vulnerable groups in society that are often most affected. The Guiding Principles on Internal Displacement state that the scope of the application of the prohibition of arbitrary displacement includes large-scale development projects that are not justified by compelling and overriding public interest. The question is which ultimate authority decides on the 'arbitrary and compelling overriding public interest', and whether states would contemplate giving up their role to an international body."

The working paper I raises some key questions and issues for further discussion:

- How should legitimate 'public interest' be defined and by whom? How can more concrete practical guidelines to determine legitimate public interest be developed?
- How can the bargaining powers of the stakeholders be balanced to ensure that potentially affected populations can be meaningfully consulted?
- How can public interest be balanced with the interests of the affected communities?

5. FAIR COMPENSATION

Fair compensation must be considered a key element of expropriation. The question is always whether all of those who are involved get a fair share, especially those who own the land. We have to balance the intrusion into the rights of the individual with the public interest at stake. It is unfair for the individual to bear an unreasonable burden in order to provide a benefit to society. Fair balance of public and private interests with regard to expropriation is often reached by fair compensation. But the question always is how fair the compensation is and should be. This question can be divided into several other questions: Compensation for which losses? Only compensation of the loss of value or also damages? How much compensation, how is it calculated? Compensation in money or in kind? Do possible future developments influence the amount of compensation? Does the social responsibility of property owners play a role in answering these questions? Does the public purpose for which the property is expropriated, play a role in answering these questions? Do we perhaps have to move towards a more contextualised calculation of the compensation? (Dagan 2011, Chapter 5 on the economics of compensation).

In my opinion, Hanoch Dagan formulated it very clearly when saying: "Those who lose to serve the interests of others, should be fully compensated for their losses. Those who benefit should

cover the costs of compensation. If the whole society benefits, then tax payers' money can be spent to cover those costs. If a future owners of houses in residential areas will benefit, they should pay." And: "Rather, in order to successfully integrate social responsibility and distributive justice into takings doctrine, and also other important property values such as autonomy, personhood and utility, we need to opt for a regime of partial and differential compensation, drawing careful (and rule-based) distinctions between types of injured properties and types of benefited groups." (Dagan 2007, p. 1-2)

So, the bottom line is that nobody needs to lose value in cases of deprivation by the government, and nobody should profit from expropriation on the detriment of the former owner.

Related to this is the following. One of the most sensitive questions in legal theory on property and land ownership in particular, is whether property has a social dimension. With this I mean whether owners of property need to have a social responsibility as an owner. For example, the German constitutional model incorporates social responsibility into the concept of property. Article 14(2) of the German Basic Law (Grundgesetz) provides that "Ownership entails obligations. Its use shall also serve the public interest". A similar kind of clause exists in other countries, like in the land law of Indonesia. Article 6 of the Agrarian Law of 1961 stipulates that all titles to land have a social function, and that individual land rights include obligations as well. The holder is not only entitled to make use of the land, but is also expected to utilise it in such a way as to serve the general welfare directly and indirectly. This is in conformity with the relationship between the individual and the community. What do these social dimensions of property entail for expropriation? Does it mean that we have to tolerate encroachments to a certain level without expropriation or compensation?

This issue touches upon two ways of legal thinking: the libertarian view, according to which compensation should be required each time that the taking's impact on the owner is disproportionate to the burden, if any, carried by other beneficiaries of the intended public use of the state action at hand; and the liberal view, according to which property should serve not only liberty but also such values as social responsibility and distributive justice, seek to restrict the range of takings law as much as possible (Dagan 2007).

In the Dutch system, full compensation of all damage directly and necessarily resulting from expropriation is the point of departure, a rule that was established not by the legislator, but by the Dutch Supreme Court, already in 1864.[9] The Dutch system of compensation contains three elements:

[9] HR 7 March 1864, W. 2569 and later on HR 23 December 1864, W. 2652.

- First, government grants full compensation in cases of expropriation, when an owner loses property for a public purpose.
- Secondly, government grants in certain cases and to a certain level compensation when land use plans change to the detriment of proprietors. [10] This will be granted for example in cases where, according to the new plan, the owner of land is not allowed to build on the land that he bought (direct damages) but also where the new plan allows building of an apartment complex on neighbouring land, or where the new plan allows building of a road that will cause hinder because of noisy traffic and pollution (indirect damages). In both cases, however, foreseeable damages are not covered whereas a certain level of damage from changing of zoning plans is to be accepted as a normal societal risk.[11]
- Thirdly, government grants in certain cases and to a certain level compensation in other cases of specific acts or decisions of government affecting peoples interests. But also here the criterion is whether the act or decision was not foreseeable and a certain level of damages from governmental acts and decisions are to be accepted as a normal societal risk.[12]

Concerning the second element: if the owner gets compensation because the value of their property decreases as a result of a change of zoning plans, one could argue that the opposite must also be valid. And indeed, in Belgium the opposite rule applies as well: owners must pay a retribution to the government when the value of their property increases because of a change of zoning plans (the so called 'planbatenheffing'). We do not have this kind of retribution in the Netherlands, but we do have a special form of tax, imposed on owners of real estate, when the owner profits form public works that have been initiated by the municipality (the so called 'baatbelasting').

In several developing countries the state adopted the general rule that the people own the land and that individuals can only have the right to use the land. If government expropriates the land of individuals, they consequently expropriate land use rights, not ownership. Currently, there is a growing trend to give land use rights a more solid foundation. You can observe this in a lot of countries, but especially in China. And as ownership of a piece of land and land use rights on that land are more or less interconnected vessels there, compensation should rise when land use rights become stronger. This is the case in growing economies that increasingly rely on market economy mechanisms, which needs breadth, duration and security of land tenure. But does

[10] Article 6.1 Law on spatial planning ('Wet ruimtelijke ordening').
[11] According to Article 6.2 of the Law on spatial planning, damages up to 2% owners must bear because it is considered as a normal societal risk that plans can change to the detriment of owners.
[12] Between 20 to 40 percent of the damage will not be covered, and there is a possibility to have a threshold of 15% at max.

expropriation law keep pace with this development? Washburn argues that much discussion of this problem by American scholars to date has tended to conclude that the standards of American eminent domain law - fair market value compensation, public use requirements - are the most likely source of Land expropriation in rural China solutions to this problem. She, in contrast, takes a different approach, one that is intended to be more sensitive to the Chinese legal background, political context, and system of land ownership (Washburn 2011).

An important point is how to deal with the land value increments, i.e. the price difference from land values resulting in a change of land use or the likely extension of services. Rent-seeking developers want to profit from it. Letting them pay would facilitate not only funding the costs of compensating former owners, but also the costs incurred for building infrastructure necessary to realise new functions of the land.

Conclusion 3 of GLTN's Working Paper I on evictions, acquisition, expropriation and compensation deals with the issue of fair compensation: "It is important to enhance the normative notion of compensation and its pragmatic application. International laws and guidelines have contributed to the 'partial reduction of damages, costs, and losses incurred by some resettled peoples'. But the implementation of guidelines in borrower nations has been 'consistently problematic' (Oliver-Smith, 2009: 3). Moreover, the capacity to enforce the implementation of guidelines on resettlement and compensation is typically weak, as is (in many cases) political will, such that adoption of formal policies by borrower nations 'is no assurance of adequate implementation' (Oliver-Smith, 2009: 3). The cases cited here from Kenya, Nigeria and Cambodia illustrate the persistent gap between laws and development practice in many countries." (Van Eerd and Banerjee 2013)

The Working Paper I puts forward some key questions and issues for further discussion:

- Local governments and other public authorities may find it difficult or impossible to comply with the requirements that are prescribed in international guidelines to compensate fully affected people. How can compensation be arranged that is both practical (i.e. affordable to public authorities) and fair (for affected persons)? The 'avalúo social' model illustrated in the Medellín, Colombia, 'Metrocable' case may point the way to more 'flexible' approaches to compensation. What are effective strategies to 'domesticate' international laws and guidelines in the local context? Which institutions have a key role?
- The fundamental question related to compensation is how can material possessions and the social impact of displacement be compensated for when affected people are displaced.

- Another fundamental question is related to the acquisition, expropriation and valuation process, in which negotiation is an important tool. The outcome of the process depends upon stakeholders' power. How can poor and vulnerable groups be empowered, or how can the process be improved to protect these groups from losing out?
- In view of the fact that development–induced displacement and resettlement de-capitalises the affected communities by imposing opportunity costs in the forms of lost natural capital, lost man-made capital, lost human capital and lost social capital, how can the scope of these costs be established and included into the overall development costs?
- Benefit-sharing for those forcibly displaced (Cernea, 2009b: 51) is a potentially powerful argument that may prevent impoverishment after displacement. There remains, however, the challenge of crafting benefit sharing schemes in public goods projects that have no revenue stream.

6. RECONCEPTUALISATION OF EXPROPRIATION

It is often said that there must be a balance between the public purpose on the one hand and the private interests at stake on the other if government encroaches private property rights. But what does this mean? It means that expropriation serves a clearly defined public purpose, the encroachment of private property is necessary to achieve that goal, it is objectively suitable to obtain that public purpose, it is the least restrictive means to achieve it and proportionate, there are no alternatives and there is proper compensation.

To put it negatively: there should be neither arbitrariness, nor abuse or wrong use of the power of eminent domain, nor carelessness for the interests at stake. In short: the legitimate encroachment must meet certain governance standards. There must be some kind of democratic legitimacy with regard to the public purpose requirement as the justification for encroaching private property. And finally, it must be able to involve the judiciary to control whether all the requirements are met and the proper legal procedure was followed. The conclusion might be that it is not enough to state that expropriation must be justified by a public interest and that there should be compensation. Expropriation requires more than that. This implies, for instance, that government should first acquire desired land on a voluntary basis on the free market, as this approach is likely to be less costly and entails more guarantees for fair compensation. Lund states: "Market-assisted reform basically means that the State, instead of expropriating and reallocating land itself, provides grants to eligible beneficiaries so that these can obtain land

through existing markets. Besides less bureaucracy, market-assisted redistribution is believed to have many other benefits. While expropriation often leads to legal disputes and court action, at once costly and time-consuming, market assisted redistribution relies on the willing seller-willing buyer principle. Thus, disputes are unlikely and beneficiaries can immediately put redistributed land to use. Market-assisted redistribution is also much more likely to receive support from all stakeholders and therefore avoid damaging political confrontations (Binswanger 1996, Deininger 1999). In addition, market-assisted redistribution will tend to ensure that inefficient, rather than efficient, farms are redistributed." (Lund 2006, p. 17)

Some countries even recognise to a certain extent the role of the people themselves to achieve these public goals. In that respect, expropriation always seems to be second best. We might have to reconceptualise expropriation to include some more elements, especially with regard to the notion of good governance.

Can we see a development towards reconceptualisation of expropriation? The latest global effort to establish good governance guidelines on land tenure are perhaps the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of the Committee on World Food Security.

The purpose of the Voluntary Guidelines is to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realisation of the right to adequate food in the context of national food security.

Part 4 contains guidelines on 'Transfers and other changes to tenure rights and duties', addressing the governance of tenure of land, fisheries and forests when existing rights and associated duties are transferred or reallocated through voluntary and involuntary ways through markets, transactions in tenure rights as a result of investments, land consolidation and other readjustment approaches, restitution, redistributive reforms or expropriation. There are sections on 'Land consolidation and other readjustment approaches' (Section 13), 'Restitution' (Section 14), and 'Redistributive reforms' (Section 15) as well as on 'Expropriation and compensation' (Section 16). What makes these Voluntary Guidelines so interesting is that they were made from the bottom up. They are based upon an inclusive process of regional consultations carried out from 2009-2010, which were held all over the World. The Guidelines were endorsed by the CFS in a special session on 11 May 2012.

When you read Section 16 of these guidelines on expropriation and compensation very closely, it appears that they reflect the most apparent problems, bottlenecks, lack of capacity, lack of transparency, malpractices, corruption, etc. with regard to expropriation. It reads as an empirical

study on the failures of regulatory systems with regard to expropriation. We should also keep in mind that these Voluntary Guidelines are made with regard to the situation in developing countries. But all the more they give us insight of the problems that countries in the Global South face, not only from a legality perspective, but – and that is important and also interesting – also from a broad governance perspective. And I doubt whether all countries, which consider themselves as developed, would comply with the Voluntary Guidelines on expropriation.

But there is also one important aspect that has not yet been made visible, but plays a very important role. I might as well refer to the introduction of Hanoch Dagan to his lecture ´Inside property´, which reveals the role of property in society: "Taking seriously the complexity and heterogeneity of property law, this Essay claims that a proper conception of property must account for both governance and inclusion. Neglecting governance obscures the significance of the internal life of property, which is often structured by sophisticated mechanisms aiming to facilitate various forms of interpersonal relationships in ways that no contractual arrangement can. Ignoring inclusion improperly marginalizes non-owners' rights to entry in categories of cases where inclusion is an indispensable feature of the property institution under examination. Looking inside property in these two senses requires abandoning the conception of property as an exclusive right and substituting it with a pluralist conception. Property should be understood as an umbrella for a limited and standardized set of institutions, which serve as important default frameworks of interpersonal interaction regarding various types of resources. At its best, the plurality of property configurations - the different contents of owners' rights in these different property institutions - enables property law to vindicate differing balances among the different values that property can serve, according to the type of social relationship and the nature of the resource at stake. The pluralist conception of property, therefore, not only fits property law better; it is also the only understanding of property suitably attending to and facilitating the individuality-enhancing role of multiplicity, which is indispensable for meaningful autonomy." (Dagan 2012, p. 1)

This governance approach and the notion of inclusion sees property not (only) from the perspective of the owner who has an exclusive right, but as part of a system that aims to regulate interpersonal relations. This holistic approach to the function of property clearly influences also expropriation.

Reconceptualisation of expropriation means that expropriation not only has to meet the requirements of public purpose and fair compensation, but should also include other important issues, such as:

- Proportionality and subsidiarity: is expropriation necessary and the only way to realise the public purpose? Are there any alternatives? Has the government tried to acquire the property on a voluntary basis on the market?
- Public participation and democratic legitimation, especially the way in which the public purpose is determined. Let the public participate and decide in the planning and process for expropriation.
- Judicial review of the expropriation process, especially the supposed public purpose and the determined compensation.
- Extra care for particular sensitivities, for instance when cultural, religious or environmental significant areas are involved, or when the livelihoods of the poor or vulnerable are at stake.
- Regulate the consequences of non-fulfilment of the public purpose for which the expropriation took place. If third private parties have been allocated the expropriated land, impose consequences, like the obligation to retransfer the land to the original owner.
- Develop new standards for compensation and provide for a process by which the land is valued fairly, given all circumstances. Also, take into account that fair compensation might also imply compensation of other damages then the loss of the land itself.
- State agencies need human, physical, financial and other forms of capacity to perform their task, not only to offer fair compensation, but also to coordinate and lead the expropriation process. (Van Eerd and Banerjee 2013, conclusion 2)

In short, the Voluntary Guidelines as well as the GLTN's Working Paper I show us that expropriation needs a new approach, comprising of developing new standards, beyond the requirements of public purpose and compensation.

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