On the legitimacy of economic development takings

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by

Sjur K. Dyrkolbotn

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1 Introduction and Summary of Main Themes

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

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

1.1 Property Lost; Takings and Legitimacy

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

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

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

2 Abraham Bell, Private Takings, p. 583.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2 Economic Development Takings as a Conceptual Category

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

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

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

private body is tasked with carrying it out.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3 A Democratic Deficit in Takings Law?

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

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

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

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

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

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

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

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

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

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

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

1.4 Putting The Traditional Narrative to the Test

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

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

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

what counts as a public interest.

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

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

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

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

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

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

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

1.5 A Judicial Framework for Compulsory Participation

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

parliament".

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

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

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

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

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

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

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

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

1.6 Structure of the Thesis

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

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

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

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

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

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

the interference.

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

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

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

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

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

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

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

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

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

Part I

Towards a Theory of Economic Development Takings

2 Property, Protection and Privilege

It's nice to own land.[1]

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

2.1 Introduction

In this chapter, I will propose a template for analysing economic development takings, based on legal theory.[3] I argue that the category of economic development takings is relevant to legal reasoning about certain situations when private property is taken by the state. This is not *prima*

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

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

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

facie clear. I am prepared to face critics who will point out that the category has no legal relevance in their jurisdictions. Fortunately, the category makes intuitive sense; it targets situations when property is, quite literally, taken for economic development. In most cases I will consider, this is even the explicitly stated aim used to justify eminent domain. Hence, the factual basis for the categorization is beyond doubt.

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

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

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

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

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

6 In fact, many state laws now *do* contain such rules, following the backlash of the controversial decision in *Kelo v City of New London* 545 US 469 (2005). However, such rules were introduced only after the category of economic development takings first came to prominence in legal discourse. See generally Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust

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

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

To make clear why such takings are special, the traditional entitlements-based perspective on property has to be abandoned in favour of a perspective that emphasises the function of property as a building block of democracy and participatory decision-making, particularly at the local level. This is what the social function theory achieves, by compelling us to recognise the importance of property in regulating social and political relations. Moreover, the social function theory emphasises the social *obligations* attached to property, particularly with respect to communities of property dependants. Hence, property not only gives owners a right to participate in decision-making processes, it also gives them a duty to do so, not only on their own behalf, but also on

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Journal 799; Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100; Harvey M Jacobs and Ellen M Bassett, 'All Sound, No Fury? The Impacts of State-Based Kelo Laws' (2011) 63(2) Planning & Environmental Law 3.

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

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

behalf of local community interests.

In the context of economic development, this highlights that property rights can empower local communities in their interactions with powerful commercial and central government interests. Importantly, the use of eminent domain can undermine this crucial function of property, thereby threatening the democratic legitimacy of the decision-making process, by depriving local communities of a potentially robust source of participatory competence. Moreover, when property interests are transferred away from the local community on a permanent basis, this threatens to leave a lasting democratic deficit in the wake of economic development. This worry, I argue, is the key reason why we need to recognise economic development takings as a separate conceptual category.

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

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

igation of economic development takings. The human flourishing theory is then used to formulate some overriding normative constraints that will rely on for the concrete policy assessments I offer in this thesis. In Section 2.7, I offer a conclusion.

2.2 Donald Trump in Scotland

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

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

Trump was not deterred, and in the end he was able to convince Scottish ministers that he should be given the go-ahead on the prospect of boosting the economy by creating some 6000 new jobs.[12] Activists continued to fight the development, launching the "Tripping up Trump" campaign

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

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

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

12 See Severin Carrell, ''World's best golf course' approved - complete with 23-acre eyesore' *The Guardian* (London,

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

At the height of the tensions, Trump asked the local council to consider issuing compulsory purchase orders (CPOs) that would allow him to take property from Forbes and other recalcitrant locals against their will.[18] These plans were met with widespread outrage. The media coverage was wide, mostly negative, and an award-winning documentary was made which painted Trump's

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

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

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

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

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

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

18 See Mark Macaskill, 'Donald Trump accused of new clearance' *The Sunday Times* (London, 6th September 2009) ⟨http://www.thesundaytimes.co.uk/sto/news/uk_news/article184090.ece⟩ accessed 16th April 2015. It would not have been the first time Donald Trump benefited from eminent domain. In the 1990s, he famously succeeded in convincing Atlantic City to allow him to take the home of Vera Coking, to facilitate further development of his casino facilities. But in this instance, Trump has been unsuccessful. Indeed, the taking of Vera's home was eventually struck down by the New Jersey Superior Court, an influential result that was hailed as a milestone in the fight against "eminent domain abuse" in the US. See Stephen J Jones, 'Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment' (2000) 50 Syracuse Law Review 285, 297-301. See also Nick Gillespie, 'Litigating for Liberty' *Reason* (Los Angeles) ⟨http://reason.com/archives/2008/03/03/litigating-for-liberty/4⟩ accessed 16th April 2015. For the decision itself, consult *Casino Reinvestment DevAuth v Banin* 727 A2d 102 (NJ Super Ct Law Div 1998).

activities in Balmedie in a highly negative light.[19] The controversy also found its way into UK property scholarship. Kevin Gray, in particular, a leading expert in property law, expressed his opposition by making clear that he thought the proposed taking would be an act of "predation".[20]

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

But then, in a surprise move, Trump announced he would not seek CPOs, claiming also, to the consternation of local residents, that it had never been his intention to do so.[22] Instead, Trump decided to pursue a different strategy, namely that of containment. He erected large fences, planted trees and created artificial sand dunes, all serving to prevent the properties he did not control from becoming a nuisance to his golfing guests. One local owner, Susan Monroe, was fenced in by a wall of sand some 8 meters high. "I used to be able to see all the way to the other side of Aberdeen", she said, "but now I just look into that mound of sand".[23] She also lamented the lack of support

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

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

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

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

23 See Booth (n 1).

from the Scottish government, expressing surprise that nothing could be done to stop Trump.

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

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

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The tale of Trump coming to Scotland serves to illustrate the kind of scenario that I will be looking at in this thesis. In addition, it puts my work into perspective. For a while, it looked like Balmedie was about to become a canonical case of an economic development taking. But in the end, it became an illustration of something more subtle, namely that what it means to protect property depends on value judgements regarding opposing property interests. In particular, while Trump achieved his ends in Scotland by relying on his own property rights, he did so by undermining the property rights of others, even if he did not formally condemn those rights.

This was made possible by an exercise of regulatory and financial power. Hence, we are re-

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

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

[26] See Booth (n 1).

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

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

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

Regardless of who we support, in the case of Balmedie, we are forced to recognise that protection implies interference and vice versa. This shows the conceptual inadequacy of the idea that property protection is all about weighing private and public interests against each other, to strike a balance between the state's power to do good and owners' right to do as they please. In reality, matters can be more subtle, involving a number of additional dimensions. Importantly, how we assess

concrete situations where property is under threat depends crucially on what we perceive as the "normal" state of property, the alignment of rights and responsibilities that we deem worthy of protection. Our stance in this regard clearly depends on our values. But values themselves are in turn influenced by the context of assessment within which they arise. An additional challenge is that our assessments are often influenced by our *perception* of the relevant context, rather than by facts.

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

This, however, is only an *idea* of property protection. It might not correspond to the reality surrounding the rules that have been moulded in its image. Indeed, it has been noted that despite the great pathos of the egalitarian property idea, egalitarianism has actually played a marginal role to the development of US property law.[29] More worryingly still, research indicates that land ownership in the US, which are hard to track due to the idiosyncrasies of the land registration system, is not actually all that egalitarian.[30] In this way, we are confronted with the danger of a

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

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

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

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

dissociation of values, reality and the law.

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

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

I think the example of Balmedie suggests a possible first step. It illustrates, in particular, the need for a framework that will allow us to recognise that opposing the use of compulsory purchase for economic development is perfectly consistent with supporting strict property regulation to

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

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

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

prevent the establishment of golf resorts in fragile coastal communities. Both of these positions, moreover, should be viewed as efforts to protect property. To the classical debate about the limits of the state's authority over property, such a dual position can be hard to make sense of. But in my opinion, this only points to the vacuity of the conventional narrative.

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

2.3 Theories of Property

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

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

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

from accessing it.[36] In civil law jurisdictions, rooted in Roman law, a dominion perspective is still often taken as the theoretical foundation of property, although it is of course recognised that the owner's dominion is never absolute in practice.[37]

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

The bundle of rights theory has long historical roots in common law. Arguably, it was distilled from the traditional estates system for real property, which was turned into a theoretical foundation for thinking about property in the abstract.[39]

However, during the 18th and 19th century, natural law and dominion theorising was also influential in common law. This is evidenced, for instance, by the works of William Blackstone and James Kent.[40] Towards the end of the 19th century, it became increasingly hard to reconcile such an approach to property with the reality of increasing state regulation. Hence, the bundle metaphor that gained prominence in the early 1900s can be seen as a return to a more modest perspective.[41]

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

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

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

38 Chang and Smih (n 37) 7.

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

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

41 See Klein and Robinson (n 36) 195.

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

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

An interested party may ask, "who owns this property?" Then, under the dominion theory, a clear answer is expected and will usually be adequate, even if it does not give a complete picture of all relevant property rights. Under the bundle theory, on the other hand, one might be inclined to respond, "to which stick are you referring?" Clearly, this narrative is more complex, perhaps

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

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

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

unduly so.

Some common law scholars have recently elaborated on this to develop a critique of the bundle theory, by suggesting that it should at least be complemented by a firm theory of *in rem* rights in property. This, they argue, would allow the law to operate more effectively, by relying on a simple and clear rule that, although defeasible, would generally suffice to inform people about their relevant rights and duties in relation to property.[45]

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

In this thesis, the efficiency and clarity of different property concepts will not be a primary concern, nor will personal attachments to things in themselves play a particularly important role.[48] Hence, I will remain largely agnostic about this aspect of the debate between dominion and bundle theorists. In particular, the differences between civil and common law traditions in this regard do not cause special problems for my analysis of economic development takings. In this regard,

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

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

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

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

it is more important how different ways of looking at property can influence how we assess when interference is legitimate under constitutional and human rights law. Hence, I now turn to the question of whether or not there are any significant differences between dominion and bundle theories in this regard.

2.3.1 Takings under Bundle and Dominion Accounts of Property

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

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

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

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

If property is thought of as a malleable bundle of entitlements that exists only because it is recognised by the law, it becomes natural to argue that when government regulates the use of property, it does not deprive anyone of property rights. It merely restructures the bundle. In the case of *Andrus v Allard*, the Supreme Court adopted such an argument when it declared that "where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety".[50]

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

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

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

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

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

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

53 To further underscore this point, it may be mentioned that while US courts do in fact recognise that a regulation

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

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

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

In terms of descriptive content, both theories appear oversimplified. They provide a manner of

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

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

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

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

2.3.2 Broader Theories

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

- *Utilitarian* theories, focusing on property's role in helping to maximize utility or welfare with respect to individual preferences and desires.[55]

- *Libertarian* theories, focusing on property's role in furthering individual autonomy and liberty, as well as the importance of protecting property against state interference, particularly attempts at redistribution.[56]

- *Hegelian* theories, focusing on the importance of property to the development of personhood and self-realisation, particularly the expression and embodiment of free will through control and attachment to one's possessions.[57]

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

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

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

- *Kantian* theories, focusing on how property arises to protect freedom and autonomy in a coordinated fashion so that *everyone* may potentially enjoy it, through the development of the state.[58]

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

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

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

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

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

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

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

First, I note that a possible objection against all the theories summarised above is that they are highly normative. They are used to argue for particular values associated with property, not to clarify the descriptive core of the notion. This is a challenge, since one of my main aims in this thesis is to argue for a descriptive proposition, namely that economic development takings make sense as a conceptual category for legal reasoning. Hence, before I move on to consider normative aspects, I first need a theoretical framework that allows me to pinpoint what makes economic development takings unique. I would like to do so, moreover, without thereby committing myself to any particular stance on how to normatively assess such takings.

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

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

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

2.4 The Social Function of Property

There is a growing feeling among property scholars that the notion of property has been drawn too narrowly by many of the traditionally dominant theories of property. Moreover, an increasing number of scholars are turning away from assessing property rules against their effectiveness in maximising utility and social welfare.[62] Instead, some scholars adopt a holistic approach, allowing property's social function to come into focus. One of the main proponents of this conceptual shift is Gregory S. Alexander, professor at Cornell University. In a recent article, he writes:

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

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

Still, traditional property scholars have surprisingly little regard for social functions when they theorise about property. According to Alexander, the classical theories of property convey the impression that "property owners are rights-holders first and foremost; obligations are, with some

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

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

few exceptions, assigned to non-owners".[64] The social function theorists attempt to redress this conceptual imbalance. As Alexander explains, "social obligation theorists do not reverse this equation so much as they balance it. Of course property owners are rights-holders, but they are also duty-holders, and often more than minimally so".[65]

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

2.4.1 Historical Roots and European Influence

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

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

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

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

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

Similar thoughts have been influential in Europe, particularly during the rebuilding period after the Second World War. For instance, the constitution of Germany – her *Basic Law* – contains a property clause stating explicitly that property entails obligations as well as rights. As argued by Alexander, this has had a significant effect on German property jurisprudence, creating a clear and interesting contrast with US law.[68]

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

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

I will return to this clause in more depth in Section **??** of Chapter 3. Here I note how it emphasises both the private right to peaceful enjoyment of possessions and the state's right to interfere with property in the general/public interest. Moreover, it does not explicitly introduce an absolute compensation requirement in case of expropriation by the state, setting it apart from many

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

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

other property clauses, including that contained in the Fifth Amendment of the US constitution. This arguably reflects a recognition of the social aspects of property.[70]

However, this particular aspect of social function reasoning also fits within a traditional narrative of private property rights as narrow entitlements, leaving aside the social responsibilities attaching to property as objectives to be pursued by the state. Indeed, the chosen formulation in P1(1) appears to suggest that social aspects are external to private property, vested in the regulatory power of the state.

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

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

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

For owners opposing hunting on ethical grounds, an interference with their hunting right is an

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

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

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

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

interference with their moral duty to act in accordance with their beliefs. Given the belief that hunting is unethical, the owner has an obligation to prevent their hunting rights from being used. If owners are deprived of their opportunity to fulfil this obligation, it changes the social function of their property in a way that publicly negates their strongly held beliefs about how it should be used.

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

Clearly, the Court is not expressing an opinion on the ethical status of hunting. Rather, the Court emphasises that the owners are entitled to have unconventional personal convictions in this regard. Indeed, managing one's property in accordance with one's convictions is part of what it means to be an owner. Moreover, as demonstrated by the ruling in *Chabauty*, protecting this aspect of ownership is more important to the Court than protecting the right of owners to keep the fruits of the land to themselves.

This can only be because the right to manage one's property in accordance with one's beliefs is itself regarded as a socially desirable aspect of property ownership. As such, it is entitled to increased protection under the ECHR.

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

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

even when this is not explicitly acknowledged.

2.4.2 The Impossibility of a Socially Neutral Property Regime

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

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

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

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

emphasise the property rights of local people who face displacement, or should it protect the property rights of outsiders wishing to invest in holiday homes?

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

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

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

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

[77] This is more than merely observing that they wanted to protect *their* property. In their desire to regulate the use

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

The social functions of property sometimes force the law to prioritise, when various functions come into conflict with one another. However, social functions can also work together in a way that promotes certain property uses and decision-making structures for property management. In this way, social functions can come to alleviate the law from pressures to regulate, as discussed in the next subsection.

2.4.3 The Regulating Effect of Property

Property shapes and reflects societies, but it also shapes and reflects social commitments and dependencies within those societies.[78] Again, this function of property is highly dependent on context. A small business owner, by virtue of being a member of the local community, is discouraged from becoming a nuisance to their neighbours, regardless of formal rules found in the law of nuisance.

Everything from erecting bright neon signs to proposing condemnation of neighbouring properties are actions that an owner will be socially deterred from taking. If the local shop owner does not conform to social expectations, he will pay a social price. Indeed, most likely even an economic price, especially if his customer-base is local. At the same time, the local connection would serve to make the business owner positively invested in the well-being of the community. This would

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of Trump's property, it would seem that the locals wanted more than merely to protect their own properties. They also wanted to protect certain social functions inherent in Trump's property, against the harmful dispositions of Trump himself. I return to this subtle perspective in more depth in Section **??** below.

[78] See generally Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) Cornell Law Review 745.

encourage everything from sponsoring local events to hiring local youths as part-time helpers.

But at the same time, the local business owner might be discouraged from changing his business model to become more competitive, if this is perceived as a threat to other members of the community. Economic rationality might suggest that he should expand, say, by physically acquiring more space and targeting new groups of customers, but social rationality might make this an untenable proposal. This, however, might render the business economically unsustainable, particularly if it is facing fierce competition from businesses that are not similarly constrained by community ties. Moreover, even if the business is in fact viable as long as the community remains in place to support it, the perception that it is not fulfilling its commercial potential can increase external pressures both on the business and the community. Importantly, in the age of regulation for commercial facilitation, the state itself might exert pressure of this kind, by acting in a way that makes it hard to sustain local businesses that are regarded as failing commercially.

Then, if our local shop owner goes out of business, for whatever reason, the new owner might not become integrated in the community in the same way, with obvious consequences for the property's function in that community. Indeed, if we imagine that the new owner is a large commercial actor who is hoping to raze the community in order to build a new shopping center, we are at once reminded of the stark contrasts that can arise between various social functions of property. The property rights of a shop owner can be the lifeblood of a community, while the exact same rights in the hands of someone else can spell destruction.

This has legal ramifications, not only for property, but also for the regulatory regime surrounding its use. For instance, it seems clear that if a non-local, for-profit, owner is to be deterred from becoming a nuisance to neighbours, new and much stricter nuisance laws might have to be put in place. The social responsibility that was previously anchored in the community must now be protected more forcefully by the state. In general, this can cause the institution of property to weaken further, as the state assumes greater powers of interference. A feedback effect might res-

ult, as increased state regulation in turn threatens to make property ownership too burdensome for average community members. Hence, the most resourceful actors, those who are able to meet the state's demands and/or protect themselves against interference, gain more and more property, while the state gains more and more regulatory power.

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

The broader point at stake here can also be brought out in relation to the famous "tragedy of the commons".[79] In his seminal article, Hardin describes how individually rational users of a common resource can eventually cause the depletion of that resource. The problem arises, according to Hardin, because individuals have no proper incentive to refrain from over-exploitation; the damage will be distributed among all resource users, so it will not outweigh the benefit of individual over-use in the short term.

In response, it has been typical to regard either state management or individual private ownership as the answer.[80] In the first case, the incentive not to over-exploit is supposed to be provided by the state, while in the second it is meant to be provided by the fact that the cost of over-exploitation cannot as easily be shifted from individual to the community.

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79 hardin68

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

However, as Elinor Ostrom and others have shown, the traditional narrative overlooks the fact that commons tend to come with community structures that provide appropriate incentives through locally grounded institutions or social arrangements.[81] Moreover, as long as external forces do not threaten them, such arrangements can be more robust than either individual ownership or state control.

The ideas of Ostrom on common pool management focus on local institutions for collective decision-making, not property rights. Moreover, the idea of private property is not identified as an important anchor for such institutions, which are rather thought to operate independently of the property regime.

By contrast, legal scholars discussing Ostrom's work have sometimes emphasised how common pool governance and private rights can be viewed as two sides of the property coin. This, specifically, is a key insight behind Smith's notion of a "semicommons", referring to property arrangements based on a combination of individual property rights and locally grounded institutions for collective action.[82]

At the same time, some authors have pointed out weaknesses with the typical local institutions that tend to emerge for managing the commons. In particular, Heller and Dagan argue that such institutions often leave inadequate room for "exit" – the possibility of alienating one's rights and obligations – potentially causing local institutions to become oppressive towards individual members.[83]

Hence, the idea that local institutions for resource management can be anchored in private property represents a potentially attractive way of thinking. Importantly, the social function theory of

[81] See generally Ostrom (n 80).

[82] See generally Henry E Smith, 'Semicommon Property Rights and Scattering in the Open Fields' (2000) 29(1) The Journal of Legal Studies 131; Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) The Journal of Legal Studies S453.

[83] See **heller00**

property already suggests pursuing this idea. Based on the social function approach, the descriptive fact that property structures shape decision-making processes at the local level is enough to conclude that local institutions for resource management should not be looked at in isolation from the law of property. I will build on this perspective in Chapter 4, when I consider the institution of land consolidation in Norway and the management tools it offers as a possible alternative to expropriation in economic development cases.

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

In addition, it becomes possible to recognise that social obligations may inhere in private property externally to whatever institutional frameworks happen to be in place at the local level. If such frameworks are marred by corruption and malpractice, a social function theorist can take the normative stance that property ownership still carries with it duties to care for other property dependants in the community. This duty, moreover, would exist independently of the extent to which it is presently fulfilled through local practices and institutional arrangements.

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

2.4.4 The Descriptive Core

The case of *State v Shack* is a standard US example of how social function reasoning can come to influence the application of rules that seem to be neutral on property's social functions.[84] The case concerned the right of a farmer to deny others access to his land, a basic exercise of the right to exclusion. The controversy arose after the two defendants, who worked for organizations that provided health-care and legal services to migrant farmworkers, entered the land of a farmer without permission. They were there to provide services to the farmer's employees, and when the farmer asked them to leave, they refused.

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

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

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

such cases, because the social dimension is intrinsic to property itself.

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

A nice demonstration of how neutrality is elusive in this regard can be found in an article by Eric Claeys, where he is critical both of the social function theory in general and *State v Shack* in particular.[85] Importantly, despite his intention to criticise the social function theory, Claeys is led to argue against the ruling of *State v Shack* by pointing to those aspects of the social context that spoke in favour of the farmer.[86] Essentially, his argument is that by considering the social circumstances in *more* depth, a different outcome suggests itself.[87]

But if this is true, it is no argument against the descriptive content of the social function theory. Rather, it becomes a further affirmation of the descriptive adequacy of such an account of property. At the same time, it becomes an argument against those who think that the social function idea dictates the "correct" outcome in cases such as *State v Shack*. As Claey's advocacy on behalf of the farmer shows, the descriptive part of the social function theory hardly entails specific normative commitments.

Claeys argues forcefully against normative fundamentalism, and he might have a point in criticising some social function theorists for normative naivety.[88] However, I do not follow Claeys when

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

86 Claeys, 'Virtues and Rights in American Property Law' (n 85) 941-942.

87 Claeys, 'Virtues and Rights in American Property Law' (n 85) 941 ("there are good reasons for suspecting that there was more blame to go around in Shack than comes across in the case's statement of facts").

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

he takes this to be an argument against the form of legal reasoning that social function theories promote and which he himself skilfully engages in.[89]

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

By contrast, the social function narrative pushes us towards a more complete picture of the relevant facts. This is its primary importance, in my opinion. However, many of its supporters appear to argue that the main significance of the theory is that it delivers an ethically superior approach to property law.[90] Unsurprisingly, critics such as Claeys use this to launch attacks on the social function theory, by suggesting that it represents a way of thinking that will invariably lead to lessened constitutional property protection and greater risk of abusive state interference.[91]

But why should it follow from property's social function that the state is the ultimate social institution to which property *should* answer? Why not take the view that property should answer to informal social structures, such as those that it is embedded in by virtue of owners' membership in local communities?

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

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89 In particular, I do not follow the leap Claeys makes when he suggests that it is beneficial to keep "discretely submerged" what he describes as "culture war overtones" in legal reasoning.Claeys, 'Virtues and Rights in American Property Law' (n 85) 947.

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

91 See Claeys, 'Virtues and Rights in American Property Law' (n 85) ("The more "virtue" is a dominant theme in property regulation, the less effective "property" is in politics, as a liberal metaphor steering religious, ethnic, or ideological extremism out of the public square").

normative measuring stick.

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

It bears emphasising that by arguing in this way, I depart from the stance taken by many contemporary scholars who advocate on behalf of social function theories. Hanoch Dagan, for instance, is a self-confessed liberal who argues for a social function understanding on the basis that it is morally superior. "A theory of property that excludes social responsibility is unjust", he writes, and goes on to argue that "erasing the social responsibility of ownership would undermine both the freedom-enhancing pluralism and the individuality-enhancing multiplicity that is crucial to the liberal ideal of justice".[92]

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

Dagan is not alone in proposing highly normative social function theories. Indeed, most contemporary scholars endorsing a social function view on property base themselves on highly value-laden assessments of property institutions.[93] These scholars provide interesting insights into the nature

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

93 See, e.g. Alexander, 'The Social-Obligation Norm in American Property Law' (n 78); Colin Crawford, 'The Social

of property, but they might overstate the desirable normative implications of adopting a social function view. In addition, they appear to believe we should embrace certain values and reject others. Hence, one is sometimes left with the impression that the social function theory has little to offer beyond the values with which it is imbued, which can in turn push the law in the direction that these writers deem desirable.

For instance, it is Dagan's stated aim to propose a theory that promotes specific liberal values. "There is room to allow for the virtue of social responsibility and solidarity", he writes, continuing by suggesting that "those who endorse these values should seek to incorporate them – alongside and in perpetual tension with the value of individual liberty – into our conception of private property".[94] This view is reflected further in the concrete policy recommendations he makes, for instance in relation to the question of when it is appropriate to award less than "full" (market value) compensation for property following a taking.[95]

Normative assertions like these are not necessarily wrong, but they need not be accepted in order to conclude that the social function of property should be given a more prominent place in property theory. Importantly, I think the focus on normative reasons threatens to overshadow the most straightforward reason for looking to social structures, namely that they are almost always crucially important behind the scenes, even if they go unacknowledged.

The social function theory, rather than being "good, period", as Dagan suggests, is simply more accurate, irrespective of one's ethical or political inclinations. As such, it provides the foundation for a debate where different values and norms can be presented in a way that is conducive to meaningful

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Function of Property and the Human Capacity to Flourish' (2011) 80(3) Fordham Law Review 1089; Nestor M Davidson, 'Sketches for a Hamilton Vernacular as a Social Function of Property' (2011) 80(3) Fordham Law Review 1053; Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94(4) Cornell Law Review 1009; Peñalver (n 90).

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

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

debate, on the basis of a minimal number of hidden assumptions and implied commitments. Thus, the first reason to accept the social function theory is epistemic, not deontic.

Theories can hardly be entirely value-neutral, nor is this a goal in itself. Still, a good theory is one that can at least serve as a common ground for further discussion based on disagreement about values and priorities. Making room for normative divergences, moreover, can hopefully diminish the worry that a broader theoretical outlook is the first step towards unchecked state power and rule by "judicial philosopher-kings", as Claeys puts it.[96]

In the next subsection, I will argue in some more detail why such a cautious perspective is warranted, by considering how the Italian fascists appropriated the social function theory in 1930s. Building on the work of di Robilant, I will also briefly track how non-fascist property scholars opposed this development by focusing on value-pluralism, local self-governance and freedom.[97] Importantly, these scholars embraced the social function theory as a common ground from which to launch a meaningful attack on more radical ideas, without alienating those with divergent views. Instead of clinging to the old-style liberal discourse that the fascists had either rejected or subverted, many Italian non-fascists were willing to engage in a discourse revolving around property's social function, by spelling out a more measured set of ideas based on this premise.

Crucially, this set the stage for a form of intellectual resistance that did not reject those aspects of fascism that had appeal to the public and which arguably reflected true insight into the unfairness and lack of sustainability of the established legal order.

2.4.5 Rooting out Fascism

According to di Robilant, the fascists were happy to embrace the social function theory of property. To the fascists, the social function theory provided a conceptual starting point from which to

96 Claeys, 'Virtues and Rights in American Property Law' (n 85) 944.

97 Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?' (2013) 66(3) Vanderbilt Law Review 869.

develop their idea that rights and obligations in property should be made to answer to one core value: the interests of the state.[98] This stance was as effective as it was oversimplified. As di Robilant notes, "earlier writers had been hopelessly evasive about the meaning and content of the social element of property".[99] Hence, the fascist approach filled a need for clarity about the implications of the main idea, which was by now attracting increasing support both from the public and the academic community. Established property doctrine, it was widely felt, was both ineffective and unfair to ordinary people. Rather than securing productivity and a livelihood for all, property was used mainly as an instrument for maintaining the privileged position of the elites. By promising to change this state of affairs, the fascists attracted many to their cause.

As di Robilant notes, supporters of the fascist idea of property made clear that "social function meant the productive needs of the Fascist nation".[100] But at the same time, they cleverly denied that there was a "contradiction between subordinating individual property rights to the larger interest of the Fascist state and the liberal language of autonomy, personhood, and labor".[101] In this way, fascist scholars could claim that fascist liberalism was true liberalism, thereby subverting the conceptual basis for the traditional idea of liberal justice.[102] In this situation, there was reason to suspect that clinging to liberal dogma would be a largely ineffective response. Moreover, it seemed undeniable that fascism's appeal was rooted in real concerns about the fairness and effectiveness of the liberal legal order.

Hence, many non-fascists shunned away from uncritical defence of traditional liberalism. Instead, they agreed that property's social function should come into focus, but emphasised the

98 See Robilant (n 97) 908-909 ("Fascist property scholars had also appropriated the social function formula. For the Fascists, the social function of property meant the superior interest of the Fascist state.").

99 Robilant (n 97) 909.

100 Robilant (n 97) 909.

101 Robilant (n 97) 900.

102 Robilant (n 97) 900.

plurality of values that could potentially inform this function, which could be different from the interests of the state. In addition, they also noted that property rights were invariably associated with *control* over resources, and that the social functions of property depended on the resources in question. To own property, they argued, provides individuals with a highly valued source of privacy, power and freedom that is worthy of protection.

To summarise their insights, Italian scholars adopted the metaphor of a "tree", by describing the core social function of property as the trunk, while referring to the various resource-specific values attached to property as branches.[103] As di Robilant notes regarding these theorists:

> The rise of Fascism, they realized, was the consequence of the crisis of liberalism. It was the consequence of liberals' insensibility to new ideas about the proper balance between individual rights and the interest of the collectivity.[104]

In light of this, the tree-theorists concluded that continued insistence on the protection of the autonomy of owners was not a viable response. Instead, they adopted a theory that "acknowledges and foregrounds the social dimension of property", but without committing themselves to fascist ideas about the supreme moral authority of the state.[105] The value of autonomy was in turn recast in terms of property's social function. Arguably, this served to make the case far more compelling. Protecting autonomy could be seen as an aspect of protecting property's freedom-enhancing function, both at the individual level and as a way of ensuring a right to self-governance and sustenance for families and local communities. This, moreover, could not easily be derided as tantamount to protecting unfair privilege and entitlement. Rather, property became elevated from an individual liberal right to a crucial building block of participatory democracy.

The story of fascist appropriation of the social function theory demonstrates why it is sensible

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[103] Robilant (n 97) 894-916.

[104] Robilant (n 97) 907.

[105] Robilant (n 97) 907.

to maintain a descriptive perspective on its core features. Indeed, the readiness with which the fascists embraced social function theorising serves as a reminder that we cannot easily predict what normative values may come to be promoted on its basis. At the same time, we are reminded of the danger of attaching too much normative prestige to a theory that is abstract and open to various interpretations.

In particular, it seems that a failure to recognise the descriptive nature of the core idea can lead to unrealistic expectations of what the social function theory provides. In addition, it will make it harder for the theory to gain acceptance as a conceptual common ground from which to depart when engaging in debate. Indeed, if no division is recognised between normative and descriptive aspects, the historical record would allow detractors to make a *prima facie* plausible attack on the social function theory by arguing that it is fascism in disguise, or that fascism, rather than liberal justice, is where we end up in practice should we choose to adopt it.[106]

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

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

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[106] This would echo the claim already made by Claeys, that the theory (when coupled with virtue ethics) might become a slippery slope towards the kind of extremism and revolt against oppression that gave rise to the Rwanda genocide in the early 1990s Claeys, 'Virtues and Rights in American Property Law' (n 85) 926-927.

2.5 Human Flourishing

Taking the social function theory seriously forces us to recognise that a person's relation to property can be partly constitutive of that person's social and personal identity, including both its political and economic components. Hence, property influences people's preferences, as well as what paths lie open to them when they consider their life choices.[107] This effect is not limited to the owner, it comes into play for anyone who is socially or economically connected to property in some way. The life-significance of property is often clearly felt also by a large group of non-owners.[108] The importance of property is obviously reduced if we move away from it in terms of social or economic distance. Hence, in many cases, property will be most important to its owner, simply because they are closest to it. This is not always the case, however, especially not if property rights are unevenly distributed, or in the possession of disinterested or negligent owners. Moreover, as mathematically oriented sociologists like pointing out, social connections are ubiquitous and the world is often smaller than it seems.[109]

Hence, there is great potential for making wide-reaching socio-normative claims on the basis of the social function perspective on the meaning and content of property. But which such claims *should* we be making? According to some, we should adjust our moral compass by looking to the overriding norm of *human flourishing* as a guiding principle of property law. In a recent article, Alexander goes as far as to declare that human flourishing is the "moral foundation of private property".[110]

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107 See generally Alexander, 'The Social-Obligation Norm in American Property Law' (n 78).

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

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

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

Human flourishing has a good ring to it, but what does it mean? According to Alexander, several values are implicated, both public and private.[111] Importantly, Alexander stresses that human flourishing is *value pluralistic*.[112] There is not one core value that always guarantees a rewarding life. To flourish means to negotiate a range of different impulses, both internal and external. Importantly, these act in a social context which influences their meaning and impact[113]

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

2.5.1 Property as an Anchor for Economic and Social Rights

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

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

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

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111 See generally Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 110); Alexander, 'Pluralism and Property' (n 63).

112 Alexander, 'The Social-Obligation Norm in American Property Law' (n 78) 750-751.

113 Alexander, 'Pluralism and Property' (n 63) 1035-1052.

Importantly, the human flourishing theory compels us to take into account the interests and needs of property dependants other than the owner. As Colin Crawford puts it, the purpose of property should be to "secure the goal of human flourishing for all citizens within any state".[114] Consider, for instance, the right to housing. If the interests of a property owner come into conflict with the housing rights of a property dependant, the human flourishing theory encourages us to approach this as a tension *within* property, between different property functions.

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

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

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

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

114 Crawford (n 93) 1089.

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

By contrast, the human flourishing narrative suggests a perspective whereby both owners and non-owners are recognised as victims of a failure of the state to protect property's proper functions. For a concrete example, I mention the case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd*, analysed in depth by Alexander and Penñalver.[115]

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

The Supreme Court of Appeal concluded that Modderklip's property rights had indeed been violated, but noted that so had the rights of the squatters, since the state had failed to provide them with adequate housing.[116] However, the Court upheld the eviction order and granted Modderklip Farm compensation for the state's failure to implement it. Hence, while the Court recognised that both housing rights and property rights were at stake, it pursued a traditional balancing approach, finding in favour of property.

The Constitutional Court, on the other hand, adopted an agnostic view on the relationship between housing rights and property rights. The Court agreed that the eviction order was valid, but concluded that as long as the state failed in its obligations towards the squatters, the order should not be implemented.[117] Hence, the owner's right to have the squatters evicted was made contingent upon an adequate plan for relocation.

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

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

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

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

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

In a detailed analysis of *Modderklip*, Alexander and Peñalver go quite far in this direction. They argue that the case highlights how property owners themselves can have responsibilities towards property dependants, obligations that endure as long as private property is protected.[118] This normative turn makes property owners addressees of obligations arising from the economic and social rights of non-owners. In this way, it strengthens such rights.

However, it also strengthens the institution of property, highlighting why it might be appropriate to grant it strong protection against interference by external forces. In particular, a human flourishing approach might serve as a bulwark against the idea that the ultimate expression of the public interest can be found in the actions taken by the state. As a replacement, the human flourishing account suggests the view that public interests manifest immediately at their place of origin, including in relation to private property.

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

As Alexander puts it in a recent article:

> The values that are part of property's public dimension in many instances are necessary to support, facilitate, and enable property's private ends. Hence, any account of public and private values that depicts them as categorically separate is grossly misleading. One important consequence of this insight is that many legal disputes that appear to pose a conflict between the private and public spheres or that seemingly require the involvement of public law can and should, in fact, be resolved on the basis of private law – the law of property alone.[119]

Perhaps the most important structural aspect of this insight concerns the mechanisms used to resolve tensions between different property values. Importantly, it might not be necessary to introduce intermediaries between owners and other primary stakeholders. To introduce such intermediaries, whether they are state bodies, international institutions, NGOs, or commercial enterprises, carries with it the risk that the decision-making process can be captured by external forces. It might be better, therefore, if the necessary balancing of interests occurs at the level of property law.[120]

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

At the same time, a human flourishing account could be used to argue against the legitimacy of

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[119] Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 110) 1295-1296.

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

interference on the basis of broader concerns rooted in communitarian economic and social values. If such values inform property's proper function, it underscores that the state has an obligation to not undermine property. Instead, the state's duty becomes that of continuously facilitating improved legal frameworks for private property.

A clear commitment to property as an institution is needed in order for this aspect of the human flourishing idea to come to fruition. Moreover, such a commitment can not be taken for granted. A good example is again found by looking to South Africa and the fallout of the Mineral and Petroleum Resources Development Act 2002.[121] This Act introduced state "custodianship" over previously private mineral and petroleum rights.[122] However, the Constitutional Court ruled in *Agri South Africa v Minister for Minerals and Energy* that this did not amount to expropriation, only deprivation.[123]

The property clause in section 25 of the South African Constitution gives effect to an important distinction between expropriation and deprivation, in that it only demands compensation in case of expropriation.[124] Hence, the decision in *Agri* implies that privately held mineral and petroleum rights in South Africa can be brought under state custodianship without any payment of compensation.[125]

The state custodianship introduced by the act in question would undoubtedly deprive the current owner of their mineral rights. Moreover, the state would subsequently be empowered to grant the minerals to a third party, e.g., a competing commercial company. In my terminology, there-

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121 See Mineral and Petroleum Resources Development Act 2002.

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

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

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

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

fore, the introduction of state custodianship amounted to a sweeping authorisation for economic development takings affecting all mineral and petroleum resources found in South Africa.

The crucial finding of the majority in *Agri* was that this did not involve any transfer of mineral rights to the state. On plain reading, this seems quite absurd. But the majority did not engage in any plain reading. Rather, its reading was motivated by what it thought would be appropriate given the history of South Africa and the prevailing social context of property, shaped by a past of racial discrimination.

Importantly, the majority did not use this past as an argument to assess the scope of compensation rights. Instead, it relied on it only implicitly when interpreting the word "expropriation" in full generality. This may have been a grave mistake. As the minority points out, the understanding of expropriation established by the majority "in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country's resources, from being recognised as expropriation".

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

Hence, we see that social obligations are talked about as though they only target states. On this narrative, honouring "social responsibilities" can only mean enhancing state power at the expense of private property. But then the implication also seems to be that in the absence of active state interference, private property is a privilege unbridled by social obligations. In the future of mineral and petroleum exploitation in South Africa, it will be a privilege only enjoyed by those chosen by the state.

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

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

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

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

The human flourishing theory clearly speaks in favour of the minority view. However, it also

asks us to consider the possibility of going a step further, to challenge the very idea that state custodianship is the best way to address past injustices. Indeed, it would perhaps have been more appropriate to look for a solution consistent with the protection of private property, for instance by building on *Modderklip* to improve the legal position of non-owning property dependants and communities.

Ideally, it should be possible to pursue key economic and social values without massively increasing the power of the state and weakening the institution of property. At the same time, it should be possible to more effectively enforce social obligations on private property owners.[126]

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

2.5.2 Property as an Anchor for Democracy

The value of participation is closely related to the value of democracy. Participation in local decision-making processes is the root which enables democracy to come to fruition at the regional and national level. Of course, the role that property plays in this regard, as it empowers and encourages owners to take active part in the political process, has been noted before.[127] Indeed, it has been important to property theorising ever since the early days of democracy. Alexander himself traces the emphasis on participation in politics back to Aristotle and the republican tradition. He notes, however, that this tradition involves a notion of participation that is rather narrowly drawn.

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

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

For thinkers in the republican tradition, participation tends to mean public participation, meaning people's engagement with the formal affairs of the polity.[128] For Alexander, participation has a broader meaning, involving also the value of being included in a community. He writes:

> We can understand participation more broadly as an aspect of inclusion. In this sense participation means belonging or membership, in a robust respect. Whether or not one actively participates in the formal affairs of the polity, one nevertheless participates in the life of the community if one experiences a sense of belonging as a member of that community.[129]

Importantly, participation in a community can have a crucial influence also on people's preferences and desires. In this way, it is also invariably relevant – behind the scenes – to any assessment of property that focuses on welfare, utility or public participation in the classical sense. As Alexander and Peñalver put it, drawing on the work of Amartya Sen and Martha Nussbaum:[130]

> The communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations and the scope of our aspirations.[131]

Therefore, for anyone adhering to welfarism, rational choice theory, utilitarianism or the like, neglecting the importance of community is not only normatively undesirable, it is also unjustified in an epistemic sense. In particular, it should be recognised as a descriptive fact that community is highly relevant to *any* normative theory that attempts to take into account the preferences and

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128 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 110) 1275.

129 Alexander, 'Property's Ends: The Publicness of Private Law Values' (n 110) 1275.

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

131 Alexander, 'The Social-Obligation Norm in American Property Law' (n 78) 140.

desires of individuals.[132] But Alexander and Peñalver go further, by arguing that participation in a community should also be seen as an independent, irreducibly social, value, not merely as a determinant of individual preferences and a precondition for rational choice. They write:

> Beyond nurturing the individual capabilities necessary for flourishing, communities of all varieties serve another, equally important function. Community is necessary to create and foster a certain sort of society, one that is characterized above all by just social relations within it. By "just social relations", we mean a society in which individuals can interact with each other in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy. Communities foster just relations with societies by shaping social norms, not simply individual interests.[133]

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

For instance, if people in a community come under pressure to sell their homes to a large commercial company that wishes to construct a shopping mall, it may be appropriate to consider this as an unjustifiable attack on their property rights. Importantly, this may be so *irrespective* of

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

[133] Alexander, 'The Social-Obligation Norm in American Property Law' (n 78) 140.

what the individual owners themselves think they should do. If they are offered generous financial compensations for their homes, or if they are threatened by eminent domain, economic incentives might trump the value of social inclusion and participation for all or a majority of these owners. As a consequence, the community might decide to sell.

Even so, in light of the value of community, it would be in order for planning authorities, maybe even the judiciary, to view such an agreement as an *attack on their property*. It is clear that by the sale of the land, the "just social relations" inhering in the community will be destroyed. The members of the community – including all the non-owners – will lose their ability to participate in those relations. The property rights that once contributed to sustaining just relations will now be transformed into property rights that serve different purposes. This includes aiding the concentration of power and wealth in the hands of commercially powerful actors. Such a change in the social function of property might have to be regarded – objectively speaking – as a threat to participation, community and democracy. Hence, on the human flourishing theory, it is also a threat to property. Property institutions, therefore, should protect against it.

In Norway, a range of such rules are in place to protect agricultural property, by limiting the owners' right to sell parcels of their land without local government consent, as well as by compelling them to reside on their property and to make use of it for agricultural production.[134]

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

The broader issue at stake here is again highlighted by recent developments in South Africa, where rules closely resembling those found for agricultural property in Norway have been proposed in a recent act on land reform. In South Africa, however, these rules have been proposed alongside

[134] See Land Act 1995, s 8 and Land Concession Act 2003, s 4.

a new framework of "state custodianship" of agricultural land, corresponding to the formulation used in the mineral and petroleum legislation, as discussed in the previous section.[135]

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

The human flourishing perspective suggests that even when provisions to promote egalitarian ownership and community commitment are appropriate, provisions that inflate the state's authority might not be. As I believe the history of democracy in Norway shows, strict property rules to protect and promote self-governing agrarian communities can work well, as long as they are applied consistently and coupled with strong institutions of local democracy and strict limits on state power.[136]

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

In the next section, I zoom in on economic development takings. First, I introduce such takings by considering the seminal case of *Kelo v City of New London*[137], which brought this category to prominence in the US discourse on property law. Then I will assess the unique aspects of such takings against the social function theory, to provide an argument that the category has significance for legal reasoning in takings law, as well as with respect to property as a constitutionally protec-

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

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

137 *Kelo* (n 6).

ted human right. Finally, I will provide an abstract presentation of the values that I believe are important when normatively assessing the law in this area. In doing so, I will draw on the human flourishing theory, setting out the main values that will inform the concrete policy assessments I provide later.

2.6 Economic Development Takings

Constitutional property rules in many jurisdictions indicate, with varying degrees of clarity, that eminent domain should only be used to take property either for "public use", in the "public interest", or for a "public purpose". Such a restriction can be regarded as an unwritten rule of constitutional law, as in the UK, or it can be explicitly stated, as in the basic law of Germany.[138] In some jurisdictions, for instance in the US and in Norway, explicit property clauses exist, but do not provide much information about the intended scope of protection.[139]

Both the Norwegian and the US property clauses appear to refer to public use only as a pre-condition for the duty to pay compensation. However, this is universally understood as expressing the *presupposition* that the power of eminent domain is only to be used in the public interest.[140] Indeed, in cases when one might say that private property is "taken" for a non-public use without compensation, for instance in a divorce settlement, it is not commonly regarded as an exercise of eminent domain. Rather, it is justified by reference to a different category of rules, meant to ensure enforcement of obligations that arise between private parties independently of the state's power to single out and compulsorily acquire specific properties.

The exact boundary between eminent domain and other forms of state interference in property is not always clear, but I will not worry too much about it in this thesis. I note, moreover, that

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138 See Chapter 3. Section 3.3 below.

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

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

most legal scholars seem to agree that the power of eminent domain is meant to be exercised in the public interest. However, differences of opinion emerge when we turn to the question of whether the presupposed public use or public interest serves also to restrict the power to take. In the US, most scholars agree that some restriction is intended, but there is great disagreement about its extent.[141] In Norway, on the other hand, a consensus has developed whereby the notion of public use is interpreted so widely that it hardly amounts to a restriction at all.[142] Moreover, the courts defer almost completely to the assessments made by the executive branch regarding the purposes that may be used to justify a taking.[143]

Some US scholars adopt a similar stance, but others argue that the public use presupposition should be read as a strict requirement, forbidding the use of eminent domain unless the public will make actual use of the property that is taken.[144] Most scholars fall in between these two extremes. They regard the public use restriction as an important limitation, but they also emphasise that courts should normally defer to the legislature's assessment of what counts as a public use.[145]

As I discuss in more depth in Chapter 3, Section 3.5.1, the debate in the US has its roots in case law developed by state courts – the federal property clause was for a long time not applied to state takings. This has changed, and today the Supreme Court has a leading role in this area of US law. It has developed a largely deferential doctrine, resembling the understanding of the public

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141 Berger (n 140) 205.

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

143 Holmøyvik and Aall (n 142) 368.

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

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

use limitation under Norwegian law.[146] The difference is that in the US, cases raising the issue still regularly arise and prove controversial. The most important such case in recent times was *Kelo*, decided by the Supreme Court in 2005.[147] This case saw the public use question reach new heights of controversy in the US.[148]

2.6.1 *Kelo*

Kelo centred on the legitimacy of taking property to implement a redevelopment plan that involved construction of research facilities for the drug company Pfizer. The home of Suzanne Kelo stood in the way of this plan and the city decided to use the power of eminent domain to condemn it. Kelo protested, arguing that making room for a private research facility was not a permissible "public use". She was represented by the libertarian legal firm *Institute for Justice*, which had previously succeeded in overturning similar instances of eminent domain at the state level.[149] Kelo lost the case before the state courts, but the Supreme Court decided to hear it and assessed its merits in great detail.

The precedent set by earlier federal cases was clear: As long as the decision to condemn was "rationally related to a conceivable public purpose", it was to be regarded as consistent with the public use restriction.[150] Moreover, the role of the judiciary in determining whether a taking was for a public purpose was regarded as "extremely narrow".[151] It had even been held that deference to the legislature's public use determination was required "unless the use be palpably without reasonable foundation" or involved an "impossibility".[152]

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

147 *Kelo* (n 6).

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

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

150 *Midkiff* (n 146) 241.

151 *Berman v Parker* (n 146) 32.

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

This understanding was also reflected in the outcome of related cases. In *Hawaii*, the Supreme Court had upheld a taking that would benefit private parties, with no direct benefit to the public.[153] In *Berman*, it had upheld a taking for economic redevelopment of a blighted area, even though the property taken was not itself blighted.[154] But in the case of *Kelo*, the court hesitated.

Part of the reason was no doubt that takings similar to *Kelo* had been heavily criticised at state level, with an impression taking hold across the US that eminent domain "abuse" was becoming a real problem.[155] A symbolic case that had contributed to this worry was the infamous *Poletown Neighborhood Council v City of Detroit Poletown Neighborhood Council v City of Detroit.*[156] In this case, General Motors had been allowed to raze a town to build a car factory, a decision that provoked outrage across the political spectrum.[157] The case was similar to *Kelo* in that the taker was a powerful commercial actor who wanted to take homes. This, in particular, served to set the case apart from *Hawaii*, which involved a taking in favour of tenants, and to some extent also *Berman*, which involved a taking of businesses (and homes) in the interest of removing blight. Moreover, the Michigan Supreme Court had recently decided to overturn *Poletown* in the case of *Wayne County v Hatchcock Wayne County v Hatchcock.*[158] Hence, it seemed that the time had come for the Supreme Court to reexamine the public use questions.[159]

Eventually, in a 5-4 vote, the court decided to apply existing precedent and held against Suzanne Kelo. The majority also made clear that economic development takings were indeed permitted

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153 *Midkiff* (n 146). For a more detailed discussion, see Chapter 3, Section 3.5.1 below.

154 *Berman v Parker* (n 146). For a more detailed discussion, see Chapter 3, Section 3.5.1.

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

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

157 See generally Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 155).

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

159 See, e.g., Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 155); Claeys, 'Public-use limitations and natural property rights' (n 144).

under the public use restriction, also when the public benefit was indirect and a private company would benefit commercially.[160] The backlash of this decision was severe. According to Ilya Somin, the case ranks among the most disliked decision that the Court has ever made.[161] Some 80 - 90 % of the US public expressed great disapproval, with critical voices coming from across the political spectrum.[162] Why did the case prove so controversial? No doubt, the discontent with the decision was fuelled in large part by the fact that it was seen as a case of the government siding with the rich and powerful, against ordinary people.[163] Indeed, the party that appeared to benefit the most from the taking was Pfizer – a multi-billion dollar company – while Suzanne Kelo, who stood to lose, was a middle class homeowner. In this context, the taking of Kelo's home seemed morally suspect, an act of favouritism showing disregard for less influential members of society.[164]

In addition, it is worth noting that many commentators conceptualised the *Kelo* case by thinking of it as belonging to a special category, by describing it as an economic development taking, a *taking for profit*, or, more bluntly, a case of *Robin Hood in reverse*.[165] Categories such as these had no clear basis in the property discourse before *Kelo*. Indeed, in terms of established legal doctrine, it would be more appropriate to say that the case revolved entirely around the notion of "public use".

However, when considering the most common reasons given for condemning the outcome in *Kelo*, it becomes clear that many critics felt it was natural to classify the case along additional dimensions. A survey of the literature shows that many made use of a combination of substantive

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

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

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

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

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

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

and procedural arguments to paint a bleak picture of the *context* surrounding the decision to take Kelo's home. Important aspects of this include the imbalance of power between the commercial company and the owner, the incommensurable nature of the opposing interests, the lack of regard for the owner displayed by the decision makers, the close relationship between the company and the government, and the feeling that the public benefit – while perhaps not insignificant – was made conditional on, and rendered subservient to, the commercial benefit that would be bestowed on a commercial beneficiary.[166] This dynamic, in which public bodies no longer seem to be leading and pushing the process forward, but are rather being led and being pushed, is regarded as particularly suspicious. This, in turn, is typically derided as a perversion of legitimate decision-making, used to argue that economic development takings such as *Kelo* suffer from what I will refer to here as a *democratic deficit*.

From a theoretical point of view, I take all of this to suggest that many critics of *Kelo* effectively adopted a social function view on property, by paying close attention to the wider social and political context of the taking.[167] Importantly, if we now turn to the social function theory of property, we are placed in a position to engage more actively with this form of reasoning, as an integrated part of our assessment of the law. This may then in turn give us cues as to how we should reason to justify a departure from the course laid down by previous cases on the "public use" requirement, where such a perspective was not adopted. Indeed, it seems to me that this is exactly what the minority of the Supreme Court did, particularly Justice O'Connor, who formulated a strongly worded dissent.[168]

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166 See, for instance, Underkuffler, 'Kelo's moral failure' (n 164); Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' (n 5); Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (n 144); Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (n 5); Daniel S Hafetz, 'Ferreting out favoritism: Bringing pretext claims after Kelo' (2009) 77(6) Fordham Law Review 3095; Zachary D Hudson, 'Eminent domain due process' (2010) 119(6) Yale Law Journal 1280.

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

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

2.6.2 Justice O'Connor as a Social Function Theorist

Justice O'Connor was joined by all the four other dissenters, but Justice Thomas also formulated his own dissent, taking a more narrow view and arguing for the revival of a strict reading of the public use requirement.[169] As such, Justice Thomas' dissent fits better with a traditional property narrative, while also making it less relevant outside the context of US law. Justice O'Connor, by contrast, made a broad assessment of the social and political consequences of allowing takings in cases like *Kelo*, an assessment that seems to be of general relevance to any jurisdiction where commercial interests benefit from the power of eminent domain. Her analysis culminates in the following warning:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[170]

The values Justice O'Connor relies on here are closely related to the values associated with the notion of human flourishing, particularly those relating to the political function of property as an anchor for community and democracy. Importantly, cases like *Kelo* not only appear to threaten individual entitlements of owners. They also appear to threaten equality in civic society, as the economic rationality used to justify interference results in an implicit political statement to the effect that the property of the rich and powerful is better protected, and valued higher by the state, than property owned by regular citizens, who reside in ordinary communities.

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

170 *Kelo* (n 6) 505.

The effect of a traditional economic development taking is that property rights are transferred from the many to the few, taken from ordinary people and given to the powerful. Hence, these cases represent a possibly pernicious redistribution of property, particularly in terms of property's social function. The structural imbalances of the condemnation process itself find permanent expression in the new distribution of property. The social structures of a living community are dismantled in favour of a social structure that revolves around the commercial interest of designated companies that enjoy the support of government. The political and social power of the community is diminished, perhaps lost in its entirety, while the political and social power of designated companies increase.

It seems clear that to Justice O'Connor, this too had to be recognised as a negative consequence of the taking in *Kelo*. Again, I stress that recognising such effects appear to require a social function approach to property. There is no clearly quantifiable individual loss – no particular "stick" in the property bundle that is not compensated. Rather, it is the community itself that is lost, a community that was not directly implicated in any formal "entitlement", but which played a crucial role in providing meaning to the totality of the bundle of rights and obligations enjoyed by the owners.

Even if we extend our perspective to account for indirect individual losses, we are not doing justice to such losses. The owner might relocate, acquire new property with a similar meaning in a new community somewhere else. But that does not make up for the fact that *this* community is lost forever, as *this* property takes on new meanings and functions. The loss to Suzanne Kelo, therefore, might even be a significant loss to the City of New London, whose democracy suffers as a result of the taking.

Of course, the economic and social gains of development might outweigh such negative effects. In any event, it seems that the balancing of interests required in this regard should be carried out by an institution that sufficiently recognises the owners' right to participation and self-governance. The

presence of a highly active commercial third party, in particular, means that public participation in the standard sense might be insufficient. In economic development takings, the commercial company typically appears alongside the government, as a more or less integrated part of the institutional structure making the decision to condemn. The owners, however, do not enjoy a corresponding level of participation.

Specifically, their interests are only negatively defined. They are adversely effected and may object, but under standard administrative regimes they play no constructive role in the process. For instance, they are not called on to take part in the development itself, or to assess its merits more broadly than by being asked to respond based on their own individual entitlements. This might be one of the main problems with economic development takings, resulting in a democratic deficit. I will argue for this in more depth later, but I remark here that an important reason to focus on this aspect is that it involves precisely those values that economic development takings are most likely to threaten. Moreover, if the loss of community outweighs the positive effect of economic development, this is unlikely to be recognised following a process that relies primarily on the contribution of the developer and the expert planners.[171]

The objections made by owners may not only be given too little weight. It is also possible that owners themselves unduly focus only on the individual loss. They might not even consider those issues that are most important for property's social function. To address this concern, I do not think it is sufficient to theoretically proclaim that social function aspects need to be considered. Such aspects are likely to already form part of the package of interests that expert planners are supposed to take into account. However, to address the democratic deficit of economic development takings, it seems that institutional reforms might be in order, to give owners and their community a more significant voice in the decision-making process. This is a call for greater involvement by the local community (including, perhaps, even non-owners) in the decision-making process relating

[171] A similar point is made in Underkuffler, 'Kelo's moral failure' (n 164).

to development. It is not sufficient to merely "consult" local communities by asking if they have objections. It is also necessary to include communities in a constructive way, perhaps even be compelled to assume an active role in relation to the proposed project.

This is a proposal that envisages owners engaging directly with both government and potential developers, by considering alternative schemes, and making their own proposals. In short, this asks for a system where owners and communities are co-authors of the government's plans for their land. According to the human flourishing theory as I understand it, acting as such a co-author is not only an owners' right, but also their obligation.

This perspective gives a plausible basis on which to strike down certain kinds of economic development takings. Moreover, it allows us to do so without giving up the value of judicial deference, since it focuses on the democratic deficit rather than the exact meaning given to the notion of "public use". In addition, it is a call for institutional reform, to search for new governance frameworks that will empower owners and their communities.

It seems to me that Justice O'Connor's argument reflects some of the ideas I have sketched here. Indeed, O'Connor seems to believe that the taking of Kelo's home would be a particularly harmful interference in "just social structures". Importantly, an entitlement-based approach to *Kelo* could hardly justify the degree of disapproval seen in Justice O'Connor's opinion. After all, Kelo had been offered generous compensation, there had been no clear breach of concrete procedural rules, and the claim that the taking was *only* a pretext to bestow a benefit on Pfizer did not seem supported by the facts.[172] Rather, it was the overall character of the taking that could be used to argue that it was illegitimate. In this argument, moreover, the perceived lack of a clearly identifiable and direct public benefit was only one of several key points.

In addition, the institutional, social and political aspects of the case was considered in depth. By contrast, the economic implications appear to have been less important to Justice O'Connor.

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[172] See Bell and Parchomovsky, 'The Uselessness of Public Use' (n 144).

Even the importance of home ownership to personhood does not receive the same attention as structural aspects pertaining to good governance. The problem which overshadows everything else is the concern that economic development takings represent a form of governmental interference in property that might systematically favour the rich and powerful to the detriment of the less resourceful. Hence, such takings may help establish and sustain patterns of inequality. Hardly anyone would openly regard this as desirable. It is not hard to agree that if Justice O'Connor's predictions about the fallout of *Kelo* are correct, then it is indeed "perverse".

The question, of course, is whether her predictions are warranted. This is a call for empirical and qualitative assessment of economic development takings, a quest for understanding of how they actual affect political, social and bureaucratic processes. In addition, it raises the question of how to *avoid* negative effects, that is, how to design rules and procedures that can reduce the democratic deficit of economic development takings. These will be the main two themes that will occupy the remainder of this thesis.

I will start by recording in some more detail a tentative list of conditions that can be used for identifying those takings that qualify as evidence for eminent domain abuse, in the broader sense of that term found in Justice O'Connor's dissent. This is not a trivial task, but in the following section I present a template that I believe can prove useful, based on a proposal due to Kevin Gray.[173]

2.7 The Gray Test

Pointing to early US case law on public use as a "laboratory of elementary proprietary ideas", Kevin Gray build on the evidence found there to provide a set of conditions for recognising what he calls "predatory takings". [174] His conditions capture key aspects of eminent domain abuse that I believe

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

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

should be recognised by a theory of economic development takings inspired by the notion of human flourishing. Below, I briefly present the criteria proposed by Gray, before adding three of my own that I believe suggest themselves on the basis of the discussions presented earlier in this chapter. I will refer to the resulting set of conditions as the *Grey test*, a principled approach to assessing whether or not an act of taking warrants being taken as evidence in support of Justice O'Connor's predictions about the fallout of the deferential stance adopted in *Kelo*. Several combinations of conditions might be sufficient to justify designating a taking as eminent domain abuse. The purpose of the test is not to produce a final answer as to how a taking should be qualified. However, a commercial or private-to-private taking that fails to meet several of the criteria seem unlikely to be a classic case of abuse. On the other hand, a taking that appears to meet all of them, seem hard or impossible to designate otherwise.

Balance of Power among the Parties

In a typical case of eminent domain abuse, the parties that stand to benefit will be more economically (and politically) powerful than those from whom property is taken.[175] This can be reflected in the takers' ability to solicit legal assistance and other services to defend the taking, while the owners might be unable to launch a coordinated defence.[176] This effect, I add, is particularly likely to be noticeable early on, during the planning stages, before the decision to condemn has actually been made. After the decision, the narrow room for judicial review will in itself greatly reduce the likelihood of launching an effective defence against the taking. Hence, strict rules concerning cost reimbursement for costs incurred *after* the decision to take has already been made, is not a sufficient response to imbalance of power in legal systems that do not offer extensive judicial scrutiny of takings purposes.

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

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

The Net Effect on the Parties

A hallmark of eminent domain abuse is that the net effect of the taking becomes a "significant transfer of valued resource from one set of owner to another"[177]

Initiative

In typical cases of eminent domain abuse, the party that stands to benefit is also the party that initially made the suggestion for using eminent domain.[178] In uncontroversial cases, on the other hand, the initiative almost always comes from some government body that seeks to bestow a benefit on society as a whole, or a particular group that is found to be in need of support through the use of undertakings that necessitate the compulsory acquisition of land. The contrast between this and cases when the initiative lies with the beneficiaries themselves point to a disturbance of the decision-making underlying the decision to use eminent domain, and as such is an important hallmark of abuse.

Location

The location, in a broad sense of the word, of the property that is taken, can be a strong indicator that eminent domain is inappropriate.[179] For instance, cases involving the taking of dwellings are naturally more suspect than cases involving the taking of barren and unused plots of land.

Social Merit

If the taking is hard to justify on the basis of its social merits, this is a sign that it is inappropriate.[180] This condition essentially points to an assessment of the type of public interest narrative

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177 See Gray, 'Recreational Property' (n 20) 31.

178 See Gray, 'Recreational Property' (n 20) 32.

179 See Gray, 'Recreational Property' (n 20) 33-34.

180 See Gray, 'Recreational Property' (n 20) 34. Using lap-dancing clubs and cigarette factories as examples of purposes that are suspect. Importantly, such purposes might well fulfil a public interest requirement via the economic

that is used to justify the taking, and the kinds of public benefits that might result. If the narrative revolves solely around 'trickle-down' effects and the successful business ventures that the takings will facilitate, there is reason to be suspicious of the taking. If the taking also fails to result in clear public benefits that can be described as having social merit, this is a further sign that something is amiss.

Importantly, the language of social merit is not intended to replace the language of public use as a conclusive test of legitimacy. Rather, by analysing the taking in terms of its social merits, one gains a better understanding of where it sits on the gray scale between admissible governance and predatory exploitation.

Environmental Impact

According to Gray, a typical feature of eminent domain abuse is that it has an adverse environmental impact. Moreover, a typical feature of eminent domain abusers is that they show disregard for such adverse affects.[181]

Rider 1: Regulatory Effects

Rider 2: Impact on the Position of Non-Owners

Rider 3: Democratic Merit

2.8 Conclusion

In this chapter, I have presented the core notion of my thesis, namely that of an economic development taking. I started by noting that while the notion is straightforward to define factually, it is far from obvious what implications it has for legal reasoning. I illustrated the subtleties involved

development narrative, yet still fail a social merit test that focuses more exclusively on the social dimensions of the use to which the property will be put.

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

by considering a concrete example of a commercial scheme that looked like it might well result in compulsory acquisition of land, namely Donald Trump's controversial plans to develop a golf course on a site of special scientific interest close to Aberdeen, Scotland. In the end, the plans did *not* require takings, as Trump was able to make creative use of property rights he acquired voluntarily, against the complaints of recalcitrant neighbours.

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

To resolve this paradox, and to arrive at a better conceptual understanding of economic development takings, I looked to various theories of property. I noted that there are differences between civil law and common law theorising about property, but I concluded that these differences are not particularly relevant to the questions studied in this thesis. In particular, I observed that neither the bundle theory, dominant in the common law world, nor the dominion theory, taught to many civil law jurists, helped me clarify economic development takings as a category of legal thought.

I then went on to consider more sophisticated accounts of property, focusing on the social

function theory, which emphasises how property structures, and is structured by, social and political relations within a society. I went on to argue that in the first instance, the social function theory should be understood as giving us *descriptive* insights into the workings of property and its role in the legal order. In this regard, I advanced a different stance than many property scholars, by arguing that we should aim to decouple descriptive insights from normative aspects of the theory, to allow the social function theory to serve as a common ground for further value-driven debate.

I then went on to clarify my own starting point for engaging in such debate, by expressing support for the human flourishing theory proposed by Alexander and Peñalver. This theory is based on the premise that property *should* enable – and even compel – individuals and their communities to participate in social and political processes. I argued that property's purpose in this regard is fundamental to its proper role in a democratic society, as an anchor for participatory decision-making.

Moreover, I noted that the human flourishing theory contains a further important insight, concerning the scope of the state's power to protect. In particular, the theory asks us to recognise that protecting property against interference that is harmful to human flourishing is a responsibility that the state has even in cases when the individual owners themselves neglect to defend their property, for instance as a result of financial incentives to remain idle. In other words, some functions of property are such that owners have an obligation to preserve them, while the state has a duty to protect them, potentially even against the will of the owners.

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

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

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

3 Taking Property for Profit

3.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 The "Underscrutinised" Language of Economic Development

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

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

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

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

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

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

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

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

3.2. THE "UNDERSCRUTINISED" LANGUAGE OF ECONOMIC DEVELOPMENT

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

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

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

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

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

9 See Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (n 15) 33.

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

11 See Mehta (n 17) 143-144 ("the power of eminent domain has been interpreted as being close to absolute power of the State over all land and interests in land within its territory. The effect of this has been that those without access to land and rights over land (including the landless, artisans, women as a composite group), those who may have use rights but no titles, communities holding common rights and others with inchoate interests, have had to bear the burden heaved on to them by eminent domain.")

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

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

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

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

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

14 As discussed in Chapter 2, Section 6.3.2.

communities.

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

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

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

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

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

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

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

3.3 Economic Development Takings in England

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

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

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

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

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

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

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

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

18 Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765–1769* (n 24) 134-135.

not compulsion was warranted.[19]

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

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

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

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

20 See Allen, *The Right to Property in Commonwealth Constitutions* (n 24) 204.

21 Allen, *The Right to Property in Commonwealth Constitutions* (n 24) 204. See generally RW Kostal, *Law and English Railway Capitalism* (Clarendon Press 1997).

22 Allen, *The Right to Property in Commonwealth Constitutions* (n 24) 204.

23 Arguably, the social function perspective is the key to understanding why this happened. Indeed, the expanded use of private takings in England during the 19th century, particularly in connection with the railways, might have served a more easily justifiable social function than that commonly associated with economic development takings today. Waring, in particular, notes how railway takings tended to affect aristocratic landowners rather than marginalised

became less controversial.

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

More recently, the Human Rights Act 1998 adds to this picture, since it incorporates the property clause in P1(1) into English law. Even so, the usual approach in England is to judge objections against compulsory purchase orders on the basis of the statutes that warrant them, rather than constitutional principles or human rights provisions that protect property.[26] It is typical for statutory authorities to include standard reservations to the effect that some public benefit must be identified in order to justify a compulsory purchase order, but the scope of what constitutes a legitimate purpose can be very wide. For instance, to warrant a taking under the Town and Country Planning Act 1990, it is enough that it will "facilitate the carrying out of

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groups ("unlike private takings today, the railway legislation was most likely to affect those who could best defend their property rights from attack"), see **waring09**

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

[25] See Taggart (n 24).

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

development, redevelopment or improvement on or in relation to the land".[27]

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

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

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

27 Town and Country Planning Act 1990 s 226.

28 See **waring09**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 80-84.

39 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 81.

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

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

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

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40 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 73-79.

41 Town and Country Planning Act 1990, s 336.

42 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 70.

43 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 81.

44 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 81.

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

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

3.3.2 *Smith & Others v Secretary of Stare for Trade and Industry*

In the case of *Smith & Others v Secretary of State for Trade and Industry*, a caravan site was compulsorily acquired for development in connection with the London Olympic Games.[46] Some of the owners protested, including Romany Gypsies who used the caravans as their primary residence. A public inquiry was held, after which the inspector recommended that the CPO should not be confirmed until adequate relocation sites had been identified. However, due to the "urgency, timing and importance" of the project, the Secretary of State decided to go ahead before a relocation scheme was put in place (although he expressed commitment to ensuring satisfactory relocation).[47] The owners argued that without satisfactory relocation plans, the interference in the property rights was not proportional and had to be struck down on the basis of human rights law, in particular Article 8 in the ECHR regarding respect for the home and private life.[48]

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45 *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* (n 46) 84.

46 *Smith and Others v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), (2008) 1 WLR 394.

47 *Smith and Others v Secretary of State for Trade and Industry* (n **??**) 10.

48 *Smith and Others v Secretary of State for Trade and Industry* (n **??**) 27-51.

The Court of Appeal considered the matter in great depth, applying the doctrine of proportionality developed at the ECtHR. Importantly, this doctrine was understood to go beyond the standard form of judicial review required under English law. However, the Court still concluded that the taking was proportional. This was largely based on the finding that "the issue of proportionality has to be judged against the background that everyone accepts that an overwhelming case has been made out for compulsory acquisition of the sites for the stated objectives and that compulsory purchase is justified."[49]

Justice Williams arrived at this conclusion after noting that the owners' *only* substantial objection against the CPO was that it was confirmed before adequate relocation measures had been agreed on.[50] Hence, the question, as he saw it, did not concern the validity of using compulsory purchase powers, but merely the timing with which it had been ordered. On this basis, he framed the question of legitimacy as one relating to the "necessity" standard, according to which an infringement of Convention rights is only permissible when the public interest cannot be served in some other way.[51] A strict reading of this standard holds that an interference must be the *least intrusive means* of achieving the stated aim.[52]

Justice Williams argued against such a strict reading, subscribing instead to a view expressed as an *obiter* in the case of *Pascoe v The First Secretary of State*. According to this view, an interference need not be the least intrusive means. Rather, it is sufficient that the measure is "reasonably necessary" to achieve that aim.[53] However, while noting his agreement with this approach, Justice

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49 *Smith and Others v Secretary of State for Trade and Industry* (n **??**) 42.

50 *Smith and Others v Secretary of State for Trade and Industry* (n **??**) 42.

51 *Smith and Others v Secretary of State for Trade and Industry* (n **??**) 43.

52 Such a standard has been adopted in some Convention cases, for instance in *Samaroo v Secretary Of State For Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150.

53 See *Pascoe v The First Secretary of State* [2006] EWHC 2356, [2007] 1 EWHC 885, 74-75 (quoting *Clays Lane Housing Co-Operative Ltd, R (on the application of) v Housing Corporation* [2004] EWCA Civ 1658, (2005) 1 WLR 2229, 25).

Williams went on to also apply the stronger necessity test, and found that even if this was applied the CPO in question would still be a proportional interference.[54]

It seems clear that while the taking in question was for economic and recreational development purposes, the case was marked by a preliminary finding to the effect that the legitimacy of the aim of interference – to facilitate the London Olympics – was beyond reproach. Hence, there was no need for, or even room for, more detailed purposive reasoning of the kind that would later be applied by Lord Walker in *Sainsbury*. The fact that the taking was for economic development and recreation, not for a pressing public need, was not considered relevant. Moreover, since the case was construed to be solely about the extent to which the CPO was "necessary" to further its stated aim, the proportionality test that was carried out, despite being detailed, was very narrow in scope. It concerned only proportionality of the means, not of the aim itself. The question of how to weigh the public interest in a multi-billion dollar sporting event against the security of someone's home was not considered.

In later cases, a dismissive attitude towards substantive review has been adopted even in situations when the owners have argued against takings by explicitly questioning the proportionality of the interference against the importance of the aim.

3.3.3 *Alliance Spring Co Ltd v The First Secretary of State*

In the case of *Alliance Spring Co Ltd v The First Secretary of State*, a large number of properties were expropriated to build a new football stadium for the football club Arsenal.[55] Some owners who stood to lose their business premises protested, pointing to the fact that the inspector in charge of the public inquiry had recommended against the takings.[56] According to Justice Collins, the main

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54 *Smith and Others v Secretary of State for Trade and Industry* (n **??**) 41-50.

55 *Alliance Spring Co Ltd v The First Secretary of State* [2005] EWHC 18 (Admin).

56 *Alliance Spring Co Ltd v The First Secretary of State* (n 63) 6-7.

argument that the owners relied on when protesting the taking was that it did not serve a "proper purpose".[57] This argument was not held to be valid, however, with Justice Collins concluding as follows:

> There is nothing in the material put before and accepted by the Inspector which persuades me that that decision was ill founded or was one which the Secretary of State was not entitled to reach. Developments which result in regeneration of an area are often led by private enterprise. Mr Horton perforce accepts that that is so, but submits that this is not the sort of situation where, for example, a private development is the anchor for a particular scheme. I disagree.[58]

Hence, unlike the case of *Smith*, where the Court did in fact carry out its own assessment of proportionality, the *Alliance* Court was content with deferring to the assessment carried out by the executive branch.[59] As such, the case appears to follow the pattern of judicial review of CPOs established before the Human Rights Act 1998. This means that the decision also contrasts with how English courts have approach the Convention in relation to other rights, such as those of Article 8 addressed in *Smith*.

Whether the approach taken in *Alliance* is good law after *Sainsbury* is unclear; judging from Lord Walker's opinion, it seems that a more substantive assessment might be required for similar cases in the future. While this might not imply a different outcome for a case like *Alliance*, it would mean that courts would have to engage in independent review of the purpose and merits of contested CPOs that benefit commercial actors. In particular, English courts would have to change the way they approach such cases, by being better prepared to assess for themselves whether a

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57 *Alliance Spring Co Ltd v The First Secretary of State* (n 63) 19.

58 *Alliance Spring Co Ltd v The First Secretary of State* (n 63) 19.

59 This has been criticized, e.g., by Kevin Grey who describes the reference to Convention Rights in Alliance as "worryingly brief". See Gray, 'Recreational Property' (n 13).

fair balance is struck between the interests of the developer and the property owners. Hence, it is not unlikely that the category of economic development takings will become an important point of reference in the future, both for the law and those who study it.

3.4 The Property Clause in the European Convention of Human Rights

The standard account of the protection against interference inherent in P1(1) describes it as consisting of three rules.[60] First, there is the rule of *legality*, asserting that an interference needs to be authorized by statute. Second, there is the rule of *legitimacy*, making clear that interference should only take place in pursuance of a legitimate public purpose. The third rule is the "fair balance" principle, requiring proportionality between the means and the aims in cases involving property interference.[61]

The starting point for property adjudication at the ECtHR is that States have a "wide margin of appreciation" with regard to the legitimacy question.[62] This question is thought to depend on democratically determined policies to such an extent that it is rarely appropriate for the Court to censor the assessments made by member states. At the same time, the Court has gradually adopted a more active role in assessing whether or not particular instances of interference are proportional and able to strike a fair balance between the interests of the public and the property owners. As argued by Allen, this has caused P1(1) to attain a wider scope than what was originally intended by the signatories.[63]

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

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

62 See *James* (n **??**) para 54.

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

In the early case law behind this development, the focus was predominantly on the issue of compensation, with the Court gradually developing the principle that while P1(1) does not entitle owners to full compensation in all cases of interference, the fair balance will likely be upset unless at least some compensation is paid, based on the market value of the property in question.[64]

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

Less obviously, a similar sentiment appears to be behind the Court's reasoning in recent cases involving rent control schemes and housing regulation.[65] There are obvious financial interests at stake in such cases, for both landlords and tenants. However, the Court has addressed these cases by looking to the fairness of the underlying regulation more generally, by critically evaluating the social, economic and political context. Moreover, the Court has not shied away from using concrete cases as a starting point for providing an assessment of the sustainability of national provisions as such.

3.4.1 *Hutten-Czapska v Poland*

The striking conclusion in *Hutten-Czapska v Poland*, which makes it interesting for the questions studied in this thesis, was that it demonstrated "systemic violation of the right of property".[66] The case concerned a house that had been confiscated during the Second World War. After the war, the property was transferred back to the owners, but in the meantime, the ground floor had been assigned to an employee of the local city council. The state implemented strict housing regulations

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

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

66 *Hutten-Czapska* (n **??**) para 239.

during this time, which eventually led to the applicant's house being placed under direct state management.[67] Following the end of communist rule in 1990, the owners were given back the right to manage their property, but it was still subject to strict regulation that protected the rights of the tenants.[68] In addition to rent control, rules were in place that made it hard to terminate the rental contracts. Hence, it became impossible for the owners to make use of the house themselves.[69]

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

The financial consequences for the owners were considered to shed light on a broader question of sustainability, as was the financial situation of the tenants.[70] The Court was particularly concerned with the fact that the total rent that could be charged for the house in question was not sufficient to cover the running maintenance costs.[71] In particular, it was noted that the consequence of this would be "inevitable deterioration of the property for lack of adequate investment and modernisation".[72]

In the end, the Court highlighted how three factors combined to bring both owners and their properties to a precarious position. First, the rigid rent control system made it hard to sustainably manage rental property. Second, tenancy regulation made it hard for owners to terminate tenancy

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67 *Hutten-Czapska* (n **??**) paras 20-31.

68 *Hutten-Czapska* (n **??**) paras 31-53.

69 *Hutten-Czapska* (n **??**) paras 20-53.

70 *Hutten-Czapska* (n **??**) paras 60-61.

71 *Hutten-Czapska* (n **??**) para 224.

72 *Hutten-Czapska* (n **??**) para 224.

agreements. Third, the Court noted that the state itself had set up these tenancy agreements during the days of direct state management, shedding doubt on the legitimacy of the commitments that these contracts imposed on owners. In combination, these factors led the Court to conclude that a fair balance had not been struck.[73]

The contextual nature of the Court's reasoning in *Hutten-Czapska* is evidenced not only by the extent to which the concrete circumstances were assessed against the goal of fairness. It is also illustrated by how the Court explicitly places the "social rights" of the tenants on equal footing with the property rights of the owners.[74] The result, therefore, was not premised on a narrow understanding of property protection as an individual entitlement, but on a broader vision of property as a social institution.

It is also of interest to note how the Court concludes that the root of the problem is with the Polish legal order as such. In this regard, great weight is placed on the observation that the regulatory system suffers from a lack of adequate safeguards to protect owners against imbalances such as those identified in *Hutten-Czapska*. In particular, the Court reflects on the position of owners and comments on "the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with the maintenance of property or to have the necessary repairs subsidised by the State in justified cases". Hence, the rent control scheme alone was not the whole problem, the Court also criticised what it saw as a defective way of implementing it.[75] Moreover, the Court did not censor the political reasoning that motivated Polish housing legislation, but concluded instead that the "burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole".

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[73] *Hutten-Czapska* (n **??**) paras 224-225.

[74] *Hutten-Czapska* (n **??**) para 225.

[75] *Hutten-Czapska* (n **??**) para 224.

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

Instead, the aim should always be to get at the systemic features that cause perceived imbalances. As in *Hutten-Czapska v Poland Hutten-Czapska*,[76] the Court serves its function best when it is able to use concrete information about a suspect case to identify a sense in which the domestic legal order needs to be improved to better comply with human rights standards. This is particularly true when, as in that case, the Court notes that the applicants have insufficient options available for achieving a fair balance by appealing to institutions within the domestic legal order. By demanding *institutional* changes, the Court effectively delegates responsibility for ensuring the kind of fair balance that is required under the ECHR. Moreover, by scrutinizing the procedures and principles that the states apply when fulfilling this duty, it is likely that the Court will still be able to steer and unify the development of the case law.

Importantly, they would then be able to do so without having to engage extensively in concrete assessments of fairness. Against this, one may argue that the judicial or administrative bodies of the signatory states can easily circumvent their obligations by giving a superficial or biased assessment of the facts in human rights cases, to avoid embarrassment for the state's political or bureaucratic

76 *Hutten-Czapska* (n **??**).

elite. However, this might then be raised as a procedural complaint before the ECtHR, resulting in cases revolving around Articles 6 (fair trial) and 13 (effective remedy).[77] In this way, the Court can streamline its functions, by always aiming to direct attention at issues that arise at a higher level of abstraction. This, in my view, is desirable. The ECtHR should not aim to micromanage the signatory states, particularly not in relation to a norm such a P1(1), which the Court itself regards as highly dependent on context.

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

By shifting attention towards the institutional context of the primary decision-maker, the Court can also avoid getting stuck in deference to domestic judicial bodies. This can then be accomplished alongside a shift of attention away from concrete assessment of alleged violations. The Court can achieve this by concretely and critically assessing those rules and procedures that are identified as causally significant to individual complaints, at the administrative rather than the judicial level.[78]

Indeed, the case of *Hutten-Czapska* appears to be suggestive of a move towards such a perspective. While the Court went into great detail about the facts of the case, it *also* looked at the case from an alternative perspective, more in line with the suggestion sketched above. In fact, I think it is likely that the Court will eventually veer even more towards such an approach, while

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

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

deferring to national judicial bodies when it comes to concrete factual assessments. If not as a result of policy, I imagine this will happen from necessity, due to the limited capacity of the Court to hear the merits of individual cases.

The proportionality doctrine could still be applied, but approached in more abstract terms as the question of what kinds of rules, and what kinds of institutions, member states need to put in place to ensure fairness. This perspective appears to have been adopted in the case of *Lindheim and others v Norway*. Here the applicants complained that their rights had been violated by a recent Norwegian act that gave lessees the right to demand indefinite extensions of ground leases on pre-existing conditions.[79] In the end, the Court concluded that there had indeed been a breach of P1(1). They engaged in the same form of assessment that they had adopted in *Hutten-Czapska v Poland Hutten-Czapska*.[80] Moreover, they concluded that the Ground Lease Act 1996 as such was the underlying source of the violation – the problem was not merely that this act had been applied in a way that offended the rights of the applicants. In light of this, the Court did not only award compensation, it also ordered that general measures had to be taken by the Norwegian state to address the structural shortcomings that had been identified.

The Court also commented that its decision should be regarded in light of "jurisprudential developments in the direction of a stronger protection under Article 1 of Protocol No. 1".[81] However, in light of the change in perspective that accompanies this development, it is interesting to ask in what sense the protection is stronger. In particular, it is not *prima facie* clear that the Court's remark should be read as a statement expressing a change in its understanding of the content of individual rights under P1(1). Rather, it may be read as a statement to the effect that the Court now assumes it has greater authority to address structural problems under that provision. In ef-

79 *Lindheim and others v Norway* (n **??**) para 119.

80 *Hutten-Czapska* (n **??**).

81 *Lindheim and others v Norway* (n **??**) para 135.

fect, this allows the Court to conclude that a violation has occurred due to structural unfairness, even when it is not possible to trace this back to any flawed decision that specifically targets the applicants.

3.4.2 How Would the ECtHR Approach an Economic Development Taking?

Is the jurisprudential developments illustrated by the rent control cases relevant to the issue of economic development takings? I believe so. Indeed, I am struck by how the reasoning of the ECtHR in recent cases on hunting and rent control mirrors the kind of reasoning that Justice O'Connor engaged in when considering *Kelo*.[82] The emphasis is on structural aspects and fairness, grounded on the facts of the concrete case, but mainly interested in what these facts reveal about the rules and procedures involved.

This is a contextual approach that can maintain a broad focus without loosing its bite. The crux of arguments used to conclude violation is the observation that the system currently in place can offend against the role that owners *should* occupy in order to be able to meet those obligations and exercise those freedoms that are attached to the properties they posses.

On this narrative, interference becomes illegitimate when it demonstrates a failure of governance. In the case of *Hutten-Czapska v Poland Hutten-Czapska*,[83] this boiled down to the observation that it was illegitimate to address problems in the Polish housing sector by placing the burden "on one particular social group", namely the owners.[84] This conclusion was backed up by the concrete observation that the rules and procedures in place meant that owners who were obliged to maintain their properties in good condition for their tenants were in fact prevented from doing so because they were not permitted to charge rents that would cover the costs.

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[82] See *Kelo v City of New London* 545 US 469 (2005).

[83] *Hutten-Czapska* (n **??**).

[84] *Hutten-Czapska* (n **??**) para 225.

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

To conclude, I think the ECtHR would have been likely to approach a case like *Kelo* in a manner consistent with Justice O'Connor's approach. Whether they would reach the same conclusion seems more uncertain, particularly since confidence in the nation states' ability and willingness to regulate private-public partnerships might be higher in Europe.[85] However, it seems unlikely that the ECtHR would follow the majority in *Kelo*, by simply deferring to the determinations made by the granting authority. Moreover, with the recent change in perspective towards structural assessment of property institutions, Justice O'Connor's predictions about the "fallout" of the *Kelo* decision would likely have been of significant interest to the justices at the Court in Strasbourg.

3.5 The US Perspective on Economic Development Takings

In this section, I consider US law in more depth. First, I track the development of the case law on the public use restriction found in the Fifth Amendment and in various state constitutions. I consider the jurisprudential development from the early 19th century up to the present day.[86] Many writers assert that case law from the 19th and early 20th century was characterised by a tension between 'narrow' and 'broad' readings of the notion of public use.[87] Adding to this, I argue that while

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

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

87 See, e.g., Walt (n 21) 483; Allen, *The Right to Property in Commonwealth Constitutions* (n 24) 203-204. For a more in-depth argument asserting the same, see Philip Nichols, 'The Meaning of Public Use in the Law of Eminent Domain' (1940) 20 Boston University Law Review 615.

different state courts expressed different theoretical views on the meaning of "public use", there was a growing consensus that the approach to judicial scrutiny should be contextual, focused on weighing the rationale of the taking against the social, political and economic circumstances.[88] In particular, early state courts did not focus unduly on the exact wording of constitutional property clauses.

Following up on this, I argue that the doctrine of deference that was developed by the Supreme Court early in the 20th century was directed primarily at state courts, not state legislatures and administrative bodies.[89] I then present the case of *Berman*, arguing that it was a significant departure from previous case law.[90] After *Berman*, deference was now taken to mean deference to the (state) legislature, meaning that there would be little or no room for judicial review of the takings purpose.

This paved the way for the infamous case of *Poletown*, where a neighbourhood of about 1000 homes was razed in order to provide General Motors with land to build a car factory.[91] I note how *Berman* provided a key authority used by the state court to uphold this taking. *Poletown* in turn links up with the even greater controversy surrounding *Kelo*, the eventual backlash of the deferential stance introduced in *Berman*.

After the historical overview, I go on to briefly present the vast amount of research that has targeted economic takings in the US after *Kelo*. I devote special attention to a proposal due to Heller and Hills, who propose a new institution that can replace eminent domain as a mechanism for land assembly in case of economic development.[92] This proposal will serve as important reference

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

89 See *City of Cincinnati v Vester* 281 US 439 (1930) (echoing and citing *Hairston v Danville & W R Co* (n 96)).

90 *Berman v Parker* (n **??**).

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

92 Heller and Hills (n 10).

point later on, when I consider the Norwegian land consolidation courts in Chapters 6.

3.5.1 The History of the Public Use Restriction

Going back to the time when the Fifth Amendment was introduced, there is not much historical evidence explaining why the takings clause was included in the Bill of Rights.[93] Moreover, there is little in the way of guidance as to how the takings clause was originally understood. James Madison, who drafted it, commented that his proposals for constitutional amendments were intended to be uncontroversial.[94] Hence, it is natural to regard the property clause as a codification of an existing principle, not a novel proposal. Indeed, several state constitutions pre-dating the Bill of Rights also included takings clauses, seemingly based on codifying principles from English common law.[95] As Meidinger notes, the Americans had never really charged the British with abuse of eminent domain, and private property had tended to be respected, also in the colonies.[96] This undoubtedly influenced early US law.

Just like English scholars at the time, early American scholars emphasised the importance of private property. For instance, in his famous *Commentaries*, James Kent described the sense of property as "graciously implanted in the human breast" and declared that the right of acquisition "ought to be sacredly protected".[97] Indeed, the Supreme Court itself expressed similar sentiments early on, when it spoke of the impossibility of passing a law that "takes property from A and gives

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93 See Fifth Amendment to the US Constitution 1791.

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

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

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

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

it to B".[98]

However, just as would happen in England, this early US attitude would soon change in response to industrial advances and a desire for economic development. As the 19th century progressed, eminent domain was used more frequently, now also to benefit (privately operated) railroad operations, hydroelectric projects, and the mining industry.[99] During this time, it also became increasingly common for landowners to challenge the legitimacy of takings in court, undoubtedly a consequence of the fact that eminent domain was used more widely, for new kinds of projects.[100] Controversy arose particularly often with respect to the so-called mill acts.[101] Such acts were found throughout the US, many of them dating from pre-industrial times when mills were primarily used to serve the farming needs of agrarian communities.[102] Following economic and technological advances, provisions originally enacted to serve local farming purposes were now being used by developers wishing to harness hydropower for manufacturing and hydroelectric plants.[103]

It is important to note, however, that mill acts could not be used to authorise large-scale compulsory transfer of natural resources from owners to non-owners. Rather, mill acts provided management tools that could be used to ensure that owners of water resources could make better use of their rights. This would sometimes involve allowing riparian owners to interfere with, or take a necessary part of, the property of their neighbours, e.g., by constructing dams that would flood

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

99 Meidinger (n 102) 23-33.

100 Meidinger (n 102) 24.

101 Meidinger (n 102) 24. See also Johnson (n 101) 306-313 and Morton J Horwitz, 'The Transformation in the Conception of Property in American Law, 1780-1860' (1973) 40 University of Chicago Law Review 248, 251-252.

102 A total of 29 states had passed mill acts, with 27 still in force, when a list of such acts was compiled in *Head v Amoskeag Mfg Co* 113 US 9, 17 (1885). According to Justice Gray, at pages 18-19 in the same, the "principal objects" for early mill acts had been grist mills typically serving local agrarian needs at tolls fixed by law, a purpose which was generally accepted to ensure that they were for public use.

103 See, e.g., *Head* (n 109) 18-21 and *Minnesota Canal & Power Co v Koochiching Co* 97 Minn 429, 449-452 (1906).

neighbouring land.[104] However, the primary purpose of most mill acts was to facilitate rational coordination among owners, to the benefit of their community as a whole. This point was frequently made by the courts to justify upholding takings on the basis of mill acts, including takings that would benefit the manufacturing industry.[105]

As the industrial use of mill acts increased in scope, the original aim of these acts gradually became overshadowed by the strength of the commercial interests involved, leading to public use controversy relating to provisions that had not previously raised any such doubts.[106] This mechanism, deeply dependant on the social and economic context, underscores the appropriateness of adopting a social function perspective on the relevant body of case law. More generally, it seems that most of the early case law on the public use test from US state courts is characterised by a contextual understanding of property protection. In the following, I explore this in some further detail.

3.5.2 Legitimacy in State Courts

When considering objections to the legitimacy of takings, state courts would not look to the federal Takings Clause directly, but rather base their decisions on corresponding property clauses from their own respective state constitutions.[107] Indeed, it was not until the late 19th century that state takings came to be regularly scrutinized at the federal level.[108]

When a state court upheld an interference that would benefit commercial interests, it would

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104 See *Head* (n 109) (a mill case adjudicated by the Supreme Court, including a summary of mill acts and case law from various states). See also Abram P Staples, 'The Mill Acts' (1903) 9(4) The Virginia Law Register 265, 265.

105 See *Fiske v Framingham Mfg Co* 12 Pick 68 (1831). See also the discussion (including references to other cases) in *Head* (n 109).

106 See **head86**

107 Not all states had such property clauses, and exact formulations varied, but a public use requirement was typically observed, see Johnson (n 101) 293-296.

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

typically emphasise the broader purpose, often focusing on economic ripple effects.[109] By contrast, when a court decided that an interference was unconstitutional, it would often focus on the concrete use made of the property that was taken, pointing out that it did not directly benefit the public in the sense required by the public use restriction.[110] Sometimes, the question of legitimacy would turn on how widely the notion of 'use' was understood. Should this notion be interpreted narrowly, as requiring that the property had to be literally used by the public, or could it be understood broadly, as pointing to a public purpose or benefit of some sort?[111]

This tension between broad and narrow readings of the public use clause have received much attention from legal scholarship.[112] However, when studying the case law in more depth, a complementary picture emerges, testifying to some cohesion in the states' jurisprudence. Regardless of their reading of the public use requirement, state courts seem to have agreed that the question of what counted as a public use was a judicial question that should be assessed concretely, not abstractly.

A good example is the case of *Dayton Gold & Silver Mining Co v Seawell*, concerning an act that gave mineral owners a right to acquire additional rights needed to facilitate extraction.[113] The Supreme Court of Nevada decided that the act was constitutional on the basis of a highly contextual reading of the public use requirement in the property clause of the Constitution of

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109 See, e.g., *Hazen v Essex Co* 66 Mass 475 (1853); *Scudder v Trenton Delaware Falls Co* 1 NJ Eq 694 (1832); *Boston & Roxbury Mill Corp v Newman* 29 Mass 467 (1832). A more comprehensive list of cases adopting a broad view can be found in Nichols (n 95) 617.

110 See, e.g., *Sadler v Langham* 34 Ala 311 (1859); *Ryerson v Brown* 35 Mich 333 (1877); *Gaylord v Sanitary Dist of Chicago* 68 NE 522 (1903); *Minnesota Canal & Power Co v Koochiching Co* (n 109). A more comprehensive list can be found in Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 'American Law Reports' (1928).

111 According to Nichols, the narrow view emerged as the "majority" opinion on public use, see (Nichols [n 95] 617-618). But contrast this with Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1978) 57 Oregon Law Review 203 and Meidinger (n 102) 24, who argue that the narrow view was only dominant in a handful of states, led by New York.

112 See Nichols (n 95); Berger (n **??**); Meidinger (n 102); Johnson (n 101).

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

Nevada. Interestingly, the Court argued against a literal (narrow) reading on the basis that such a reading would ultimately provide *weaker* protection of property:

> If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. [...] Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor.[114]

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

The Court follows up on its reading of the public use requirement by giving a highly contextual assessment of the takings purpose. Specifically, it considers the social and economic importance of mining, concluding that it is the "greatest of the industrial pursuits" and that all other interests are "subservient" to it.[115] Indeed, the Court goes as far as to conclude that the benefits of the

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

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

mining industry are "distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills".[116] On this basis, the Court upholds the taking.

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

The Court noted the importance of deference to the legislature on matters of policy, but qualified this by remarking that any authority to take property had to be "enforced by the courts so as to prevent its being used as an instrument of oppression to any one".[117] Furthermore, the Court was convinced that its contextual approach in this regard would generally offer *increased* protection of private property compared to more formalistic approaches. The Court summarised its view on this as follows:

> Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent.[118]

The *Seawell* case is not unique. For another example, I mention *Ryerson v Brown*, a case often cited as an authority for a narrow view of public use.[119] Here the taking in question was held to

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

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

[118] *Dayton Gold & Silver Mining Co v Seawell* (n **??**) 398.

[119] *Ryerson v Brown* (n **??**).

be unconstitutional. However, the Supreme Court of Michigan qualified also made clear that it was "not disposed to say that incidental benefit to the public could not under any circumstances justify an exercise of the right of eminent domain".[120]

The case concerned the constitutionality of a taking under a mill act, and while the court argues that public use should be taken to mean "use in fact", it is clear that "use" is understood rather loosely, not literally as physical use of the property that is taken.[121] Moreover, when clarifying its starting point for judicial scrutiny, the court explains that "in considering whether any public policy is to be subserved by such statutes, it is important to consider the subject from the standpoint of each of the parties". Following up on this, the court finds, with respect to the case in question, that "the power to make compulsory appropriation, if admitted, might be exercised under circumstances when the general voice of the people immediately concerned would condemn it". On thi basis, the Court strikes down the taking, summing up its factual assessment as follows: "what seems conclusive to our minds is the fact that the questions involved are questions not of necessity, but of profit and relative convenience".[122]

Hence, far from nitpicking on the basis of the public use phrase, the court adopts a contextual approach to takings that is rather similar to the approach of *Dayton Gold & Silver Mining Co. v. Seawell*. The outcome is different, but it is also based on a different assessment of the context and the consequences of the takings complained about. Importantly, the case does not rest on any *a priori* assumption that economic development takings of the kind in question could not meet

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120 *Ryerson v Brown* (n **??**) 337.

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

122 *Ryerson v Brown* (n **??**) 336.

a public use test – no general rule is relied on at all. Hence, it is somewhat strange that later commentators have focused on the case for its ambiguous comments on public use as "public in fact" rather than its broad and well-reasoned assessment of actual legitimacy.[123]

Many of the important cases from the late 19th century, on both sides of the public use debate, share crucial features with the two cases discussed above.[124] Hence, a shared trait appears to have emerged among state courts during this period, namely a willingness to engage in broad judicial scrutiny of the legitimacy of economic development takings. Indeed, state courts appear to have been conscious of the special legitimacy questions that arise when eminent domain is used to facilitate economic development through commercial enterprise. The question of how to understand public use terminology was an important part of this, but it was not considered in isolation from other aspects.

This observation is relevant when considering the takings doctrine that later developed at the federal level. In particular, the broad scrutiny offered by state courts suggests that the doctrine of extreme deference that was about to be adopted by the Supreme Court resulted from a completely new development, not a continuous broadening of the public use requirement.[125]

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123 See, for instance, Justice Thomas' dissent in *Kelo*, *Kelo* (n 87) 513 (using *Ryerson* as a reference to support an 'actual use' interpretation of the public use requirement in the fifth amendment).

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

125 This contrasts with the argument given by the majority in *Kelo*, see *Kelo* (n 87) 479-480 (placing the doctrine of deference in a tradition emerging from how the narrow view of some early state courts "steadily eroded" because of the "diverse and always evolving needs of society").

3.5.3 Legitimacy as Discussed by the Supreme Court

Initially, the Supreme Court held that the takings clause in the US Constitution did not apply to state takings at all.[126] Federal takings, on the other hand, were of limited practical significance since the common practice was that the federal government would rely on the states to condemn property on its behalf.[127]

This changed towards the end of the 19th century, particularly following the decision in *Trombley v Humphrey*, where the Supreme Court of Michigan struck down a taking that would benefit the federal government.[128] Not long after, in 1875, the first Supreme Court adjudication of a federal taking occurred, marking the start of the development of the federal doctrine on public use and legitimacy.[129]

At the same time, the Supreme Court began to hear takings cases originating from the states, first on the basis of the due process clause of the fourteenth amendment, introduced after the civil war.[130] Later, in 1897, the Supreme Court held that state takings could be scrutinized also against the takings clause of the fifth amendment.[131]

The early 20th century was a period of great optimism about the ability of *laissez faire* capitalism to ensure progress and economic growth, a sentiment that was reflected in the federal case law on eminent domain. A particularly clear expression of this can be found in *Mt Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co.*[132] This case dealt with the legitimacy of condemnation arising from the construction of a hydropower plant. The Supreme Court held that it

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

127 Meidinger (n 102) 30.

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

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

130 See, e.g, *Head* (n 109).

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

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

was legitimate, with the presiding judge arguing briskly as follows:

> The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. The respect due to the judgment of the state would have great weight if there were a doubt. But there is none.[133]

On the one hand, the Court notes the importance of deference to the *state* judgement (not specifically the judgement of the state legislature). On the other hand, it prefers to conclude on the basis of its own assessment of the purpose of the taking. This assessment, however, is not grounded in the facts of the case or the circumstances in Alabama. Rather, it is based on sweeping assertions about "all our welfare" and the desire to "save mankind from toil that it can be spared". This marks a contrast with the approach of state courts, as discussed in the previous subsection.

The contrast was even greater in cases when the takings in question had been authorised by the federal government itself. In such cases, the Supreme Court showed little willingness to subject takings purposes to public use scrutiny. In *United States v Gettysburg Electric Railway Co*, a

[133] *Mt Vernon-Woodberry Cotton Duck Co* (n **??**) 32.

case from 1896, deference to the legislature in federal takings cases was referred to as a principle that should be observed unless the judgement of the legislature was "palpably without reasonable foundation".[134]

However, such a deferential stance was not adopted in cases originating from the states. In *Cincinatti v Vester*, a case from 1930, the Supreme Court commented that "it is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one".[135] In this judgement, Chief Justice Hughes also describes how the judicial assessment of the public use question should be carried out:

> In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[136]

Notice how this echoes the contextual approach developed at the state level, while explicitly prescribing deference to state *courts*. In the earlier case of *Hairston v Danville & W R Co*, from 1908, the same idea was expressed by Justice Moody, who surveyed the state case law and declared that "the one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."[137] Justice Moody continued by describing in more depth the typical approach of the state courts in determining public use cases:

> The determination of this question by the courts has been influenced in the different

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134 *US v Gettysburg Electric R Co* 160 US 668, 680 (1896).

135 *City of Cincinnati v Vester* (n 97) 447.

136 *City of Cincinnati v Vester* (n 97) 447.

137 *Hairston v Danville & W R Co* (n 96) 606.

> states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected.[138]

Justice Moody goes on to give a long list of cases illustrating this aspect of state case law, showing how assessments of the public use issue is inherently contextual.[139] Following up on this, he points out that "no case is recalled" in which the Supreme Court overturned "a taking upheld by the state *court* as a taking for public uses in conformity with its laws" (my emphasis). After making clear that situations might still arise where the Supreme Court would not follow state courts on the public use issue, Justice Moody goes on to conclude that the cases cited "show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people".[140]

Hairston is important for three reasons. First, it makes clear that initially, the deferential stance in cases dealing with state takings was primarily directed at state courts rather than legislatures and administrative bodies. Second, it demonstrates federal recognition of the fact that a consensus had emerged in the states, whereby scrutiny of the public use determination was consistently regarded as a judicial task.[141] Thirdly, it provides a valuable summary of the contextual approach to the public use test that had developed at the state level.

The *Hairston* Court clearly looked favourably on the case law from state courts. Indeed, the judicial scrutiny provided by state courts was held to be of such high quality that there was in general little need for federal intervention. Hence, when a deferential stance was adopted in

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138 *Hairston v Danville & W R Co* (n 96) 606.

139 *Hairston v Danville & W R Co* (n 96) 607.

140 *Hairston v Danville & W R Co* (n 96) 606.

141 Indeed, *Hariston* provides the authority for *Vester* on this point. See *City of Cincinnati v Vester* (n 97) 606.

Hairston, this was contingent on the fact that state courts would continue to administer the required public use test.

Despite this, *Hairston* would later be cited as an early authority in favour of almost unconditional deference.[142] This happened in *US ex rel Tenn Valley Authority v Welch*, concerning a federal taking.[143] The Court first cited *US v Gettysburg Electric R Co* as an authority in favour of deference with regards to the public use limitation.[144] The Court then paused to note that *Vester* later relied on the opposite view, namely that the public use test was a judicial responsibility.[145] The Court then attempts to undercut this by setting up a contrast between *Vester* and *Hairston*, by selectively quoting the observation made in the latter case that the Supreme Court had never overruled the state courts on the public use issue.[146] Hence, *Hairston* is effectively used to argue against judicial scrutiny, in a manner that is quite incommensurate with the full rationale behind the Court's decision in that case.

Later, *Welch* was used as an authority in the case of *Berman v Parker*.[147] This case concerned condemnation for redevelopment of a partly blighted residential area in the District of Colombia, which would also condemn a non-blighted department store. In a key passage, the Court states that the role of the judiciary in scrutinizing the public purpose of a taking is "extremely narrow".[148] The Court provides only two references to previous cases to back up this claim, one of them being *Welch*.[149]

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142 In fact, it was cited in this way also by the majority in *Kelo*, see *Kelo* (n 87) 482-483.

143 *U S ex rel Tenn Valley Authority v Welch* 327 US 546, 552 (1946).

144 *US v Gettysburg Electric R Co* (n 143).

145 *City of Cincinnati v Vester* (n 97).

146 See *U S ex rel Tenn Valley Authority v Welch* (n **??**) 552.

147 *Berman v Parker* (n **??**).

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

149 The other case, *Old Dominion Land Co v US*, concerned a federal taking of land on which the military had already invested large sums in buildings. The Court commented on the public use test by saying that "there is nothing shown in the intentions or transactions of subordinates that is sufficient to overcome the declaration by Congress

Moreover, both of the cases cited were concerned with federal takings, while in *Berman* the Court explicitly says that deference is due in equal measure to the state legislature.[150] It is possible to regard this merely as a *dictum*, since the District of Columbia is governed directly by Congress. However, *Berman* was to have a great impact on future cases. In effect, it undermined a large body of case law on judicial scrutiny of taking purposes without engaging with it at all.

In *Hawaii Housing Authority v Midkiff*, the Supreme Court further entrenched the principle expressed in *Berman*.[151] Here the state of Hawaii had made use of eminent domain to break up an oligopoly in the housing sector. Given the circumstances of the case, it would have been natural to argue in favour of this taking on the basis that it served a proper public purpose.

However, the Court instead decided to rely on the doctrine of deference, shunning away from scrutinizing the takings purpose. Justice O'Connor, in particular, observed that "judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of eminent domain".[152]

The formulation here is slightly less absolute than that given in *Berman*. In particular, the deferential stance is not presented as a system imperative, but rather made contingent on the fact that legislatures are "better able" to assess what counts as a public purpose. Moreover, Justice O'Connor also actively refers to the merits of the taking, especially when she points out that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers".[153]

Despite these nuances, *Midkiff* reaffirmed the main principle expressed in *Berman*, namely that

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of what it had in mind. Its decision is entitled to deference until it is shown to involve an impossibility. But the military purposes mentioned at least may have been entertained and they clearly were for a public use". See *Old Dominion Land Co v US* 269 US 55, 66 (1925) A misleading and partial quote, to the effect that deference to the legislature is in order except when it involves an "impossibility", has since become commonplace. In particular, such a quote was repeated by the Supreme Court itself in the later case of *Hawaii Housing Authority v Midkiff* 467 US 229, 240 (1984).

150 *Berman v Parker* (n **??**) 32.

151 *Midkiff* (n **??**).

152 **hawaii84**.

153 **hawaii84**.

the meaning of public use is a matter for legislatures and that the room for judicial review is narrow. In light of this, it is easy to understand why *Kelo* was decided in favour of the taker. It would have been a clear break with earlier precedent on the public use restriction if the Supreme Court had chosen to decide otherwise.

Formally, the case law on the federal takings clause is not binding on state courts when they assess cases against their own constitutions.[154] Moreover, as Merrill notes, state courts have not uniformly responded by embracing deference towards their own legislatures.[155] Rather, many state courts continued to offer scrutiny of taking purposes, despite the signals coming from the federal level.[156]

It should be noted, however, that the time after *Berman* was also a time when many government bodies throughout the US would actively seek to condemn homes for redevelopment projects, to combat "blight", but often also to the benefit of commercial enterprises.[157] Hence, continued public use scrutiny at state courts might also reflect an increased threat of eminent domain abuse. Sometimes, moreover, state courts seems to have failed in their duty to offer appropriate protection.

The case of *Poletown Neighborhood Council v City of Detroit* is a classic example.[158] In this case, the Michigan Supreme Court held that it was not in violation of the public use requirement in the Michigan Constitution to allow General Motors to displace some 3500 people for the construction of a car assembly factory. The majority 5-2 cites *Berman*, commenting that the state court's room for review of the public use requirement is similarly limited.[159]

The *Poletown* decision was controversial, and the minority, especially Justice Ryan, was highly

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154 See Thomas W Merrill, 'The Economics of Public Use' (1986) 72 Cornell Law Review 61, 95.

155 Merrill (n **??**) 65.

156 Merrill (n **??**) 65.

157 See generally Wendell E Pritchett, 'The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain' (2003) 21(1) Yale Law & Policy Review 1.

158 *Poletown Neighborhood Council v City of Detroit* (n **??**).

159 *Poletown Neighborhood Council v City of Detroit* (n **??**) 632-633.

critical of it. He objects both to the deferential stance in general and to the majority reading of *Berman* in particular, pointing out that the Supreme Court's doctrine of deference outside the context of federal takings was directed at the state courts, not state legislatures.[160] Hence, as he concludes, the majority's reliance on *Berman* was "particularly disingenuous".[161]

Justice Ryan was not alone in his disapproval of *Poletown*.[162] Moreover, the case is widely regarded as the prelude to an era of increased tensions over economic development takings in the US.[163] This would culminate with *Kelo* which, despite upholding and strengthening the deferential doctrine, also inadvertently caused a shift towards stricter public use scrutiny at the state level, as discussed in the following subsection.

3.5.4 Economic Development Takings after *Kelo*

The fact that *Kelo* was decided against the homeowner met with wide disapproval among the public.[164] In addition, many scholars expressed concern that the deferential approach had been taken too far, and that economic development takings such as *Kelo* were in need of more substantive public use scrutiny by courts.[165] Moreover, following *Kelo*, much attention was directed at the perceived dangers of eminent domain abuse in the US.[166]

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160 *Poletown Neighborhood Council v City of Detroit* (n **??**) 668.

161 *Poletown Neighborhood Council v City of Detroit* (n **??**) 668.

162 Indeed, the decision would later be overturned by the Supreme Court of Michigan itself, see generally Timothy Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (2005) 28(2) Harvard Journal of Law and Public Policy 651.

163 See Sandefur, 'A gleeful obituary for Poletown Neighborhood Council v. Detroit' (n 167) 664-668.

164 See Ilya Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (2009) 93 Minnesota Law Review 2100, 2109.

165 For a small sample, see Charles E Cohen, 'Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2006) 29 Harvard Journal of Law and Public Policy 491; Laura S Underkuffler, 'Kelo's moral failure' (2006) 15(2) William & Mary Bill of Rights Journal 377; Timothy Sandefur, 'Mine and Thine Distinct: What Kelo Says About Our Path' (2006) 10 Chapman Law Review 1; Ilya Somin, 'Controlling the Grasping Hand: Economic Development Takings after Kelo' English (2007) 15(1) Supreme Court Economic Review 183; Nicholas M Gieseler and Steven Geoffrey Gieseler, 'Strict Scrutiny and Eminent Domain After Kelo' English (2010) 25(2) Journal of Land Use & Environmental Law 191.

166 See generally Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168).

Many states responded by introducing reforms aimed at limiting the use of eminent domain for economic development.[167] Within two years, 44 states had passed post-*Kelo* legislation in an attempt to achieve this.[168] Various legislative techniques were adopted. Some states, including Alabama, Colorado and Michigan, enacted explicit bans on economic development takings and takings that would benefit private parties.[169] In South Dakota, the legislature went even further, banning the use of eminent domain "(1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue".[170]

In other states, more indirect measures were taken, such as in Florida, where the legislature enacted a rule whereby property taken by the government could not be transferred to a private party until 10 years after the date it was condemned.[171] Many states also offered lengthy lists of uses that were to count as public, designed to restrict the room for administrative discretion while allowing condemnations for purposes that were regarded as particularly important.[172]

Somin points to an interesting trend, namely that state reforms enacted by the public through referendums tend to be more restrictive than reforms passed through the state legislature.[173] Many of the more radical reform proposals, moreover, did not emerge from the state government, but were initiated by activist groups as ballot measures. In some US states, initiative processes make it possible for activist groups to put measures on the ballot without prior approval by the state

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167 For an overview and critical examination of the myriad of state reforms that have followed *Kelo*, I point to Steven J Eagle and Lauren A Perotti, 'Coping with Kelo: A potpourri of legislative and judicial responses' (2008) 42(4) Real Property, Probate and Trust Journal 799. See also Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168).

168 See '50 State Report Card' (*Castle Coalition*) ⟨http://castlecoalition.org/50-state-report-card⟩ accessed 17th July 2015.

169 See Eagle and Perotti (n **??**) 107-108.

170 South Dakota Codified Laws § 11-7-22-1, amended by House Bill 1080, 2006 Leg, Reg Ses (2006).

171 Eagle and Perotti (n **??**) 809.

172 Eagle and Perotti (n **??**) 804.

173 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2143.

legislature.[174] As Somin observes, the reforms taking place via this route would be comparatively strict, testifying to the power of direct democracy.[175]

Indeed, the successes of popular anti-takings movements underscores how strongly the US public opposed the decision in *Kelo*. Surveys show that as many as 80-90 % believe that it was wrongly decided, an opinion widely shared also among the political elite.[176]

Kelo has clearly had a great effect on the discourse of eminent domain in the US. However, the effects of the many state reforms that have been enacted are less clear. According to Somin, most of these reforms have in fact been ineffective, despite the overwhelming popular and political opposition against economic development takings.[177] At the same time, property lawyers report a greater feeling of unease regarding the correct way to approach the public use requirement, expressing hope that the Supreme Court will soon revisit the issue.[178]

Why have legislative reforms proved inadequate and ineffective? Part of the reason, according to Somin, is that people are "rationally ignorant" about the economic takings issue.[179] For most people, it is unlikely that eminent domain will come to concern them personally or that they will be able to influence policy in this area. Hence, it makes little sense for them to devote much time to learn more about it. This, in turn, helps create a situation where experts can develop and sustain a system based on practices that a majority of citizens actually oppose.[180] Indeed, Somin argues that surveys show how people tend to overestimate the effectiveness of eminent domain reform,

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174 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2148.

175 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2143-2149.

176 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2109.

177 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2170-2171.

178 See MM Murakami, BCK Ace and RH Thomas, 'Recent developments in eminent domain: Public use' (2013) 45(3) Urban Lawyer 809 ("Until the Supreme Court revisits the issue, we predict that this question will continue to plague the lower courts, property owners, and condemning authorities").

179 See Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2170.

180 Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2163-2171.

possibly due to the fact that symbolic legislative measures are mistaken for materially significant changes in the law.[181]

I think Somin's analysis is on an interesting track. However, it should be noted that the notion of rational ignorance is a double-edged sword with regards to his main argument. In particular, it seems possible, in theory, that the prevailing critical attitude towards economic development takings is itself an instance of such ignorance. Perhaps people would change their opinion on economic development takings if they were better educated on the issue?

However, this possibility does nothing to detract from the main message, which is that the *Kelo* backlash have in fact caused greater insecurity about what the law is and what it delivers, often without significantly curbing those uses of eminent domain that are regarded as most problematic. Arguably, this shows that the legislative approach so far, which has focused on introducing more elaborate and detailed versions of the public use restriction, need to be supplemented by different kinds of proposals.

In this regard, it seems important to also target governmental decision-making processes regarding the use of private land for economic development. These processes, it seems, need to be imbued with greater legitimacy. In particular, it seems crucial that owners themselves should be granted a better chance to participate in the management of their own land, even when this involves deliberating on, and possibly taking part in, large-scale development projects. After all, it is the owners' and their communities' feeling that they are being treated unfairly that tend to lie at the root of controversies surrounding takings for economic development.[182]

If improved principles of governance are put in place, this alone might be enough to restore some confidence in eminent domain as a procedure by which to implement democratically accountable decisions about land use. However, it seems that eminent domain as such might often be an unduly

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[181] Somin, 'The Limits of Backlash: Assessing the Political Response to Kelo' (n 168) 2155-2157.

[182] For a similar perspective, see Underkuffler, 'Kelo's moral failure' (n **??**).

blunt instrument when society desires commercial development on private land. Instead, it might be possible to devise mechanisms for collective action that replaces the use of eminent domain altogether.

In the next section, I will consider a proposal for reform of this kind. This proposal targets the decision-making process leading to economic development by proposing a framework for land assembly that can sometimes replace the use of eminent domain.

3.6 Land Assembly Districts

Heller and Hills propose a new institutional framework for carrying out land assembly for economic development. Interestingly, it is meant to replace eminent domain altogether. The goal is to ensure democratic legitimacy while also setting up a template for collective decision-making that will prevent inefficient gridlock and holdouts.

The core idea is to introduce *Land Assembly Districts* (LADs), institutions that will enable property owners in a specific area to make a collective decision about whether or not to sell the land to a developer or a municipality.[183] The idea is that while anyone will be able to propose and promote the formation of a LAD, the official planning authorities and the owners themselves must consent before it is formed.[184] Clearly, some kind of collective action mechanism is required to allow the owners to make such a decision.

Hiller and Hill suggest that voting under the majority rule will be adequate in this regard, at least in most cases.[185]

How to allocate voting rights in the LAD is given careful consideration, with Heller and Hills

[183] Heller and Hills (n 10) 1469-1470.

[184] Heller and Hills (n 10) 1488-1489.

[185] See Heller and Hills (n 10) 1496. However, when many of the owners are non-residents who only see their land as an investment, Heller and Hills note that it might be necessary to consider more complicated voting procedures, for instance by requiring separate majorities from different groups of owners. See Heller and Hills (n 10) 1523-1524.

opting for the proposal that they should in principle be given to owners in proportion to their share in the land belonging to the LAD.[186] Owners can opt out of the LAD, but in this case, eminent domain can be used to transfer the land to the LAD using a conventional eminent domain procedure.[187]

Heller and Hills envision an important role for governmental planning agencies in approving, overseeing and facilitating the LAD process. Their role will be most important early on, in approving and spelling out the parameters within which the LAD is called to function.[188] Hence, it appears to be assumed that the planning authorities will define the scope of the LAD by specifying the nature of the development it can pursue.

A possible challenge that arises, not discussed by Heller and Hills at any length, is that the scope of the LAD needs to be broad enough to allow for meaningful competition and negotiation after LAD formation. To achieve this might be difficult, particularly in light of incentives to make the outcome of the LAD process more predictable. Indeed, both governments, initiating developers, and landowners eager for development might want to ensure that the scope of the LAD is defined narrowly enough to give confidence that zoning permissions will not later be denied. In addition, there is the obvious nefarious incentive that some actors might have to ensure that a specific development is chosen. In light of this, LAD regulation is needed to ensure a balanced approach to the issue of how the initial development possibility should be defined, and to what extent this definition should limit the authority of the LAD to choose alternative projects.

If the owners do not agree to forming a LAD, or if they refuse to sell to any developer, Heller and Hills suggest that the government should be precluded from using eminent domain to assemble

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186 See Heller and Hills (n 10) 1492. For a discussion of the constitutional one-person-one-vote principle and a more detailed argument in favour of the property-based proposal, see Heller and Hills (n 10) 1503-1507.

187 Heller and Hills (n 10) 1496.

188 Heller and Hills (n 10) 1489-1491.

the land.[189] This is a crucial aspect of their proposal that sets the suggestion apart from other proposals for institutional reform that have appeared after *Kelo*. A LAD will not only ensure that the owners get to bargain with the developers over compensation, it will also give them an opportunity to refuse any development to go ahead. Hence, the proposal shifts the balance of power in economic development cases, giving owners a greater role also in preparing the decision whether or not to develop, and on what terms. Hence, the LAD proposal promises to address the democratic deficit of economic development takings, without failing to recognise that the danger of holdouts is real and that institutions are needed to avoid it.

There are some problems with the model, however. First, I observe that planning authorities might have an incentive to refuse granting approval for LAD formation. After all, doing so entails that they give up the power of eminent domain for the land in question. For this reason, Heller and Hills propose that a procedure of judicial review should exist whereby a decision to deny approval for LAD formation can be scrutinized.[190] However, the question then arises to what extent the courts should adopt a deferential stance in this regard, echoing the conundrum that engulfs the safeguard intended by the public use restriction. Presumably, one would want the courts to strictly scrutinise LAD rejections, to instil in governments that LADs should normally be promoted. However, would the courts be comfortable providing such scrutiny, also against a government body claiming that the "public interest" speaks against LAD formation? This would likely depend on the exact formulation and spirit of the LAD-enabling legislation. To work as intended, some sort of presumption in favour of LAD approval appears to be in order, but this in turn can have the effect of making it easier for powerful landowners to abuse the LAD system.

A second possible objection against the LAD proposal concerns the practicalities of the process leading up to the LAD's decision on whether or not to accept a given offer. Is it possible to organise

189 Heller and Hills (n 10) 1491.

190 Heller and Hills (n 10) 1490.

such a process in a manner that is at once efficient, inclusive and informative, without making it too costly and time consuming? Here Heller and Hills envision a system of public hearings, possibly organised by the planning authorities, where potential developers meet with owners and other interested parties to discuss plans for development.[191] The process envisioned here would resemble existing planning procedures to such an extent that additional costs could hopefully be kept at a minimum.

The significant difference would concern the relative influence of the different actors, with the owners receiving a considerable boost as a result of the LAD. Rather than being sidelined by a narrative that sees the use of eminent domain as the culmination of planning, the owners are now likely to occupy center stage throughout, as they now will have the final say on whether or not the development will go ahead.

From this, however, arises the question of how the interests of other locals, without property rights, will be protected. Heller and Hills assumes that local non-owners will also be represented during the stages leading up to the LAD's final decision, but their role in the process is not clarified in any detail.[192] This raises the worry that LADs might undermine local democracy by giving property owners a privileged position with respect to policy questions that should be decided jointly by all members of the local community. The risk in this regard depends heavily on the circumstances. In a context of egalitarian property ownership and sensible government regulation of land uses and LAD operations, the risk should be minimal. In principle, the local anchoring that LADs provide should also benefit non-owners, by brining the decision-making process closer and making it more easily accessible. Moreover, if some members of the local community remain marginalised, this is probably best regarded as a regulatory failure or a reflection of underlying

[191] See Heller and Hills (n 10) 1490-1491. It might also be necessary for the planning authorities or other government agencies to take on some responsibilities with respect to providing guidance and assistance to less resourceful members among the owners.

[192] Heller and Hills (n 10) 1490-1491.

inequality, not a shortcoming of the LAD proposal. In these cases, a reasonable approach might even be to *expand* the function of LADs, by granting voting rights to a larger class of local property dependants, not only formally titled owners.[193]

However, the LAD proposal raises some highly problematic issues pertaining to the proposed mechanism of collective decision-making. As Kelly points out, the basic mechanism of majority voting is deeply flawed.[194] He argues, in particular, that if different owners value their property differently, majority voting will tend to disfavour those with the most extreme viewpoints, either in favour of, or against, assembly. If these viewpoints are assumed to be non-strategic and genuine reflections of the welfare associated with the land, the result can be inefficiency. In short, the problem is that a majority can often be found that does not take due account of minority interests.

For instance, if a minority of owners are planning alternative development, conflicting with the LAD proposal, they might simply be ignored. Indeed, they might *have to be* ignored, if the development description underlying LAD formation is incompatible with the kind of development they wish to pursue. This could become particularly inefficient in cases when the alternative development is more socially desirable than the development sketched during LAD formation. In such cases, LAD formation will not improve the quality of the decision to develop, since it pushes the decision-making process into a track where those interests that *should* prevail are voiced only by a marginalised minority inside the new institution.[195]

More generally, the lack of clarity regarding the role of LADs in the planning process is a

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193 The important invariant to maintain, I believe, is that the locally anchored institution should be the active, invested, agent, while more centralised and/or expert-dominated government bodies should act as passive, impartial, regulators. In the processes leading to economic development takings, this equation is typically reversed, with government bodies and commercial companies being the active agents, while the owners and the local community are the passive agents whose property rights and dependencies place some nominal limits on the authority of other parties (limits which, due to the weakness of owners as a group, tend to be easily disregarded).

194 Daniel B Kelly, 'The Limitations of Majoritarian Land Assembly' (2009) 122 Harvard Law Review Forum 7.

195 Of course, one might imagine these landowners opting out of the LAD, or pursuing their own interests independently of it. However, they are then unlikely to be better off than they would be in a no-LAD regime. In fact, it is easy to imagine that they could come to be further marginalised, since the existence of the LAD, acting 'on behalf of the owners', might detract from any dissenting voices on the owner-side.

problem. If LAD formation as such can be used to privilege a specific development over alternatives, developers would have a great incentive to form a LAD as early as possible. Moreover, if the presumption is in favour of allowing LAD formation, with limited room for government censorship, developers might rely on LADs to push through a *de facto* condemnation of property, through a procedure that might leave the minority less protected than the traditional takings process. Indeed, it would be theoretically possible for any landowner to use a LAD to condemn any neighbouring property smaller than their own. Eventually, a whole community might be taken over by one or a few powerful landowners, through a sequence of cleverly designed LAD processes and development projects.

Despite these worries, the ideal of the LAD proposal is clearly stated and highly attractive. LADs should help to establish self-governance for land assembly and economic development. In particular, Heller and Hills argue that LADs should have "broad discretion to choose any proposal to redevelop the neighbourhood – or reject all such proposals".[196] As they put it, two of the main goals of LAD formation is to ensure "preservation of the sense of individual autonomy implicit in the right of private property and preservation of the larger community's right to self-government".[197] Unfortunately, these ideals turn out to be at odds with some of the concrete rules that Heller and Hills propose, particularly those aiming to ensure good governance of the LAD itself.

In relation to the governance issue, Heller and Hills emphasise, in direct contrast to their comments about "broad discretion" and "self-governance", that "LADs exist for a single narrow purpose – to consider whether to sell a neighborhood".[198] This is a good thing, according to Heller and Hills, since it provides a safeguard against mismanagement, serving to prevent LADs from becoming battle grounds where different groups attempt to co-opt the community voice to

[196] See Heller and Hills (n 10) 1496.

[197] See Heller and Hills (n 10) 1498.

[198] See Heller and Hills (n 10) 1500.

further their own interests. As Heller and Hills puts it, the narrow scope of LADs will ensure that "all differences of interest based on the constituents' different activities and investments, therefore, merge into the single question: is the price offered by the assembler sufficient to induce the constituents to sell?".[199]

This means that there is a significant internal tension in the LAD proposal, between the broad goal of self-governance on the one hand and the fear of neighbourhood bickering and majority tyranny on the other. Indeed, it is hard to see how LADs can at once have both a "narrow purpose" as well as enjoy "broad discretion" to choose between competing proposals for development. If such discretion is granted to LADs, what prevents special interest groups among the landowners from promoting development projects that will be particularly favourable to them, rather than to the landowners as a group? What is to prevent landowners from making behind-the-scene deals with favoured developers at the expense of their neighbours? It might be difficult to come up with rules that prevent mechanisms of this kind, without also making meaningful "self-governance" an impossibility.

If a LAD is obliged to only look at the price, this might prevent abuse. But it will not give owners broad discretion to consider the social functions of property when choosing among development proposals. In my view, it is undesirable to restrict the operations of LADs in this way. It is easy to imagine cases where competing proposals, perhaps emerging from within the community of owners themselves, will be made in response to the formation of a LAD. Such proposals may involve novel solutions that are superior to the original development plans, in which case it is hard to see any good reason why they should not be taken into account, even if they are proposed by a minority. Moreover, it is hard to see why they should be disregarded simply because they are less commercially attractive, or because the developer interested in pursuing such a proposal cannot offer the highest payment to the owners. In the end, the decision that the LAD makes concerns the

[199] Heller and Hills (n 10) 1500.

future of the community as a whole. This is not an exercise in profit-maximization, and there are good reasons to believe that LAD regulation should encourage a broad perspective, not enforce a narrow one.

However, when it comes to the details, Heller and Hills seem to give up on the ideals of self-governance in favour of strict regulation to reduce the risk of LAD abuse. In particular, they argue that "LAD-enabling legislation should require especially stringent disclosure requirements and bar any landowner from voting in a LAD if that landowner has any affiliation with the assembler".[200] Hence, the notion of self-governance is made even thinner, as owners will effectively be barred from using LADs as a template for gaining the right to participate in development projects on their own land. We are almost back to square one: the owner must sell or receive nothing. Moreover, new questions arise. For one, what is meant by "affiliation"? Say that a landowner happens to own shares in some of the companies proposing development. Should they then be barred from voting? If so, should they be barred from voting on all proposals, or just those involving companies in which they are a shareholder? If the answer is yes, how can this be justified? Would it not be easy to construe such a rule as discrimination against landowners who happen to own shares in development companies? On the other hand, if the landowner in question is allowed to vote on all other proposals, would it not be natural to suspect that their vote is biased against assembly that would benefit a competing company? Or what about the case when some of the landowners are employed by some of the development companies? Should such owners be barred from voting on proposals that could benefit their employers? This seems quite unfair as a general rule. But in some cases, employment relations could play a decisive factor in determining the outcome of a vote. This might happen, for instance, if an important local employer proposes development in a neighbourhood where it has a large number of employees.

The fundamental issue that arises is the following: who exactly should be empowered to make

[200] Heller and Hills (n 10).

the determination of when an affiliation is such that an owner should be deprived of their voting rights? Heller and Hills give no answer, but it is easy to imagine that whoever is given this task in the first instance, the courts must be prepared to deal with complaints. At this point, the circle has in some sense closed in on the proposal. In particular, one might ask: why is it less objectionable to deprive someone of their LAD voting rights whenever they enter into an "affiliation" with a developer, than it is to deprive someone of their property rights to ensure economic development on their land? In both cases, severe interferences with basic rights are taking place, on the basis of vague proclamations. Moreover, both interferences appear to be based on the premise that owners are passive agents who can at best hope to be remunerated if they step aside, but who are not themselves meant to be active contributors to economic development.

I conclude that how to best organise a LAD remains an open problem. The challenge is to ensure that LADs deliver a real possibility of self-governance, while also ensuring good governance and protection against abuse. That it remains unclear how to do this is acknowledged by Hiller and Hills themselves, who point out that further work is needed and that only a limited assessment of their proposal can be made in the absence of empirical data. Later in the thesis, I will shed light on this challenge when I consider the Norwegian framework for land consolidation. This framework can be looked at as a sophisticated institutional embedding of many of the central ideas of LADs.

I will discuss how Norwegian land consolidation can be employed in cases of economic development, and how it is increasingly used as an alternative to expropriation in cases of hydropower development. This will allow me to shed further light on the issues that are left open by Heller and Hills' important article.

3.7 Conclusion

In this chapter, I have given a more in-depth presentation of economic development takings. I began by noting that the issue is particularly pressing for land users that are not regarded as

bringing about economic growth. Hence, I argued that the issue is closely related to that of land grabbing, which is currently receiving much attention, both academic and political. Under the social function understanding of property there is in principle no difference between protecting property rights arising from formal title and property rights arising from use. That said, special issues arise in the latter case, not least because it is unclear how the law should deal with rights resulting from cultural practices that western property regimes are not designed to handle. In addition, I noted that special issues related to poverty and basic necessities such as food and water arise with particular urgency in relation to land grabbing.

The nature of my case study makes it natural for me to focus on traditional western systems of property law. Hence, I went on to discuss how economic development takings are dealt with in such legal systems, focusing on Europe and the US respectively. For the case of Europe, this assessment was made more difficult by the fact that the category is not an established part of legal discourse. However, by looking to England for concrete examples, I noted that such cases do arise and that they are increasingly seen as controversial.

I then went on to consider the property protection offered by P1(1) of the ECHR, and how it is applied by the Court in Strasbourg. I zoomed in on those aspects that I believe to be the most relevant for economic development takings. While I noted that this category has yet to be discussed by the ECtHR, I argued that a recent shift in the Court's property adjudication is suggestive of the fact that it would likely approach such cases similarly to how Justice O'Connor approached *Kelo*. In particular, I noted how the Court has recently adopted a stricter standard of assessment. This standard, I argued, is characterised primarily by increased sensitivity to systemic imbalances causing alleged P1(1) violations. Hence, to regard economic development takings as a special category appears to fit well with recent jurisprudential developments at the Court in Strasbourg.

I went on to consider US sources on economic development takings, noting that the issue has

receive an extraordinary amount of attention in recent years. I adopted an historical approach to the material, by tracing the case law surrounding the public use restriction in the fifth amendment to the US constitution, which was much debated even before the specific issue of economic development takings rose to prominence. I focused particularly on case law developed by state courts, and I argued that it shows great sensitivity to the need for contextual assessment. Indeed, it seems that many state courts originally adopted an implicit social function view of property when assessing such cases.

I then looked at the history of Supreme Court adjudication of public use cases. I noted that the doctrine of deference was developed early on, but that it was initially directed mainly at state courts. In fact, I showed that the Supreme Court itself explicitly approved the contextual and in-depth approach these courts relied on when dealing with the legitimacy issue.

The shift, I argued, came with *Berman*, in which the Supreme Court adopted a deferential doctrine that was directed specifically at the state legislature.[201] This was quite a dramatic departure from the Court's previous attitude towards state takings. Moreover, it was almost entirely backed up by precedent set in cases when *federal* takings had been ordered by Congress.

I went on to consider the fallout of *Berman* at state level, which culminated with the infamous *Poletown* case. This case prompted wide-spread accusations of eminent domain abuse and thus set the stage for *Kelo*.

After completing the historical overview, I went on to consider the literature after *Kelo*. I expressed particular support for those responses that focus on the need for *institutional* reform, to address dangers that Justice O'Connor pointed to in her minority opinion. As a shorthand, I proposed referring to the mechanisms she identified as the *democratic deficit* of economic development takings.

I then gave a thorough presentation of a recent reform suggestion that might help address

[201] *Berman v Parker* (n **??**).

this deficit, namely the proposal for Land Assembly Districts (LADs) made by Heller and Hills. According to the motivation behind this proposal, local communities should be entitled to greater self-governance in economic development scenarios, organised through LADs. Importantly, this proposal recognises the need for a mechanism to avoid inefficient and socially harmful gridlock due to holdouts among unwilling owners. Instead of eminent domain, however, a different mechanism is proposed, namely that of a majority decision made by a land assembly district.

I pointed out some problems and seeming inconsistencies in the proposal, particularly regarding the lack of clarity regarding the exact role LADs are supposed to play during the planning process. I argued that while the risk of abuse and failure increases with the level of participation, so does the overall potential for achieving a positive effect on legitimacy. I concluded that to reduce the democratic deficit in economic development cases, a wide power of participation must be granted to the land owners and their communities. This is needed, in particular, to restore balance in the relationship between owners and others directly connected with the land, the planning authorities, and the commercial actors interested in development for profit. The question that is as of yet unresolved is how to organise such participation in a way that avoids obvious pitfalls, such as administrative inefficiency and tyranny by majorities or elites that assume control of the local agenda.

In Chapter 6, I will shed light on this question by considering the Norwegian institution of land consolidation, which has a very long tradition behind it. It is a flexible framework which includes, among other things, a template for establishing institutions that can function as a LAD. I will focus on how land consolidation functions in cases of economic development that would otherwise likely be pursued by eminent domain. The case study is based on considering hydropower development, but I will also discuss planning law and development more generally, as the Norwegian government is now considering making consolidation, traditionally a rural institution, a primary mechanism for land development even in urban areas.

Before I delve into this, I will present an overview of Norwegian hydropower and the role of waterfalls as private property. This will serve as an introduction to the second part of this thesis, to which I now turn.

Part II

A Case Study of Norwegian Waterfalls

4 Norwegian Waterfalls and Hydropower

4.1 Introduction

Norway is country of mountains, fjords and rivers, where around 95 % of the annual domestic electricity supply comes from hydropower.[1] The right to harness energy from rivers, streams and waterfalls generally belongs to local landowners under a riparian system.[2] Historically, waterfalls were very important to local communities, particularly as a source of power for flour mills and saw mills.[3]

Following the industrial revolution, local ownership and management came under increasing pressure. At the beginning, this pressure was exerted by private commercial interests, often foreign investors, who saw the industrial potential in hydropower and started speculating in Norwegian water resources.[4] Later, the pressure on local self-governance was exerted mainly by the government,

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1 See Statistics Norway, data from the year 2011, http://www.ssb.no/en/elektrisitetaar/.

2 This arrangement is rooted in the first known legal sources in Norway, the so-called "Gulating" laws, thought to have been in force well before AD 1000. See Knut Robberstad (ed), *Gulatingslovi* (4th edn, An edition of the old "Gulatingsloven", a collection of the first known legal principles used by a Norwegian court (the Gulating), dating back to before AD 1000, Det Norske Samlaget 1981) 111-112,120.

3 See Terje Tvedt, *A Journey in the Future of Water* (IB Tauris 2013) 121.

4 See Hjemfall, 'NOU 2004:26' (Report to the Ministry of Petroleum and Energy from a special committe appointed by the King in Council on 04 April 2003,) 30-31.

following the introduction of new legislation to regulate the development of hydroelectric power.[5] This legislation set up a system that gave highly preferential treatment to public utilities over private actors, including local owners.[6] At first, the motivation behind this reform was to facilitate a decentralised form of government control, led by public utilities controlled by the municipality governments.[7] However, the hydroelectric sector underwent gradual centralisation, a process that gained momentum after the Second World War when the state itself assumed a leading role.[8] At this time, local communities and local riparian owners became increasingly marginalised. In particular, they were forced to shut down their hydroelectric plants in order to connect the national, monopolised, electricity grid.[9]

Then, in the early 1990s, the electricity sector was reformed once again, largely inspired by the market-orientation and privatisation of the public sector in the UK under Thatcher.[10] The production sector was liberalised, while public utilities where reorganised as commercial companies.[11] At the same time, the regulatory system was decoupled from both political and commercial decision-making processes, to become more expert-based.[12] Moreover, the sector underwent additional centralisation, as a result of mergers and acquisitions among former public utilities.[13]

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5 See Lars Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (Ad notam Gyldendal 1996) 41-57 (describing the regulatory system set up during this time).

6 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 46 (describing legislation introduced to promote public utilities, including new expropriation authorities directed at local owners of waterfall).

7 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 44-47.

8 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 59-85. For the history of the state's involvement with hydropower generally, see Lars Thue, *Statens Kraft 1890-1947: Kraftutbygging og Samfunnsutvikling* (Universitetsforlaget 2006); Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006); Lars Thue and Yngve Nilsen, *Statens Kraft 1965-2006: Miljø og Marked* (Universitetsforlaget 2006).

9 See Hans Hindrum, *Elektrisitetsforsyning ved hjelp av statsstøtte* (NVE 1994) p.111.

10 See generally Atle Midttun and Steve Thomas, 'Theoretical ambiguity and the weight of historical heritage: a comparative study of the British and Norwegian electricity liberalisation' (1998) 26(3) Energy Policy 179.

11 See *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Court Report 164, 86 (describing how Norwegian electricity companies, most of which are still (partly) publicly owned, now operate as for-profit, limited liability companies).

12 [26-27]brekke12.

13 See Jens Bibow, 'Energiloven, forvaltningspraksis og EØS-retten: Organisatoriske krav til energiselskaper' (2003)

Following the reform, access rights to the national grid are meant to be granted equally to all potential actors on the energy market, including private companies.[14] After the passage of the Energy Act 1990, the energy companies controlling the local grids were no longer authorised to shut out competitors.[15] A side-effect of this is that it has become possible for local landowners to undertake their own hydropower projects. Local owners can now access the grid to sell the electricity they produce on Nord Pool, the largest electrical energy market in Europe.[16] This has led to increased tension between local interests and established hydropower companies. The following fundamental question has arisen: who is entitled to benefit from rivers and waterfalls, and who is entitled to a say in decision-making processes concerning their use?

In this chapter, I set the stage for discussing this question in more depth, by detailing how the hydropower sector is organised. I look to the law as well as to commercial and administrative practices and I focus on those aspects that have changed following the reform of the early 1990s. I pay particular attention to the growing importance and competitiveness of so-called *small-scale* hydropower, including development projects that are undertaken by local owners, or in cooperation with them. Several commercial actors have emerged who now specialise in such cooperation, by offering waterfall owners a significant share of the commercial value resulting from development.

To bring out the multi-faceted character of the current debate on hydropower in Norway, I begin in Section 4.2 by offering a basic overview of the Norwegian political system. I focus on the

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42(10) 579, 583. I mention that despite significant continuous centralisation from the Second World War to this day, the Norwegian hydroelectric sector is still relatively decentralised compared to other countries, e.g., the UK, see **"cite** midttun98. Arguably, this is a lasting influence of a tradition based on local, egalitarian, ownership of water resources.

14 See generally Ulf Hammer, 'Hovedtrekk ved Organiseringen og Reguleringen av Kraftmarkedet' [1996] Lov og Rett 390. For an interesting presentation and analysis of grid-based markets in general, see Ingvald Falch, *Rett til Nett: Konkurranse i Nettbundne Sektorer* (Universitetsforlaget 2004).

15 See the Energy Act 1990 s 3-4.

16 See generally Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Erstatning for erverv av fallrettigheter' (2006) 2006 Tidsskrift for eiendomsrett 175; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Fallerstatning – Ulebergdommen' (2008) 2008 Tidsskrift for eiendomsrett 46; Ulf Larsen, Caroline Lund and Stein Erik Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (2012) 2012(1) Tidsskrift for eiendomsrett 21.

role that property has played in the history of Norwegian democracy. In Section 4.3, I move on to describe the law relating to hydropower development. I first identify a basic tension in the law – some would call it an inconsistency – between hydropower as a private right on the one hand, and a public good on the other. I then go on to explain how this tension permeates the law, by presenting the statutory regulation of hydropower development in more depth.

I follow this up by considering hydropower in practice, especially practices that relate to small-scale development in cooperation with local owners. I trace the history of the dominant model used to organise this form of development, going back to the first expression I could find of the core principles, given in the so-called *Nordhordlandsmodellen*, from 1996.[17] This model presented a financial mechanism for benefit sharing that was later adopted by the market for small-scale hydropower development. In addition, the model expressed broader governance principles pertaining to the importance of sustainability, the involvement of non-owners, and the desirability of long-term planning based on local conditions and local participation in decision-making processes.

However, as I discuss in Section 4.6, these aspects of the model have largely failed to make an impact. I go on to argue that a lack of social awareness might be part of the reason why small-scale hydropower now appears to be falling out of favour. I note, moreover, how a recent change in the perception of small-scale hydropower has also lead to a resurgence of large-scale development. This is threatening to undermine the position of local communities and owners, and has led to a series of controversial cases before the courts.

This underscores the importance of maintaining a social function perspective on local ownership of riparian rights. Moreover, it provides important background and context for my study in the two chapters that follow, wherein I specifically address the use of expropriation – and alternatives to it – to facilitate hydropower development.

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[17] See Otto Dyrkolbotn and Arne Steen, *Nordhordlandsmodellen* (A manifesto on local hydropower development, published following a seminar at Dyrkolbotn Leirskole, fall of 1996, Dyrkolbotn Leirskole 1996).

4.2 Norway in a Nutshell

Norway is a constitutional monarchy, based on a representative system of government.[18] The executive branch is led by the King in Council, the Cabinet, headed by the Prime Minister. Legislative power is vested in the Storting, the Norwegian parliament, elected by popular vote in a multi-party setting.[19] In 1884, the parliamentary system first triumphed in Norway, as the cabinet was forced to resign after it lost the confidence of parliament. The principle has since obtained the status of a constitutional custom. In particular, the cabinet can not continue to sit if parliament expresses mistrust against it. However, an express vote of confidence is not required. In practice, due to the multi-party nature of Norwegian politics, minority cabinets are quite common. These can sustain themselves by making long-term deals with supporting parties, or by looking for a majority on a case-by-case basis.

The judiciary is organised in three levels, with 70 district courts, 6 courts of appeal, and the Supreme Court. The district courts have general jurisdiction over most legal matters; there is no division between constitutional, administrative, civil, criminal courts. [20] The courts of appeal have a similarly broad scope. Moreover, the right to appeal is ensured in most cases.[21] The Supreme Court, on the other hand, operates a very strict restriction on the appeals it will allow.[22] It

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18 For Norwegian constitutional law generally, see Johs Andenæs and Arne Fliflet, *Statsforfatningen i Norge* (10th edn, Akademika 2006).

19 It should be noted that the executive branch also enjoys considerable legislative power under Norwegian law. Both informally, because it prepares new legislation, and also formally, because it has wide delegated powers to issue so-called *directives* (forskrifter). Indeed, it is typical for acts of parliament to include a general delegation rule which permits the executive to legislate further on the matters dealt with in the act, by clarifying and filling in the gaps left open by it.

20 However, there are distinct procedural rules for civil and criminal cases and a special court exists for *land consolidation*. See the Land Consolidation Act 1979. Moreover, both the district courts and the courts of appeal follow special procedural rules in *appraisement disputes*, for instance when compensation is awarded following expropriation. See the Appraisal Act 1917 respectively, discussed in more detail in later chapters.

21 The right to an appeal is not absolute. In civil cases, it is generally required that the stakes are above a certain lower threshold, measured in terms of the appellants' financial interest in the outcome. See Civil Dispute Act 2005 s 29-13.

22 See the Civil Dispute Act 2005, s 30-4.

typically only hears cases if a matter of principle is at stake, or if the law is thought to be in need of clarification.[23]

The Norwegian legal system is often said to be based on a special "Scandinavian" variety of civil law, which includes strong common law elements: legislation is not as detailed as elsewhere in continental Europe, some legal areas lack a firm legislative basis, it is generally accepted that courts develop the law, and the opinions of the Supreme Court are considered crucial to the legislative interpretation at the lower courts.[24] At the same time, legislation remains the primary source used to resolve most legal disputes. Moreover, when applying the law, the courts tend to place great weight on preparatory documents procured by the executive branch. These documents are widely regarded as expressions of legislative intent, even though parliament is not usually actively involved in the process during the preparatory stages.

The Constitution of Norway dates back to 1814 and was heavily influenced by contemporaneous political movements, particularly in the US and France.[25] Moreover, it was influenced by a desire for self-determination, as Noway was at that time a part of Denmark-Norway, largely controlled by the Danish elite.[26] Following the Napoleonic wars, Norwegian politicians sought to take advantage of Denmark's weak position to gain independence. In the end, Norway was instead forced to enter into a union with Sweden, but the Constitution remained in place. Moreover, after the triumph of the parliamentary system in 1884, Norway would also eventually gain independence, in 1905, following a peaceful and democratic transition process.[27]

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[23] See, generally, Jens Edvin A Skoghøy, 'Anketillatelse til Norges Høyesterett' in *Festskrift til Lars Heuman* (Jure 2008).

[24] See, generally, Ulf Bernitz, 'What is Scandinavian law?' (2007) 50 Scandinavian Studies in Law 13.

[25] See generally 'Grunnlovas Historie' (*Store norske leksikon*, 4th October 2014) ⟨https://snl.no/Grunnlovas_historie⟩ accessed 14th July 2015.

[26] See generally

[27] See generally Francis Sejersted, 'Unionsoppløsningen i 1905' (*Store norske leksikon*, 24th April 2015) ⟨https://snl.no/Unionsoppl%C3%B8sningen_i_1905⟩ accessed 14th July 2015.

During the 19th century, farmers and peasants emerged as a powerful group in Norwegian politics. This, it is commonly held, was in large part due to the fact that they were also landowners, whose rights and contributions were not limited to traditional farming.[28] Importantly, Norwegian tenant farmers and small-holders had a significant degree of influence over the management of the land and its natural resources. The feudal tradition was never as strong in Norway as elsewhere in Europe.[29]

The Danish-Norwegian nobility had fallen into a fiscal crisis in the 18th century, weakening their influence further. This had in turn made it possible for tenant farmers in Norway to buy land from their landowners, including grazing grounds and non-arable land.[30] As a result, the distribution of land ownership in Norway had already become highly egalitarian at the time of the Constitution. Moreover, many resources attached to land were owned jointly by several members of the local community, as larger estates were partitioned into several individual smallholdings. As a result, Norway became a society were land ownership was not a privilege for the few, but held by the many, particularly compared to feudal Europe.[31]

In 1814, the landed nobility in Norway was further marginalised. Indeed, the Constitution itself prohibited the establishment of new noble titles and estates.[32] Then, in 1821, all hereditary titles were abolished (although existing nobles kept their titles for their lifetimes).[33] By the middle of the 19th century, ordinary farmers had gained even greater political influence. In fact, they

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28 The "classic" presentation of the political influence of farmers in Norway is Halvdan Koht, *Norsk Bondereising: Fyrebuing til Bondepolitikken* (Aschehough 1926).

29 See Tore Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (Samlaget 1999) 59-60.

30 See Pryser, *Norsk Historie 1814-1860: Frå Standssamfunn mot Klassesamfunn* (n 40) 59-60.

31 For a comparative discussion of this, focusing on how it influenced the industrialisation process in Norway, setting it apart from the industrialisation process in the UK, see Ottar Brox, 'Fattigdom og framgang: Alternative fortider? – Norsk industrialisering i komparativt lys' (2013) 24(3/4) Norsk antropologisk tidsskrift 169.

32 Constitution of the Kingdom of Norway 1814, s 23.

33 See 'Lov, angaaende Modificationer og nærmere Bestemmelser af den Norske Adels Rettigheder' (Act of August 1, 1821).

emerged as the leading political class, alongside the city bureaucrats.[34] During this time, Norway also introduced a system of powerful local municipalities. These were organised as representative democracies, becoming miniature versions of the cherished, as of yet unfulfilled, nation state (Norway was still in a union with Sweden at this time). Even today, municipalities retain a great deal of power in Norway, particular in relation to land use planning.[35] They represent a highly decentralised political structure, with a total of 428 municipalities in force as of 01 January 2013.[36]

Local control of water resources, ensured through property rights, was very important to farmers and rural communities in pre-industrial Norway. According to Terje Tvedt, 10 000 - 30 000 mills were in operation in Norway in the 1830s.[37] As Tvedt argues, the fact that these mills were under local control was particularly important because it helped ensure self-sufficiency. In addition, saw mills became an important source of extra income for Norwegian farming communities.

Today, the importance of water is clearly felt throughout Norwegian society. This is not because water is scarce, but rather because it is so plentiful. Not only is water power the main source of domestic energy. It also occupies a special place in Norwegian culture. It is important to the identity of many communities, particularly in the western part of the country, where majestic waterfalls are important symbols both of the hardship of the natural conditions and the sturdiness of local people. One particular aspect of this, with significant economic implications, is that waterfalls are an important asset to Norwegian tourism. The so-called "Norway in a nutshell" tours, for instance,

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34 See generally Marthe Hommerstad, *Politiske bønder - Bondestrategene og kampen om demokratiet 1814–1837* (Spartacus 2014).

35 They are the primary decision-makers for spatial planning, as pursuant to Planning and Building Act 2008.

36 This is down from the all-time high of 747 in 1930. There have long been proposals to reduce the number of municipalities further, but so far the political resistance against this has prevented major reforms. See 'Kriterier for god kommunestruktur' (1st December 2014) ⟨https://www.regjeringen.no/no/tema/kommuner-og-regioner/kommunereform/ekspertutvalg/sluttrapport/id751494/⟩ accessed 14th July 2015 (report to the Ministry from an expert committee on municipality reform, 2014).

37 See Tvedt (n 9) 121.

have become greatly popular, based on delivering access to wild and unspoilt nature, with fjords, waterfalls, idyllic villages, and railway lines that seem to defy gravity.[38]

Another aspect of the same is the great tradition in Norway for local resistance against large-scale development that is considered damaging to the environment. In the 1960s and 70s, when the state embarked on their most ambitious projects, this led to a general political movement in Norway which saw progressive leftist protest groups join forces with local opposition groups in a fight against centralisation, exploitation of weaker groups, and environmental destruction.[39]

This all speaks to the fact that water resources are embedded in the social fabric in Norway in such a way that an entitlements-based account of property rights to such resources would be largely inappropriate. Rather, the case of Norwegian streams and waterfalls seems to be particularly suited for an investigation based on a social function view on property. As I show in this and the following two chapters, rivers and waterfalls serve to bring out tensions between rights and obligations in property, while also shedding light on the question of how to organise decision-making processes regarding economic development.

In the next section, I argue that the present law on hydropower in Norway tends to recognise only a small part of the relevant picture. On the one hand, it recognises the financial entitlements of individual owners, which it tries to balance against the regulatory needs of the state. But it largely fails to take into account that owners have broader interests, even obligations, relating to the sustainable management of their streams and their waterfalls. Moreover, it also seems that the law is increasingly failing to take into account that commercial interests can exert a strong pull on various state bodies, particularly those that are only weakly grounded in processes of democratic decision-making.

As a result, the current narrative on water resource management in Norway appears to be

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[38] See Norway in a Nutshell ⟨http://www.norwaynutshell.com/en/explore-the-fjords/⟩.

[39] See ....

based on a false dichotomy that sees the interests of "profit-maximising" owners, acting out of self-interest, pegged against the interests of a "benevolent" state, acting for the common good. In the following, I shed further light on this narrative and argue that it is deeply flawed.

4.3 Hydropower in the Law

Under Norwegian law, rights to harness power from rivers and waterfalls are regarded as private property.[40] The system is riparian, so by default, a stream belongs to the owner of the land over which the water flows.[41] The landowners do not own the water as such – freely running water is not subject to ownership – and the riparian owners' right to withhold or divert water is limited.[42] It is common in Norway to refer to owners of hydropower rights as *waterfall owners* ('falleiere'), a terminology I will also adopt-[43]

The waterfall owners have the exclusive right to harness the potential energy in the water over the stretch of riverbed belonging to them. This right can be partitioned off from rights in the surrounding land, and large-scale hydropower schemes typically involve such a separation of water rights from land rights. In this way, the energy company acquires the right to harness the energy, while the local landowners retain ownership of the surrounding land.

Norwegian rivers, and especially rivers suitable for hydropower schemes, tend to run across

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40 Historically, the law emphasised ownership of traditional agrarian water resources, such as fishing rights. However, new sticks were added to the waterfall bundle over the years, including the right to develop hydropower, see Arne Vislie, *Grensene for Grunneierens Rådighet over Vassdrag* (Centraltrykkeriet 1944) 14-32. For a detailed presentation of the history of water law in pre-industrial times, I refer to UA Motzfeld, *Den Norske Vasdragsrets Historie indtil Aaret 1800 med Domsamling* (Brøgger 1908).

41 See the Water Resources Act 2000 s 13.

42 See Water Resources Act 2000, s 8.

43 The Norwegian term 'fall' has a somewhat broader meaning than its English counterpart, 'waterfall'. The word 'fall' is used to describe a continuous section of any stream or river, typically identified by giving the total difference in altitude over the relevant stretch of riverbed. Furthermore, the Norwegian term 'falleier' refers to a legal person who possesses the rights to the hydropower over such a section. In this thesis, I will typically refer to the owners of waterfalls, streams and rivers with the intended reading being the same as the Norwegian notion of a 'falleier'. If special qualification is needed, for instance to distinguish between different classes of riparian owners, I will make a note of this explicitly.

grazing land and non-arable land that is owned jointly by local farmers. Hence, rights to streams and waterfalls are typically held among several members of the rural community.[44] Local owners might not be willing to give up their ownership to facilitate development, especially not on terms proposed by external developers. Hence, the authority to expropriate has become an important legal instrument for Norwegian hydropower companies.

This has resulted in a tension where, on the one hand, rights to harness hydropower from streams and waterfalls are considered private property, while on the other hand, it has become common to speak of hydropower as a resource belonging to the public. Since the Industrial Licensing Act 1917 was amended in 2008, this ambivalence in the discourse surrounding hydropower has also been part of the statutory provisions regulating hydropower development. I quote the two relevant sections side by side below:[45]

> A river system belongs to the owner of the land it covers, unless otherwise dictated by special legal status. [...]
>
> The owners on each side of a river system have equal rights in exploiting its hydropower.
>
> (Water Resources Act 2000, s 13)

> Norwegian water resources belong to the general public and are to be managed in their interest. This is to be ensured by public ownership.
>
> (Industrial Licensing Act 1917, s 1 (after amendment in 2008))

The intended reading of section 1 of the Industrial Licensing Act 1917, quoted on the right above, is that it expresses a "general starting point".[46] According to the Ministry, it expresses no more than what has always been the purpose of the special licensing requirements for large-scale

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44 Rivers tend to run through land that has not to been enclosed. Moreover, in places where there has been a land enclosure, water rights are often explicitly left out, such that they are still considered jointly owned rights belonging to the community of local farmers. For more details on (forms of) joint ownership among Norwegian farmers, see, e.g., Geir Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' [2007] Tidsskrift for Eiendomsrett 293, 570.

45 The first quote is taken from the general water law, with roots going back a thousand years to the so-called "Gulating" laws mentioned in Section 4.1. The second quote is taken from a law directed specifically at large-scale hydropower, introduced during the early days of the hydropower industry.

46 See Ot.prp.nr.61 (2007-2008) , 72.

hydropower.[47]

Despite appearances, it would be wrong to regard this as an attempt to explicitly confront the principle of private property expressed in section 13 of the Water Resources Act 2000, quoted on the left above. At least, such a confrontation does not appear to have been intended by the Ministry.[48] However, the Ministry's comment underscores the extent to which the government regards it as natural to interfere with private rights to waterfalls, to pursue policies that it regards to be in the public interest. Taken in this light, section 1 of the Industrial Licensing Act 1917 reflects the prevailing opinion that there are few, if any, recognised limits on the state's power to manage privately owned water resources.[49]

This aspect of the Norwegian system has become particularly significant following the liberalisation of the electricity sector in the early 1990s.[50] Since then, there have been an increasing number of cases where owners who are interested in undertaking their own development schemes attempt to fend off commercial energy companies wishing to expropriate.[51] Importantly, the state has tended to side with the commercial companies in these cases, granting them the authority to expropriate for economic development. This has resulted in several Supreme Court decisions on hydropower and expropriation in the past few years.[52] Before discussing the case law in more detail in the next chapter, I present the most important legislation regarding hydropower development.

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47 See Ot.prp.nr.61 (2007-2008) (n 52) 72.

48 There are no indications in the preparatory materials that the Ministry sought to confront the principles of ownership encoded in the Water Resources Act 2000.

49 For a reflection of the same attitude, citing the state's broad regulatory competence as the main reason not to nationalise Norwegian water power rights, I refer to the preparatory documents underlying the Water Resources Act 2000. See Lov om vassdrag og grunnvann, 'NOU 1994:12' (Report to the Ministry of Business and Energy from a special committee appointed by the Crown Prince Regent in Council 09 November 1990,) 152-153.

50 See, e.g., Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 23).

51 See, e.g., Christian Sontum and Einar Sofienlund, 'Ekspropriasjon av vannkraft – hvorfor den historiske metoden fra norsk rettspraksis ikke er relevant i dagens marked' (2007) 2007(4) Småkraftnytt.

52 See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82; *Otra Kraft DA, Otteraaen Brugseierforening v Bjørnarå and others* Rt-2010-1056; *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393; *BKK Produksjon AS v Austgulen and others* Rt-2011-1683; *Bjørnarå and others v Otra Kraft DA, Otteraaens Brugseierforening* Rt-2013-612.

I focus on those aspects that are particularly relevant to the position of local owners and their communities.

4.3.1 The Water Resources Act

The Water Resources Act 2000 contains the basic rules regarding water management in Norway.[53] This act is not only concerned with hydropower, but regulates the use of river systems and groundwater generally.[54]

In section 8, the Act sets out the basic license requirement for anyone wishing to undertake measures in a river system.[55] The main rule is that if such measures may be of "appreciable harm or nuisance" to public interests, then a license is required.[56] The water authorities themselves decide if this condition is met.[57] Moreover, the water authorities are obliged to issue such a decision if the developer, an affected authority, or others with legal standing in the matter, request it. In relation to hydropower development, it is established practice that most hydropower projects over 1000 KW will be deemed to require a license.[58]

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53 Act relating to river systems and groundwater of 24 November 2000 No. 82 (unofficial translation provided by the University of Oslo, http://www.ub.uio.no/ujur/ulovdata/lov-20001124-082-eng.pdf). I also mention the Water Framework Directive of the European Union, Water Framework Directive [2000] OJ L327/1. It has been implemented in Norwegian law as the Directive Regarding Frameworks for Water Management, FOR-2006-12-15-1446. It does not directly impact on the hydropower licensing procedure, however, so I will not say much about it in this thesis. However, I mention that there is some concern that the Norwegian implementation of the directive has not sufficiently recognized the need for structural reforms, preferring to rely on the established approach to water management, which is highly centralised and sector-based. See Gro Sandkjær Hanssen, Sissel Hovik and Gunn Cecilie Hundere, 'Den nye vannforvaltningen - Nettverksstyring i skyggen av hierarki' (2014) 3 Norsk statsvitenskapelig tidsskrift 155.

54 See the Water Resources Act 2000, s 1. A river system is defined as "all stagnant or flowing surface water with a perennial flow, with appurtenant bottom and banks up to the highest ordinary floodwater level", see Water Resources Act 2000, s 2. Artificial watercourses with a perennial flow are also covered (excluding pipelines and tunnels), along with artificial reservoirs, in so far as they are directly connected to groundwater or a river system, see the Water Resources Act 2000, s 2a-2b.

55 Measures in a river system are defined as interventions that "by their nature are apt to affect the rate of flow, water level, the bed of a river or direction or speed of the current or the physical or chemical water quality in a manner other than by pollution", see the Water Resources Act 2000, s 3a.

56 See the Water Resources Act 2000, s 8. There are two exceptions, concerning measures to restore the course or depth of a river, and concerning the landowner's reasonable use of water for his permanent household or domestic animals, see the Water Resources Act 2000, s 12.

57 See Water Resources Act 2000, s 18.

58 See, e.g., http://www.nve.no/no/Konsesjoner/Vannkraft/Konsesjonspliktvurdering/ (accessed 16 August 2014). Ex-

The basic assessment criterion is that a license "may be granted only if the benefits of the measure outweigh the harm and nuisances to public and private interests affected in the river system or catchment area".[59] Hence, the water authorities are empowered to decide whether a licence *should* be granted, if they find that the benefits outweigh the harms. The courts are very reluctant to censor the discretion of the administrative decision-makers on this point.[60]

The Ministry of Petroleum and Energy maintains indirect control over the assessment process by issuing directives regarding the administrative procedure in licensing cases.[61] In addition, the procedure is determined in large part by administrative practices developed by the water authorities themselves.[62] Many of the rules in the Public Administration Act 1967 also apply. However, these are general rules that tend to play a minor role compared to sector-specific practices.[63]

A few basic procedural rules are encoded directly in the Water Resources Act 2000. This includes rules to ensure that the application is sufficiently documented, so that the authorities have enough information to assess its merits.[64] Moreover, a basic publication requirement is expressed, stating that applications are public documents and that the applicant is responsible for giving public notice. The intention is that interested parties should be given an opportunity to comment on the plans.[65] More detailed rules for public notice of applications are given in section 27-1 of the

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ceptions are possible, for instance projects that upgrade existing plants, or which utilise water flowing between artificial reservoirs.

59 See Water Resources Act 2000, s 25.

60 This is an expression of the principle of "freedom of discretion" for the administrative branch, a fundamental tenet of Norwegian administrative law. See generally Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 71-74.

61 See section 65 of the Water Resources Act 2000.

62 I return to a presentation of administrative practice in Section 4.3.5.

63 This was a point of contention in the Supreme Court case of *Jørpeland* (n **??**). The case is discussed and presented in depth in Chapter 5, Section 5.6.

64 See Water Resources Act 2000 s 23.

65 See Water Resources Act 2000, s 24. There are some exceptions to the requirement to give public notice, however. It may be dropped in case it appears superfluous, or if the application must be rejected or postponed, see Water Resources Act 2000, s 24a-24c.

Planning and Building Act 2008, which also applies to licensing applications under section 8 of the Water Resources Act 2000.

Furthermore, an important rule of principle is given in section 22, regarding the relationship between applications for licenses and governmental "master plans" for the use or protection of river systems in a greater area. These plans have no clear legislative basis, but were introduced through parliamentary action in the 1980s, when the parliament decided to initiate such planning in an effort to introduce a more holistic basis for assessment of licensing applications.[66] According to section 22 of the Water Resources Act 2000, if a river system falls within the scope of a master plan that is under preparation, an application to undertake measures in this river system may be delayed or rejected without further consideration.[67] Moreover, a license may only be granted if the measure is without appreciable importance to the plan.[68] In addition, once a plan has been completed, the processing of applications is to be based on it, meaning that an application which is at odds with some master plan may be rejected without further consideration.[69] It is still possible to obtain a license for such a project, but if it harnesses less hydropower than the project indicated by the plan, section 22 states that only the Ministry may grant it.[70]

The rules considered so far apply to any measures in river systems, not only hydropower projects. However, special procedures that apply to hydropower cases are described in other statutory provisions. The most important is the Watercourse Regulation Act 1917, which is specifically aimed at a certain subgroup of hydropower schemes, namely those that involve regulation of the flow of

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66 Today, the planning authority is delegated to the Directorate of Natural Preservation and the NVE. See Norwegian Water Resources and Energy Directorate, 'Samlet plan for vassdrag' ⟨http://www.nve.no/no/energi1/fornybar-energi/vannkraft/samlet-plan-for-vassdrag/⟩.

67 See Water Resources Act 2000, s 22, para 1.

68 See Water Resources Act 2000, s 22, para 1.

69 See Water Resources Act 2000, s 22, para 2.

70 See Water Resources Act 2000, s 22, para 2.

water in a river system.[71] However, according to section 19 of the Water Resources Act 2000, many provisions from the Watercourse Regulation Act 1917 also apply to unregulated, run-of-river, schemes, if they generate more than 40 GWh/year.[72] In the next section, I will present the Watercourse Regulation Act 1917 in more detail.

4.3.2 The Watercourse Regulation Act

In order to maximise the output of a hydropower scheme, the flow of water may be regulated using dams or diversions. Regulation was particularly important in the early days of hydropower, before the national electricity grid was developed.[73] Consumers did not want to pay for more energy than they needed when the flow was high, and they wanted to avoid power cuts in periods of drought. At this time, a few local hydropower plants were typically the only sources of electricity in any given area. This meant that regulation of the waterflow was needed to even out the level of electric output, otherwise the electricity supply would be unstable. Indeed, in the early days, it was common for electricity producers to get paid based on the stable effect they were able to deliver, rather than the total amount of energy they harnessed.[74]

This changed with the development of a wide-ranging electricity grid, which allowed electricity to be imported and exported between different geographical areas depending on the levels of output from those areas.[75] Today, producers get paid based on the total amount of electricity produced, measured in kilowatt hours (KWh). The price fluctuates over the year, and the supply-side is still influenced by instability in the waterflow in Norwegian rivers. However, the smoothing effect of the national grid means that run-of-river schemes can be carried out profitably, even if most of the

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71 See Section 4.3.2 below.

72 See Water Resources Act 2000, s 19

73 See *Uleberg* (n **??**) 83.

74 See Sontum and Sofienlund (n **??**).

75 See *Uleberg* (n **??**) 83-84.

electricity from the plant is produced during peak periods.

Despite the growing importance of run-of-river schemes, many key rules regarding hydropower development are still to be found in the Watercourse Regulation Act 1917.[76] The Act defines regulations as "installations or other measures for regulating a watercourse's rate of flow". It also explicitly states that this covers installations that "increase the rate of flow by diverting water".[77] The core rule of the act is that watercourse regulations that affect the rate of flow of water above a certain threshold are subject to a special licensing requirement.[78]

The threshold is defined in terms of the notion of a "natural horsepower", such that a license is required if the regulation yields an increase of at least 400 natural horsepower in the river. Natural horsepower is a measure of the gross estimate of the power that can be harnessed from a river stably for at least 350 days a year.[79] The mathematical definition is a very simple expression, given below:

$$nat.hp(Q, H) = 13.33 \times H \times Q$$

This formula states that the natural horsepower of a regulation project ($nat.hp(Q, H)$) is a function of two variables, H and Q. The constant factor 13.33 is the force of gravity of Earth exerted on a mass of 1 kg (or, approximately, 1 litre of water). The variable H is the difference in altitude (measured in metre) from the intake dam to the power generator. The variable Q is the amount of water (measured in litre) stably available every second for at least 350 days per year. The result is then a gross estimate (assuming no energy loss) of the stable horsepower output of the hydroelectric plant that harnesses the power of Q litres of water per second over a difference in altitude of H

[76] Act relating to the regulation of watercourses of 14 December 1917 No. 17.

[77] See Watercourse Regulation Act 1917, s 1.

[78] See Watercourse Regulation Act 1917, s 2.

[79] See Watercourse Regulation Act 1917, s 2.

metres.

Section 2 of the Watercourse Regulation Act 1917 asks us for the *increase* of this figure after regulation. To arrive at this number, one first uses the formula with Q taken to be Q_1, the stable water flow prior to regulation, before calculating it with Q taken to be Q_2, the stable water flow after regulation. The difference between the second and the first figure $(nat.hp(Q_2, H) - nat.hp(Q_1, H))$ is the increase of natural horsepower resulting from regulation.

Effectively, at a time when electricity had to be produced at a stable effect, from a stable source of power, this increase in natural horsepower was a gross estimate of the value added to the river by regulation. In the present context, suffice it to say that most watercourse regulations undertaken in the context of hydropower development will indeed yield 400 natural horsepower or more, so that they require a special license pursuant to section 2 of the Watercourse Regulation Act 1917.

The criteria for granting a regulation license are similar to those for granting a license pursuant to the Water Resources Act 2000. In particular, section 8 of the Watercourse Regulation Act 1917 states that a license should ordinarily be issued only if the benefits of the regulation are deemed to outweigh the harm or inconvenience to public or private interests.[80] In addition, it is made clear that other deleterious or beneficial effects of importance to society should be taken into account.[81] Finally, if an application is rejected, the applicant can demand that the decision is submitted for review by parliament.[82]

The Watercourse Regulation Act 1917 contains more detailed rules regarding the procedure for dealing with license applications. The most practically important is that the applicant is obliged to carry out an impact assessment pursuant to the Planning and Building Act 2008.[83] This means

[80] See Watercourse Regulation Act 1917, s 8.

[81] See Watercourse Regulation Act 1917, s 8.

[82] See Watercourse Regulation Act 1917, s 8.

[83] Act no 71 of 27 June 2008 relating to Planning and Building Applications.

that the applicant must organise a hearing and submit a detailed report on positive and negative effects of the development, prior to submitting a formal application for a licence. Effectively, at least *two* detailed rounds of assessment are therefore required.

In addition to prescribing impact assessments, the Watercourse Regulation Act 1917 contains more specific rules concerning the second public hearing that should take place, when the application as such is processed. First, the applicant should make sure that the application is submitted to the affected municipalities and other interested government bodies.[84] Second, the applicant should send the application to organisations, associations and the like whose interests are "particularly affected".[85] Along with the application, these interested parties should be given notification of the deadline for submitting comments, which should not be less than three months.[86] The applicant is also obliged to announce the plans, along with information about the deadline for comments, in at least one commonly read newspaper, as well as the Norwegian Official Journal.[87] In so far as the water authorities find it "reasonable", the applicant is obliged to compensate landowners and other interested parties for expenses accrued in relation to legal and expert assistance sought in relation to the application.[88]

A license pursuant to the Watercourse Regulation Act 1917 might be cumbersome to obtain, but a successful application also results in a significant benefit. Most importantly, the license holder then automatically has a right to expropriate the necessary rights needed to undertake the project, including the right to inconvenience other owners.[89]

One may ask whether this approach, making expropriation a side-effect of a regulation license,

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84 Watercourse Regulation Act 1917, s 6.

85 Watercourse Regulation Act 1917, s 6.

86 See Watercourse Regulation Act 1917, s 6.

87 Watercourse Regulation Act 1917, s 6. The Norwegian Official Journal is the state's own announcement periodical.

88 Watercourse Regulation Act 1917, s 6.

89 See Watercourse Regulation Act 1917, s 16.

is a legitimate manner in which to organise interference in property rights. It is clear that the issue of expropriation rarely receives separate treatment in regulation cases. In particular, the assessment undertaken by the water authorities is focused on the licensing issue, which does not compel them to direct any special attention towards owners' interests.[90]

In general, the issue of who owns and controls the water resources in question receives little attention in relation to licensing applications, both pursuant to the Watercourse Regulation Act 1917 and the Water Resources Act 2000. Instead, the focus is on weighing environmental interests against the interest of increasing the electricity supply and facilitating economic development. The issue of resource ownership is more prominent in relation to a third important statute, namely the Industrial Licensing Act 1917.

4.3.3 The Industrial Licensing Act

In the early 20th century, industrial advances meant that Norwegian waterfalls became increasingly interesting as objects of foreign investment. To maintain national control of water resources, parliament passed an act in 1909 that made it impossible to purchase valuable waterfalls without a special license. The follow-up to this act is the Industrial Licensing Act 1917, which is still in force.[91] It applies to potential purchasers and leaseholders of rivers that may be exploited so that they yield more than 4000 natural horsepower.[92]

In practice, this means that the Act does not apply to many run-of-river hydropower schemes, even large-scale projects. Even some regulation schemes fall outside the scope of the Industrial Licensing Act 1917, although most large-scale regulation schemes will be covered. Originally, the main rule in the Industrial Licensing Act 1917 stated that all licenses granted to private parties

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90 I demonstrate this, and discuss it in much more depth, in Chapter 5, Section 5.6.

91 Act relating to acquisition of waterfalls, mines, etc. of 14 December 1917 No. 16.

92 Unlike section 2 of the Watercourse Regulation Act 1917, this asks only for the number of horsepower in the river (after regulation), not the *increase* of this number.

were time-limited, and that the waterfalls would become state property without compensation when they expired, after at most 60 years.[93] This was known as the rule of *reversion* in Norwegian law.[94]

In a famous Supreme Court case from 1918, the rule was upheld after having been challenged by owners on constitutional grounds.[95] I return to this decision in Chapter 5, but mention here that the main conclusion was that the rule of reversion represented a form of regulation of property, not expropriation. Hence, it could not be challenged on the basis of section 105 of the Constitution, even though the owners were not awarded compensation.

While the rule of reversion withstood internal challenges, it was eventually struck down by the EFTA Court in 2007, as a breach of the EEA agreement.[96] This conclusion was fuelled by the fact that reversion only applied to privately owned companies, so that it represented a form of discrimination. After this ruling, the Industrial Licensing Act 1917 was amended. Today, only companies where the state controls more than 2/3 of the shares may purchase waterfalls or rivers to which the act applies.[97]

This means that such rivers and waterfalls can only be bought, leased or expropriated by companies in which the state is a majority shareholder. In practice, however, landowners are still able to sell the land from which the right to a waterfall originates, even if this also means transferring the waterfall to a new owner. The rule is only enforced when riparian rights as such

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93 See the old Industrial Licensing Act 1917, s 2, in force before the amendment on 26 September 2008.

94 This is a misnomer, however, in light of how most rivers and waterfalls were originally owned by local peasants, not the state.

95 See *Johansen v Den norske Stat ved 1 Regjeringens chef, 2 A/S Furuberg ved dets direktions formand* Rt-1918-403.

96 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 17). The EEA (European Economic Area) agreement sets up a framework for the free movement of goods, persons, services and capital between Norway, Iceland, Lichtenstein and the European Union. The EFTA (European Free Trade Association) oversees the implementation of the EEA for those members of EFTA that are also members of the EEA (all except Switzerland). For further details, see generally Henrik Bull, 'The EEA Agreement and Norwegian Law' [1994] (12) European Business Law Review 291; Mads Magnussen, 'Traktatbruddssøksmål ved EFTA-domstolen' [2002] Lov og Rett 131; Halvard Haukeland Fredriksen, 'Er EFTA-domstolen mer Katolsk enn Paven?' [2009] Tidsskrift for Rettsvitenskap 507.

97 See the Industrial Licensing Act 1917, s 2.

are transferred, specifically for the purpose of hydropower development. Moreover, local owners may in theory still develop hydropower in rivers and waterfalls that fall under the Act, since they already own them. But this would be difficult in practice if they are denied permission to partition the water rights off from the surrounding land, to make them available as stand-alone security for debt commitments. In effect, local owners would have a hard time acquiring financing for projects in these rivers, particularly if they do not wish to put their entire land holdings down as security.

Moreover, if they succeed in acquiring financing, a development license would likely be hard to obtain. It is quite clear, in particular, that the Norwegian government takes the view that hydropower projects in waterfalls falling under the Industrial Licensing Act 1917 should only be undertaken by companies in which the state has at least 2/3 of the shares. Moreover, the state does not seem willing to differentiate between development by external commercial interests and development by local owners.

For instance, in the ongoing case of *Sauland*, the local owners of a large waterfall wish to develop a project that would fall under the Industrial Licensing Act 1917. At the same time, a large-scale development involving the same waterfall is planned by a company in which the state owns more than 2/3 of the shares. The case is still pending a final decision, but the water authorities have stated their unwillingness to assess any licensing application from the local owners, unless they ensure that the state is granted at least a 2/3 stake in the development.[98]

In this case, the authorities use section 2 of the Industrial Licensing Act 1917 to deprive the owners of control over the development of their waterfalls. This, moreover, is not regarded as expropriation under Norwegian law. Hence, it would be unlikely to result in an obligation to pay compensation to original owners.[99] The question of how to apply the Industrial Licensing Act 1917

98 Source: NVE (www.nve.no).

99 Instead, the question may be raised whether the government acted in accordance with the Industrial Licensing Act 1917 in this case, or extended its scope in an illegitimate way. After all, the project that the water authorities refused to consider did not in fact involve transferring control over the waterfalls to any new, non-local, owners.

in this situation has not yet been clarified by the courts. If local owners may be deprived of the development potential under the act, it also raises the further question of what the consequences will be for the level of compensation when this development potential is subsequently transferred to a company in which the state controls more than 2/3 of the shares. If the initial act of deprivation is regarded as following from regulation rather than expropriation, it would seem to follow from general expropriation law that no compensation is payable when the hydropower potential is subsequently taken by someone to whom all the necessary licenses may be granted.[100] In this situation, the hydropower potential might not need to be compensated, since it can no longer be said to represent a foreseeable source of income for the original owners.

The policy justification for the Industrial Licensing Act 1917 is based on the idea that giving preference to state-owned actors will protect the public interest in Norwegian hydropower. However, this perspective clashes with the fact that the electricity sector itself has been liberalised. The state may be a majority shareholder in the most powerful companies, but these companies are now run according to commercial principles, with little or no direct political involvement.[101]

Hence, as the EFTA court highlights in its judgement on reversion, there appears to be a lack of convincing policy reasons why state-owned companies should be given preferential treatment.[102] Of course, the public benefits indirectly from the fact that public bodies, as shareholders, are entitled to dividends. However, it is not clear why this benefit should be considered in a different light than other indirect financial benefits which might as well be extracted from private companies, e.g., through taxation.

The preferential treatment of publicly owned market actors also contrasts with some of the key ideas behind the basic building block of the new electricity market, namely the Energy Act 1990.

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100 I note the parallel with the *Agri* case in South Africa, which concerned similar mechanisms in the context of mineral rights, as discussed in Chapter 2, Section **??**.

101 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 17) 86.

102 See *EFTA Surveillance Authority v The Kingdom of Norway* (n 17) 84-87.

4.3.4 The Energy Act

Before 1990, the Norwegian electricity sector was tightly regulated by the government.[103] The responsibility for the national grid was divided between various public utilities that would also typically engage in electricity production, wielding monopoly power within their districts. The most powerful utilities were controlled by the state, who also developed large-scale hydropower to supply the metallurgical industry with cheap electricity.[104] However, the county councils and the municipalities maintained a significant stake in the hydroelectric sector, as they often controlled the utilities responsible for the electricity supply in their own local area.[105] Prior to 1990, there was not competition on the electricity market, and the local monopolists could deny other energy producers access to the distribution grid.[106]

This system was abandoned following the passage of the Energy Act 1990.[107] This act set up a new regulatory framework, where management of the grid was decoupled from the hydropower production sector.[108] In particular, the act established a system whereby consumers could choose their electricity supplier freely. At the same time, the Act aimed to ensure that producers were granted non-discriminatory access to the electricity grid. This laid the groundwork for what has today become an international market for the sale of electricity, namely the Nord Pool.[109]

In this way, the Energy Act served to establish a market where any actor, privately owned or otherwise, could supply electricity to the grid, and therefore profit commercially from developing

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103 See generally Torstein Bye and Einar Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (2005) 40(50) Economic and Political Weekly 5269; Dag Ove Skjold and Lars Thue, *Statens nett: systemutvikling i norsk elforsyning 1890-2007* (Universitetsforlaget 2007).

104 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 67-71.

105 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 85.

106 See *Uleberg* (n **??**) 83-84.

107 See generally Jens Naas-Bibow and Gunnar Martinsen, *Energiloven med kommentarer* (2nd edn, Gyldendal 2011).

108 See generally Bye and Hope, 'Deregulation of Electricity Markets: The Norwegian Experience' (n 109).

109 See http://www.nordpoolspot.com/About-us/. See generally Skjold and Thue (n 110); Lars Galtung, 'Nord Pool og Kraftmarkedet' 39(6) Plan 22.

hydropower. In response to this, monopoly companies were reorganised, becoming commercial companies that were meant to compete against each other, and against new actors that entered the market.[110] In addition to commercialisation, the market-orientation of the sector has also lead to centralisation, as many of the locally grounded municipality companies have disappeared as a result of mergers and acquisitions.[111] As a result, the local and political grounding of the electricity sector, which used to be ensured through decentralised municipal ownership, has been significantly weakened.

At the same time, the fact that any developer of hydropower is now entitled to connect to the national grid gives private actors a possibility of entering the Norwegian energy market. They may do so not merely as (minority) shareholders in former utilities, but also as *competitors*.[112]

In the next section, I give a step-by-step presentation of the licensing procedure for hydropower, which serves to put the information presented in this and preceding sections into a dynamic context.

4.3.5 The Licensing Procedure

The water authorities in Norway are centrally organised. The most important body is the Norwegian Water Resources and Energy Directorate (NVE), based in Oslo.[113] In many cases, the NVE have been delegated authority to grant development licenses themselves, but in case of large-scale development, they only prepare the case, then hand it over to the Ministry of Petroleum and En-

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110 See DH Claes and A Vik, 'Kraftsektoren: fra samfunnsgode til handelsvare' in DH Claes and PK Mydske (eds), *Forretning eller fordeling? Reform av offentlige nettverkstjenester* (Universitetforlaget 2011).

111 Today, the 15 largest companies, largely controlled by the state and some prosperous city municipalities, own roughly 80% of Norwegian hydropower, measured in terms of annual output. See Ot.prp.nr.61 (2007-2008) (n 52) 28. I remark that the process of consolidation started even before the market-oriented reform of the sector. In particular, from 1960 onwards there was a significant push towards centralisation, as the state became a more dominant actor in the hydropower sector. For the state's increasing influence on the sector generally, see Skjold (n 15); Thue and Nilsen (n 16).

112 See generally Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 23); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 24); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 25).

113 See www.nvn.no.

ergy.[114] The Ministry, in turn, gives its recommendation to the King in Council, who makes the final decision.[115] Parliament must also be consulted for regulations that will yield more than 20 000 natural horsepower.[116]

As indicated by the survey of relevant legislation given in previous sections, there are many categories of hydropower projects. Moreover, different categories call for different licenses. Hence, the first step in the application process is for the developer to determine exactly what kind of license they require. This is further complicated by the fact that some categories overlap, since they are based on different measuring sticks for assessing the scale of an hydropower project.

One important parameter is the power of the hydropower generator, measured in MW (Megawatts). There are four categories of hydropower formulated on this basis: the micro plants (less than 0.1 MW), the mini plants (less than 1 MW), the small-scale plants (less than 10 MW), and the large-scale plants (more than 10 MW). In practice, one tends to use small-scale hydropower more loosely, to refer to all projects less than 10 MW. Still, a further qualification is sometimes required. For example, the authority to grant a license for a micro or mini plant has been delegated to the regional county councils since 2010, in an effort to reduce the queue of small-scale applications at the NVE.[117] The council's decision is based on a (simplified) assessment made by the regional office of the NVE. In addition, licenses for micro and mini plants may be granted even in

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114 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705) and directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270), pursuant to Water Resources Act 2000 s 64.

115 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

116 See Watercourse Regulation Act 1917, s 2.

117 See delegation letter from the Ministry of Petroleum and Energy, dated 07 December 2009, available at http://www.nve.no (accessed 24 August 2014). The county council is an elected regional government institution situated between the municipalities and the central government. There are 19 county councils in Norway as of 01 January 2015. They are comparatively less important than both the municipalities and the central government, but have several responsibilities, particularly in relation to infrastructure, education and resource management. See generally Ole T Berg, 'Fylkeskommune' (*Store norske leksikon*, 29th April 2015) ⟨https://snl.no/fylkeskommune⟩ accessed 14th July 2015.

watercourses that have protected status pursuant to environmental law.[118]

For small-scale plants proper, the authority to grant a license is delegated to the NVE, with the Ministry serving as the first instance of appeal.[119] For large-scale plants, the granting authority is the King in Council, based on a recommendation from the Ministry.[120] However, in practice, the decision is usually closely based on assessments and recommendations provided by the NVE.[121]

While the relevant licensing authority depends on the effect of the planned plant, the kind of license required depends on a different categorisation, relating to the level of planned water regulation, measured in natural horsepower. Here, there are three categories: run-of-river schemes (less than 500 natural horsepower), non-industrial regulations (less than 4000 natural horsepower), and industrial regulations (more than 4000 natural horsepower).[122]

Almost all hydropower schemes require a license pursuant to section 8 of the Water Resources Act 2000.[123] For run-of-river schemes, no further licenses are required for the development itself, although an operating license pursuant to the Energy Act 1990 is typically required for the electrical installations.[124] For schemes involving a non-industrial regulation, an additional license pursuant to section 8 of the Watercourse Regulation Act 1917 is required. Industrial regulation schemes require yet another license, pursuant to section 2 of the Industrial Licensing Act 1917.

As is to be expected, the complexity of the licensing procedure tends to increase with the number of different licenses required. However, the licensing applications tend to be dealt with in

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118 See Decision no 240, Stortinget (2004-2005), St.prp.nr.75 (2003-2004) and Innst.S.nr.116 (2004-2005).

119 See delegation of 19 December 2000, from the Ministry of Petroleum and Energy (FOR-2000-12-19-1705).

120 See directive of 15 December 2000, from the King in Council (FOR-2000-12-15-1270).

121 For a detailed guide to the administrative process for large-scale applications, published by the NVE, see Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010).

122 See Watercourse Regulation Act 1917 s 2 and Industrial Licensing Act 1917, ss 1,2.

123 As mentioned in Section 4.3, the exceptions are very small schemes (usually mini or micro) that are deemed to be relatively uncontroversial. Such schemes only require a license pursuant to the Planning and Building Act 2008.

124 See Energy Act 1990, s 3-1.

parallel, so that all licenses are granted at the same time, following a unified assessment. In practice, when the Watercourse Regulation Act 1917 applies, it structures the procedure as a whole, also those aspects that pertain to other licenses.

In addition, yet another categorisation of hydropower schemes is used to determine the relevant application procedure. This categorisation is based on the annual production of the proposed plant, measured in GWh/year. There are three categories: simple schemes (less than 30 GWh/year), intermediate schemes (less than 40 GWh/year), and complicated schemes (more than 40 GWh/year). As mentioned in Section 4.3.2, the most important rules in the Watercourse Regulation Act 1917 applies to complicated schemes, regardless of whether or not the scheme involves a regulation.[125] In addition, applications for such schemes must be accompanied by an impact assessment pursuant to section 14-6 of the Planning and Building Act 2008.

This means that the applicant is required to organise a public hearing prior to submitting their formal application, to collect opinions on the project and provide an overview of benefits and negative effects of the plans, particularly as they relate to environmental concerns.[126] In practice, if an impact assessment is required this significantly increased the scope and complexity of the application processing.

For intermediate schemes that do not involve regulation, the rules in the Watercourse Regulation Act 1917 do not apply. However, impact assessments *may* still be required.[127] Here the threshold of 30 GWh/year has been set as an additional threshold by the NVE, who have been delegated authority to require impact assessments for hydropower projects even when these yield less than 40 GWh/year.[128] For the intermediate schemes, NVE decides whether an impact assessment is

[125] See Water Resources Act 2000, s 19.

[126] See directive of 19 December 2014 (FOR-2014-12-19-1758), pursuant to the Planning and Building Act 2008, ss 1-2,14-6.

[127] See Stokker (n **??**) 20.

[128] See directive of 19 December 2014 (FOR-2014-12-19-1758).

required on a case-by-case basis. For simple schemes, on the other hand, impact assessments will not be required. Such schemes make up the core of what is described as small-scale hydropower in daily language.

The time from application to decision can vary widely, depending on the complexity of the case, the level of controversy it raises, and the priority it receives by the licensing authority. Usually, the assessment stage itself will last 1-3 years, sometimes longer.[129] While large-scale schemes involve more complicated procedures, they are also typically given higher priority than small-scale schemes. In recent years, following the surge of interest of small-scale development, a processing queue has formed at the NVE.[130] This means that small-scale applications typically have to wait a long time, sometimes several years, before the NVE begins processing them.[131]

As I will discuss in more depth in the next chapter, the issue of expropriation is rarely given special attention during the application assessment. This is so even in cases when an application to expropriate waterfalls is submitted alongside the licensing applications. The issue of expropriation is rarely singled out for special treatment, at least not in cases of large-scale development. Moreover, as mentioned in Section 4.3, an automatic right to expropriate follows from section 16 of the Watercourse Regulation Act 1917.

This rule is not understood to cover the right to harness hydropower as such, but it *is* understood to cover the right to divert water away from river systems where the applicant has no previous riparian rights.[132] This is a *de facto* expropriation of a riparian right, and it is recognised as such in relation to the issue of compensation. However, it does not count as expropriation of a right to harness hydropower. Recently, the Supreme Court held that because of this, many of the

[129] See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø, 'NOU 2012:9' , 84-85.

[130] See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 84.

[131] See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 84.

[132] See *Jørpeland* (n **??**).

procedural rules that ordinarily apply to expropriation of riparian rights are not relevant.[133] Rather, the procedural rules and practices related to the licensing procedure are considered exhaustive.

These rules and practices pay little attention to the interests of local owners and the immediate local community. Usually, the only locally grounded actor that is recognised as playing an active role in the process is the municipality. However, even the role of the municipality is limited. Once a license is granted according to a sector-specific statute, no regular planning license needs to be obtained from the municipality government.[134] However, the municipalities must be notified of any application that might affect their interests, and they are expected to express their views.[135] In addition, they may protest against the plans using a form of objection that requires the NVE to enter into dialogue with them about possible changes and improvements.[136] If an agreement is not reached, a license can still be approved, although then always by the Ministry, not the NVE.[137]

The local owners are in a much weaker position. The NVE is not even obliged to notify them of licensing applications concerning their riparian rights. Rather, it is expected that the applicant notifies affected owners when submitting a license application. It is not established practice for the NVE to check that the applicant has fulfilled their obligation in this regard.[138] The applicant is also responsible for several other aspects of the assessment process, including the assessment of possible alternatives.[139]

One might think that this would raise competency questions, particularly in cases involving expropriation. However, even for such cases it is established practice for the NVE to delegate to

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133 See *Jørpeland* (n **??**).

134 See Planning and Building Act 2008 s 12-1.

135 See Watercourse Regulation Act 1917, s 8 and Water Resources Act 2000, s 24.

136 See Planning and Building Act 2008, ss 5-4,5-6, c.f., Water Resources Act 2000, s 24.

137 See Planning and Building Act 2008, s 5-6.

138 See *Jørpeland* (n **??**), and the discussion in Chapter 5, Section 5.6.

139 See Stokker (n **??**). For a concrete example of its effect in expropriation cases, I refer to *Jørpeland* (n **??**) and the detailed assessment of this case offered in the next chapter.

the applicant much of the responsibility for preparing the assessment material, a practice that the Supreme Court has accepted.[140]

In cases that fall under the Watercourse Regulation Act 1917, the NVE must send its final report and recommendation to the interested parties for comments.[141] It is established practice that local owners do *not* count as interested parties in this regard.[142] This includes the owners of those rivers and waterfalls that the applicant wishes to expropriate. Hence, while the municipalities and various environmental interest groups are informed of how the case progresses and asked to comment prior to the final decision, the owners must inquire on their own accord if they wish to be kept up to date on the application process.

The lack of procedural safeguards protecting the interests of local owners is reflected in the kind of assessments that tend to be carried out. It is typical for assessments to focus primarily on the benefit of increased electricity production weighed against the negative effects on the natural environment. This, indeed, is the perspective that permeates the whole system, from the rules setting out the expected content of applications, through to the procedures followed when assessing cases, towards the criteria used to determine if a license should be granted.[143] As a result, the opinions of environmental groups and expert agencies are typically taken seriously, while the owners typically struggle to make an impact.[144]

To sum up, hydropower cases are assessed from within an expert-based system of governance, which also relies heavily on data that is collected and presented by the applicant. Political voices tend to remain fairly distant, although special interest groups can still play an important role. Municipality companies have been replaced by commercial actors on the applicant side, while the

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140 See *Jørpeland* (n **??**).

141 See Watercourse Regulation Act 1917 s 6.

142 See *Jørpeland* (n **??**).

143 See Stokker (n **??**).

144 See *Jørpeland* (n **??**).

most important administrative decision-maker, the NVE, is a centralised, expert-based, directorate.

This is the procedural context of Norwegian hydropower, entrenched in law. In the next section, I will shift attention towards practical reality, focusing on the changes that resulted from the liberalisation reform of the early 1990s. I will begin by considering the established part of the sector, by presenting the ownership and management structures surrounding large-scale plants and the management of the national grid. Then I go on to consider specifically the surge of interest in small-scale hydropower, which represents an important counterweight to the process of centralisation that has followed in the wake of the reform.

4.4 Hydropower in Practice

The history of hydropower in Norway can be roughly divided into four stages. The first stage was the development that took place prior to 1909. During this time, private actors dominated, with public ownership playing a minor role.[145] Moreover, there were many private interests speculating in acquiring Norwegian waterfalls, anticipating the value that these would have for industrial development.[146]

After 1909, the introduction of licensing obligations and the rule of reversion meant that the state gained increased control over Norwegian water resources. At the same time, local municipalities began to invest in hydropower to provide electricity to its citizens, a service they were increasingly being obliged to provide.[147] This marked the start of the second stage of hydropower development, which saw the development of a more tightly regulated, yet still decentralised, hydropower sector.

In fact, throughout the first half of the 20th century, most hydroelectric plants were small-scale

[145] See Ot.prp.nr.61 (2007-2008) (n 52).

[146] See Hjemfall (n 10) 30-31.

[147] See Ot.prp.nr.61 (2007-2008) (n 52).

plants that supplied local communities with electricity.[148] Moreover, as of 31 December 1943, 89% of all hydroelectric power stations in Norway were still private, many of which were mini and micro plants that were owned and operated by the local community.[149] However, many bigger plants were also under private ownership, with 57% of the total hydroelectric power available at this time supplied by the private sector. Moreover, while the micro and mini plants accounted for 72.9% of the total number of plants, they only accounted for 1.6% of the total electricity supply.[150]

By the end of 1943, 80% of the Norwegian population had access to electricity. In scarcely populated rural areas, the corresponding figure was 70%.[151] This shows that the decentralised approach to hydropower development, based on private ownership and local control, succeeded quite well in supplying electricity to the country's population.

However, the regulatory regime was soon to undergo a significant change, designed to facilitate industrial development and increased state control. This change came quite rapidly after the Second World War, when the central government began to invest heavily in hydropower, often to ensure economic development by subsidising the metallurgical industry.[152] This period saw increased marginalisation of small private electricity companies, as well as local owners.[153] Indeed, it was often demanded, as a condition for allowing local communities access to the national electricity grid, that local hydroelectric plants had to be shut down.[154] During this time, the development of hydropower was seen as an important aspect of rebuilding the nation, a task carried out in the

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148 See Utbygd vannkraft i Norge (Norges vassdrags- og elektrisitetsvesen 1946) 11. This is a report from the water directorate published in 1946, showing that as of 31 December 1943, 97.8% of all hydroelectric plants in Norway were small-scale plants. However, these plants contributed only 28% of the total hydroelectric power installed at that time.

149 See Utbygd vannkraft i Norge (n **??**) 6. See also Hindrum (n 16) 111.

150 See Utbygd vannkraft i Norge (n **??**) 7.

151 See Utbygd vannkraft i Norge (n **??**) 7.

152 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 59-65.

153 At the same time, powerful (private) metallurgical interests benefited greatly, sometimes also at the expense of the general supply of electricity. See **tvedt96**

154 See Hindrum (n 16) p.111.

public interest, not primarily to supply the public with electricity, but rather to facilitate a specific kind of economic development that national politicians deemed desirable.[155]

The state-dominated system set up on this basis remained in place until the 1970s, when environmental concerns and discontent among the municipality governments began to emerge with greater force.[156] At the same time, the typical development project had grown both in scale and complexity, making environmental worries and local demands for increased benefit sharing more convincing.[157] Several actors would frequently oppose large-scale hydroelectric development, including environmental interest groups, local communities, as well as municipal and regional government institutions.[158] The typical response from the state was to introduce measures that sought to pacify the regional and municipal government opposition, which was structurally more serious than opposition from local people and environmental groups. The typical approach was to grant an increased share of the financial benefit to local and regional institutions of government, to instil support for state-led development plans.[159] This generally worked quite well, but also to some extent limited the centralisation process and the state's power over the hydroelectric sector.[160]

The fourth state of hydropower development began in 1990 after the passage of the Energy Act 1990. The liberalisation that followed saw the transformation of the hydropower sector into a commercial market, based on profit-maximising and competition. As a result, the structure of decentralised management withered away further, as many municipality companies were either bought up by more commercially aggressive actors or forced to merge and change their business

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155 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 59.

156 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 71-75.

157 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 73.

158 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 71-72.

159 See Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(01) Historisk tidsskrift, 73-76.

160 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n 11) 85.

practices in order to remain competitive.[161] At the same time, a new decentralised force emerged in the sector, in the form of local owner-led projects.[162]

The core idea behind the Energy Act 1990 was that the electricity sector should be restructured in such a way that production and sale of electricity, activities deemed suitable for market regulation, would be kept organisationally separate from electricity distribution over the national grid, a natural monopoly. However, the act itself does not explain in any depth how this is to be achieved. In practice, moreover, the divide has not been strictly implemented. In particular, most of the large energy companies in Norway continue to maintain interests in both distribution, production and sale of electricity, a phenomenon known as "vertical integration".[163] In fact, since the liberalisation reform also caused centralisation, the degree of vertical integration in the electricity sector has increased since the passage of the Energy Act 1990.[164]

The water authorities try to respond to this, particularly by making use of their authority to give organisational directives when they grant distribution licenses.[165] Moreover, electricity companies are required to keep separate accounts for production, distribution and sale of electricity.[166] It is also required that transactions across these functional divides are clearly marked, and that they are based on market prices.[167] Moreover, the NVE serves a control function in this regard, as they review the accounts of distributors on an annual basis.[168]

The water authorities have also sometimes required that a separate company is set up to

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161 See Bibow (n 18) 583 (commenting on the increased consolidation of power on the electricity market, following acquisitions and mergers after 1990).

162 See Section **??** below.

163 See Bibow (n 18) 580-583.

164 See Bibow (n 18) 583.

165 See Energy Act 1990, s 4-1, para 2, no 1.

166 See directive of 11 March 1999 (FOR-1999-03-11-302), s 4-4 a and s 2-6, issued by the NVE pursuant to directive of 7 December 1990 (FOR-1990-12-07-959), s 9-1, cf., Energy Act 1990, s 10-6.

167 See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-8.

168 See directive of 11 March 1999 (FOR-1999-03-11-302), s 2-1.

manage the distribution activities.[169] However, it is permitted for this reorganisation to take place through the formation of a conglomerate, under a single parent company that controls both the distribution company, the production company and the sales company. Indeed, this model has now been implemented by most of the large energy companies in Norway.[170]

It seems unclear whether this approach really achieves the stated objective. By adopting the conglomerate model of organisation, the major players on the market have successfully gained control over a larger share of both the production and distribution facilities for electricity. Hence, these actors effectively control the core infrastructure that makes up the backbone of the Norwegian electricity sector. The *intention* is that monopoly power should only be exercised with respect to the distribution grid on strictly regulated, non-discriminatory, terms. But is this realistic when the conglomerate including the grid operator has significant stakes in production and sale of electricity?

This question calls for a separate study, and I will not be able to address it in any depth here. However, I will direct attention at one aspect of this that arises with particular urgency for small-scale development of hydropower. It is quite common, in particular, that small-scale projects remain unrealised because the grid is regarded to lack sufficient capacity to accommodate new electricity.[171] The distribution company is authorised to deny access in such cases, in keeping with their responsibility for providing an efficient and stable public service.[172]

Often, the distribution company will be a sister company of an energy producer operating in direct competition with the company seeking access. This raises obvious questions about the impartiality of the assessments carried out by the distribution company. In expropriation cases, this tends to become a thorny issue, particularly in relation to the assessment of the cost of undertaking

169 See Bibow (n 18) 581-582.

170 Bibow (n 18) 582.

171 See, e.g., Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 84,161-162.

172 See Energy Act 1990, s 3-4, c.f., directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

alternative development schemes. Riparian owners are rarely pleased when they realise that the expropriating party is part of the same conglomerate as the grid company that estimates the grid connection costs associated with owner-led development.

The water authorities themselves have recognised that access rights soon become illusory if it is too easy for the grid companies to deny access based on efficiency considerations.[173] At the same time, they point to the need for responsible management of the national grid, which, as they see it, requires delegation of authority to the grid companies. Hence, the authorities are left with a dilemma. So far, they have responded to this mainly by issuing more regulation, not by attempting to reduce the level of power-concentration in the electricity sector.

The Energy Act was changed in 2009, such that grid companies are now subjected to a more wide-reaching duty to allow access for producers, even when this necessitates new investments.[174] But who should pay, and how much? This is often unclear, and while the water authorities have a supervisory function, it is the grid companies themselves that determine this in the first instance.[175] In addition, grid companies may still deny access in cases when the needed investments are not "socio-economically rational".[176] Hence, it seems that these new rules only push the question of fairness and accountability further into the details of the decision-making process, without addressing the underlying problem of power concentration.

As I have already mentioned, the market-orientation of the electricity sector has reduced the level of political control and accountability. Today, a management model based on economic rationality and expert rule has become dominant. According to Brekke and Sataøen, this serves to set the reform that took place in Norway apart from similar energy reforms in Sweden and the

[173] See Ot.prp.nr.62 (2008-2009) .

[174] See Act no 105 of 19 June 2009 regarding changes in the Energy Act 1990.

[175] See directive of 7 December 1990 (FOR-1990-12-07-959), s 3-4.

[176] See Energy Act 1990, s 3-4. The authority to decide whether this requirement is fulfilled is vested with the Ministry.

UK.[177] Moreover, Brekke and Sataøen argue that this might be an underlying cause of some recent controversies, particularly with regards to the development of the national grid.

The most serious case so far is that of *Sima - Samnanger*, a new distribution line that will cut through the area known as *Hardanger*, a scenic part of south-western Norway. The local population vigorously protested the plans.[178] It would destroy a valuable part of Norwegian nature, they argued, without providing the people living there with anything in return.[179] Despite an extensive campaign against the plans, the government still pushed ahead, arguably demonstrating both the power of the central government and its willingness to use it in cases involving management of the national grid.[180]

The growth of the small-scale hydropower sector acts as a counterweight to centralised management and expert rule, giving local communities and owners a new voice, as market participants. Since the mid- to late 1990s, the small-scale sector has grown significantly. It has been estimated that about one third of the remaining potential for hydropower in Norway, measured in annual energy output, will come from small-scale projects.[181]

Many established energy companies have entered into the small-scale market, but they are facing serious competition from new actors, several of which are owner-controlled and locally based. This development has been a counterweight to the increasingly centralised ownership pattern in the hydroelectric sector. In many ways, owner-led and owner-cooperating companies have replaced the municipality companies as the local anchor of Norwegian hydropower.

In a recent report, the potential for profitable small-scale hydropower projects was estimated to

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177 See Ole Andreas Brekke and Hogne Lerøy Sataøen, 'Fra Samkjøring til Overkjøring' (2012) 44(6) Plan 22.

178 See Brekke and Sataøen (n **??**) 22-23.

179 Brekke and Sataøen (n **??**) 26-27.

180 Brekke and Sataøen (n **??**) 27.

181 See Energiutredningen - verdiskaping, forsyningssikkerhet og miljø (n **??**) 231.

be around 20 TWh/year.[182] On this basis, the authors of the report estimate that the total present-day value of the waterfalls suitable for small-scale hydropower is about 35 billion Norwegian kroner, i.e., about 3.5 billion pounds.[183] This calculation is based on a model where the waterfalls are exploited in cooperation with a commercial company, *Småkraft AS*. It might be an underestimate of what small scale hydropower could represent for local communities if they remain in charge of development themselves.

Small-scale hydropower has become socially and political significant in Norway. In the report mentioned above, it is estimated that the value of rivers and waterfalls amount to just under 50 % of the total equity in Norwegian agriculture.[184] Moreover, hydropower is increasingly seen as a possibility for declining regions to counter depopulation and poverty. It promises to give these communities a chance to regain some autonomy and influence with respect to how local natural resources should be managed. In some regions, small-scale hydropower is the only growth industry. Hence, it takes on great political and social importance, not just for the owners of waterfalls, but for the community as a whole.

For an example of a community where small-scale hydropower has played such a role, I point to Gloppen, a municipality in the county of Sogn og Fjordane, in the western part of Norway. 19 schemes have already been successfully carried out, all except one by local owners themselves, amounting to a total production of over 250 GWh/year. This prompted the mayor to comment that "small scale hydro-power is in our blood".[185] When interviewed, he also directed attention at the fact that hydropower had many positive ripple effects, since it significantly increased local

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182 See Normann Aanesland and Olaf Holm, Verdiskapning av Småkraft (Rapport Nr. 31, Universitetet for miljø- og biovitenskap 2009). For comparison, suggesting the scale of this potential, I mention that the total consumption of electricity in Norway in 2011 amounted to 114 TWh, see http://www.ssb.no/en/energi-og-industri/statistikker/elektrisitetaar.

183 See Verdiskapning av Småkraft (n **??**) 1.

184 Verdiskapning av Småkraft (n **??**) 1.

185 See Andreas Starheim, 'Kommunen med Småkraft i Blodet' [2012] (3) Småkraftnytt.

investment in other industries, particularly agriculture, which had been severely on the decline.

To achieve such effects, it is important to organise development in an appropriate manner. Moreover, to explain how waterfalls came to be as valuable as they are today, it is crucial to direct attention to the way in which waterfall owners initially asserted themselves on the market. In the following, I do this by giving an in-depth presentation of an early model for local involvement in hydropower development, published at a seminar in 1996.[186] This model contains an early expression of several ideas that would prove influential to the development of the small-scale hydropower sector.

However, certain other aspects of the model have not been widely adopted. These are aspects that pertain to the balance of power between owners and developers, as well as the relationship that should be established with larger communities of non-owners, including environmental groups and other water users. Hence, considering the model in some depth, and assessing its impact, will allow me to shed light on desirable social functions of waterfall ownership, and the extent to which such functions are fulfilled on the market today.

4.5 *Nordhordlandsmodellen*

In five brief points, the *Nordhordlandsmodellen* sets out a framework for cooperation between waterfall owners, professional hydroelectricity companies, local communities, and greater society.[187] The first point makes clear that the aim of cooperation should be to ensure local ownership and control: external interests should never be allowed to hold more than 50 % of the shares in the development company. If this company is organised as a limited liability firm, then the plan stipulates that local residents – not necessarily owners – are to be given a right of preemption in the

[186] See Dyrkolbotn and Steen (n 27).

[187] See Dyrkolbotn and Steen (n 27). The model was presented at a seminar in 1996, as the result of a collaboration between Otto Dyrkolbotn, a farmer and a lawyer, and Arne Steen, the director of *Nordhordland Kraftlag*, a municipality-owned energy company.

event that shares come up for sale. The possibility of organising the development company as a local cooperative is also mentioned.[188]

The second point of the model sets out a method for valuing the riparian rights prior to development. It stipulates that the appraisement should reflect the real value of such rights, normally estimated on the basis of lease capitalisation. That is, one assumes first that the riparian owners are entitled to rent based on the level of annual production in the planned hydropower project. Then, for the purpose of appraisement, the expected rent is capitalised to find the present value of the riparian rights, relative to the development project in question.[189]

After such a value has been calculated, the model stipulates that owners are to be given a choice of either leasing out their water rights to receive rent, or to use the capitalised value of (part of) this rent as equity to acquire shares in the development company. The third point in the model then offers a clarification, by stating that the development company should not in any event acquire ownership of riparian rights, but only a time-limited right of use. After 25-35 years, this usufruct should fall away and full dominion over the river should revert back to the landowners, free of charge. This is the proposed rule even in cases when the landowners themselves initially control the majority of the shares in the development company.

The model goes on to demonstrate the commercial viability of this organisational model, by pointing to a concrete municipality-owned energy company that stated its willingness to cooperate with owners on such terms, to help with financing and share the risk.[190] The fourth and fifth points of the model describe the intended role of the local development company in society, by making

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188 References needed.

189 This approach stands in stark contrast to the earlier valuation method used in the electricity sector, which relied on a purely theoretical assessment based on the aforementioned notion of a natural horsepower. See Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015); *Bergenshalvøens Kommunale Kraftselskap v Neset and others* Rt-1997-1594.

190 The company in question is Nordhordland Kraftlag, where one of the authors of the model, Arne Steen, was a director.

clear that hydropower development should not take place in isolation from other interests and potential uses of the affected river. Rather, potential developers should take on formal obligations towards other user groups. Moreover, obligations should not only be negatively defined, as duties to minimise or avoid harms. Positive obligations should also be introduced, such as duties to improve other qualities of the river system, and to engage in active cooperation with other users.

It is explicitly stated that environmental concerns should be given due regard. As an illustration of a positive obligation arising from this, the model goes on to make clear that less invasive projects may have to be considered, even if this is not prescribed by the authorities. In some cases, environmental concerns can suggest solutions that are not economically optimal. In addition, fishing and tourism are mentioned as concrete examples of other water uses that the hydropower company should actively seek to promote.

The overall aim, it is made clear, is to ensure sustainable management of the river system as a whole. Interestingly, the model predicts that local ownership will make this easier, by making a structural contribution to sustainability that exceeds what can be achieved through governmental regulation alone. This claim is then illustrated by a concrete example of a case in which the local owners decided to pursue a scheme that was less invasive than the project endorsed by the water authorities.[191]

The model goes on to emphasise the need for integrated processes of resource planning and decision-making, to ensure that hydropower development is not approached as an isolated economic and environmental concern, but looked at in a broader social and political context. To achieve this, it is argued that local communities need to play an important role in the management of water resources. Another concrete example follows, regarding the master plan for *Romarheimsvassdraget*, a river system in the municipality of Lindås, in the county of Hordaland.

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[191] Today, this project has become Svartdalen Kraftverk, finalised in 2006. It produces 30 GWh annually, enough electricity for about 1500 households, see http://no.wikipedia.org/wiki/Svartdalen_kraftverk.

This river system was originally intended for large-scale development undertaken by BKK AS, with no involvement of local owners.[192] The project would involve a total of three river systems, such that the water from *Romarheimselva* and another river would be diverted to a neighbouring municipality for hydropower development there. After local owners got involved in the planning, they argued against these plans. Eventually, they were successful, as the NVE agreed to endorse an alternative consisting of 7 distinct run-of-river projects undertaken in cooperation with local owners.[193]

It is important to note that when *Nordhordlandsmodellen* was formulated, owner-led development of hydropower was still a recent phenomenon, driven forward by individual owners and local groups that saw the potential and had enough know-how to get organised. Later, however, commercial companies emerged that specialised in cooperating with local owners.[194] Today, many such companies operate, making it relatively easy to initiate a process of owner-led development. Moreover, owners that are not themselves aware of the potential inherent in their riparian rights may be approached by interested commercial actors. These actors will then tend to compete for the chance of striking a deal with the owners. Most of them rely on cooperation on terms that reflect the main ideas expressed in the first three points of *Nordhordlandsmodellen*.

However, several adjustments have become standard, adjustments which systematically benefit the external partner: the requirement that locals should at all times control a majority of the shares is dropped, the period of usufruct is typically longer than 35 years, the reversion to the landowners after this time is made conditional on payment for machines and installations, and no preemption rights are granted to local residents. Importantly, however, the core idea that riparian rights are

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192 BKK AS is one of the 15 biggest hydropower companies in Norway, and would later also purchase Nordhordland Kraftlag.

193 See *Vassragsrapport nr. 25*, Direktoratet for Naturforvaltning, 1999.

194 For a good survey of later developments, I point to Larsen, Lund and Stinessen, 'Erstatning for erverv av fallrettigheter' (n 23); Larsen, Lund and Stinessen, 'Fallerstatning – Uleberg-dommen' (n 24); Larsen, Lund and Stinessen, 'Er naturhestekraftmetoden rettshistorie?' (n 25).

to be valued based on a capitalisation of future rent is accepted. This means, in turn, that local owners rarely need to raise any additional capital to acquire shares in the development company. Moreover, the rent itself can become a significant source of income.

There are two main approaches to calculating this rent. The first approach, introduced already in *Nordhordlandsmodellen*, specifies the rent as a percentage of the gross income from sale of electricity, today often around 10-20 %.[195] In this way, passive owners need not take on any risk related to the performance of the hydropower company. The second approach has been developed by the company Småkraft AS, which is now the leading market actor specialising in cooperation with local owners.[196] According to their model, riparian owners are paid a share of the annual *surplus* from hydropower generation.[197]

This share is usually higher than the rent payable based on the net income; often, the owners are entitled to 50% of the profit.[198] Hence, if the project is a success, the riparian owners might be better compensated. However, they do accept some risks as though they were shareholders, and they do so even though they might not have much of a say in how the company is run.[199]

To illustrate the financial scale of the rent agreements that have now become standard, let us consider a typical small-scale hydropower plant that produces 10 GWh annually. With an electricity price of 0.3 NOK/KWh, this gives the hydropower plant an annual gross income of NOK 3 million. If the rent payable is 20 %, the waterfall owners will receive NOK 600 000 annually, approximately

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195 Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723 (available from the author upon request). See also Katrine Broch Hauge, 'Erstatningsnivået ved tvangsovertaking av fallrettar' (PhD Thesis, 2015) 55-57.

196 It is owned by several large-scale actors on the energy market, see www.smaakraft.no.

197 See Hauge (n 202) 57-60 (also discussing variants of this contractual idea, based on how the surplus is actually defined in the contract).

198 Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 202) (available from the author upon request). See also Hauge (n 202) 58.

199 To limit the risk for owners, companies such as Småkraft AS also operates a system of "guaranteed" rent, but this rent is usually quite a lot less than what the owners could expect from an agreement based solely on rent based on gross income. Source: contracts presented to the court in *Aktieselskabet Saudefaldene v Hallingstad and others* (n 202) (available from the author upon request).

GBP 60 000. By contrast, if the rights were expropriated, the traditional method of calculating compensation would be unlikely to result in more than NOK 600 000 as a *one-time payment* for a waterfall that yields 10 GWh/year.[200]

Hence, the financial consequences of the ideas expressed in *Norhordlandsmodellen* have been dramatic. At the same time, it is clear that the latter two points of the model, addressing the importance of responsible and inclusive management of river systems, have not had the same degree of influence on the market. In the next section, I address this in more depth and comment on some recent developments that threaten to undermine the status of small-scale development as a sustainable alternative to large-scale exploitation. I argue, in particular, that the future of hydropower will likely leave local owners and their communities marginalised once again, unless a social function approach to small-scale development is adopted and entrenched in the law.

4.6 The Future of Hydropower

In recent years, there has been a growing tension between the small-scale hydropower sector and environmental groups. There is talk of a brewing "hydropower battle", as environmentalists grow increasingly critical of what they regard as predatory practices.[201] Reports on small-scale producers who violate regulations help fuel the negative impression of the industry.[202] At the same time, the

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200 For further details on the compensation issue, see **dyrkolbotn14**; **dyrkolbotn15a**; Dyrkolbotn, 'On the compensatory approach to economic development takings' (n **??**). Sometimes, the difference in valuation would be even greater, since the natural horsepower of a development project is highly sensitive to the level of regulation of the waterfall, much more so than the value of the development. For an demonstration of how this affected compensation according to the natural horsepower method, one may consider the case *Bergenshalvøens Kommunale Kraftselskap v Neset and others* (n **??**), which went to the Supreme Court. Here the owners were paid just over NOK 1 million for a waterfall that would yield 100 GWh/year.

201 See 'Det yppes til ny vassdragsstrid!' (2012) 44(03-04) Plan 34.

202 In 2010, the NVE conducted randomised inspections and announced that 4 out of 5 mini and micro plants operated in violation of regulations pertaining to the amount of water they may use at any given time. See 'Små kraftverk driver ulovlig' (*Teknisk Ukeblad*, 13th December 2010) ⟨http://www.tu.no/kraft/2010/12/13/sma-kraftverk-driver-ulovlig⟩ accessed 15th July 2015. In the largest newspaper in Norway, this was reported under the heading that four out of five small-scale plants break the law, see 'Fire av fem småkraftverk driver ulovlig' (*Verdens Gang*, 13th December 2010) ⟨http://www.vg.no/nyheter/innenriks/stroemprisene/fire-av-fem-smaakraftverk-driver-ulovlig/a/10020264/⟩ accessed 15th July 2015. This is misleading, since mini and micro plants are distinct from small-scale plants proper. Most importantly, the former kinds of plants do not usually require a sector-specific

price of electricity has been much lower in recent years than what had previously been forecast, causing severe financial difficulty for many small-scale developers.[203] This has also revealed that some of the actors on the market have engaged in speculative practices, by aggressively entering into agreements with local owners, without carrying out much actual hydropower development.[204]

On the regulatory side, the water authorities have announced that they will adopt stricter procedures to assess licenses for small-scale hydropower.[205] In addition, different planning routines have been adopted to ensure that small-scale schemes are no longer considered individually, but in so-called "packages", collecting together applications from the same area. As a consequence of these changes, the number of rejected applications have increased dramatically in recent years.[206]

Many powerful market actors, who still favour a traditional mode of exploitation, have seized the opportunity to revive the idea of large-scale exploitation.[207] This, they argue, is preferable also from an environmental point of view. It might be more damaging to the affected area, the argument goes, but at the same time, a few large-scale projects mean that many other areas can be left undisturbed with no loss of total energy output. This argument has proven influential in many quarters, particularly among state agencies, such as the NVE and the Norwegian Environ-

development license. Because of this, it also seems plausible that the reported violations might in large part be due to a lack of knowledge and professionalism, not predation. I remark that questions later emerged regarding the accuracy of the report itself. Apparently, one of the plants that was reported to have violated regulations did not even exist, see Øyvind Lie, 'NVE inspiserte kraftverk som ikke finnes' (*Teknisk Ukeblad*, 20th December 2010) ⟨http://www.tu.no/kraft/2010/12/20/nve-inspiserte-kraftverk-som-ikke-finnes⟩ accessed 15th July 2015.

203 See Linda Sunde, 'Småkraft: Kong Midas i revers' (*Bondebladet*, 8th May 2014) ⟨http://www.bondebladet.no/midten/smakraft-kong-midas-i-revers/⟩ accessed 15th July 2015.

204 See Rune Endresen, Jostein Løvås and Stig Tore Laugen, 'Solgte før kraftflopp' (*Dagens Næringsliv*, 20th March 2014) ⟨http://www.dn.no/nyheter/2014/03/20/Energi/solgte-for-kraftflopp⟩ accessed 15th July 2015.

205 See Øyvind Lie, 'NVE varsler flere småkraftavslag' (*Teknisk Ukeblad*, 18th January 2012) ⟨http://www.tu.no/kraft/2012/01/18/nve-varsler-flere-smakraft-avslag⟩ accessed 15th July 2015.

206 In 2013, the number of rejections tripled compared to previous years, while the number of accepted applications remained stable. See Linda Sunde, 'Rekordmange småkraft-avslag' (*Bondebladet*, 6th February 2014) ⟨http://www.bondebladet.no/nyhet/rekordmange-smakraft-avslag/⟩ accessed 15th July 2015.

207 See, e.g., Rune S Alexandersen, 'Troms kraft lobber for å stoppe konkurrent - vil bygge kraftverk til 649 mil' (*Nord 24*, 16th August 2014) ⟨http://www.nord24.no/nyheter/article7531155.ece⟩ accessed 15th July 2015.

mental Agency.[208] It has also been claimed that this perspective is backed up by research done on environmental effects of small-scale and large-scale projects.[209]

The argument used to back up this conclusion is that small-scale plants indirectly affect a greater total area of land, per energy unit produced.[210] This is no doubt true, since small-scale development is a decentralised approach to hydropower. In particular, this form of development requires plants at many different sites to match the energy produced by a single larger plant. But is the accumulative effect on the environment of small-scale development on many sites more damaging than the effect of a much more invasive project on a single site?

This seems to depend on one's starting point when it comes to qualitatively assessing the negative impacts arising from small-scale development compared to large-scale projects. The research so far has provided little or no information or discussion to shed light on this question. In particular, the parameters used to compare small-scale and large-scale developments are mostly defined quantitatively, in terms of generic buffer zones that do not take into account differences in the severity of different kinds of environmental intrusions.[211]

The only buffer zone that is not defined in this way is the *scenic* buffer, the area from which some installation can be seen. Here the model takes into account that a large installation should be assessed using a larger buffer zone than a small one, since the former is visible over a greater area. But even for this parameter, no distinction is made based on the actual visual impression; a large dam that dries up a river and makes it possible to regulate the water level in a lake by

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208 See Jannicke Nilsen, 'Vil ha større vannkraftverk' (*Teknisk Ukeblad*, 14th October 2011) ⟨http://www.tu.no/kraft/2011/10/14/vil-ha-storre-vannkraftverk⟩ accessed 15th July 2015.

209 See generally Tor Haakon Bakken and others, 'Development of Small Versus Large Hydropower in Norway– Comparison of Environmental Impacts' (2012) 20 Energy Procedia 185; Tor Haakon Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (2014) 140 Journal of Environmental Management 93.

210 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 218) 96-99.

211 Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 218) 95.

several meters counts the same as a small cabin with a generator inside, as long as both can be seen.[212] For the other parameters, the data analysis is even more dubious, since the buffers are set uniformly according to general rules of thumb.[213] For instance, a conflict with a threatened species is assumed to arise whenever a technical installation occurs within a certain distance from its natural habitat.[214] Importantly, nothing is said about the severity of conflict, and no distinction is made between a minor installation and a massive disturbance.

Despite the shortcomings of the research presently available, the observation that more land is affected by small-scale hydropower, per produced unit of electricity, has struck a cord with administrative decision-makers. In particular, the idea that large-scale development is better for the environment is fast gaining ground in Norway, representing a complete reversal compared to the political narrative that has dominated for the last 15-20 years.

In his New Year's speech 01 January 2001, the Prime Minister went as far as to declare that the age of large-scale development was over.[215] The same phrase was then repeated in the policy platforms of two successive national governments, in 2005 and 2009 respectively.[216] But as administrative practices and case law on hydropower shows, the end of large-scale exploitation has proved impossible to implement. Despite being official policy at the highest level of government for almost 15 years, large-scale development interests continue to dominate the hydropower sec-

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212 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 218) 95.

213 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 218) 95.

214 See Bakken and others, 'Demonstrating a new framework for the comparison of environmental impacts from small- and large-scale hydropower and wind power projects' (n 218) 95.

215 See, e.g., (n 208) 34.

216 See the "Soria Moria" declaration from 2005, p 57, and "Soria Moria II", from 2009, p 52 (available at www.regjeringen.no).

tor.[217] Interestingly, the leading national politicians are now changing their position as well.[218] This seems to suggest that politicians have yielded to pressure exerted by expert planners and commercial interests in this matter.

This political shift is likely to result in a further weakening of property rights and the rights of local communities. For example, it provides indirect political legitimacy to the NVE, who now pursue an explicit policy of prioritising applications for large-scale projects when these come into conflict with small-scale schemes in the same rivers.[219] In effect, the NVE will refuse to consider applications from owners as long as there are applications pending that might result in the expropriation of their property.

All in all, it seems that small-scale hydropower is currently loosing both commercial force and political credibility as a sustainable alternative for development. The underlying causes of this deserve more attention than I can devote to them in this thesis. It would be particularly interesting to conduct a further examination into the effects of lobbying and the relationship between commercial interests and bureaucratic elites.

In addition, I would like to emphasise a different aspect, namely how many of the recent misfortunes for the small-scale sector seem to underscore the importance of adopting a broader, non-commercial, perspective on privately held rights to waterfalls. It seems that the small-scale sector needs to be challenged with its failure to comprehensively address social and environmental concerns. Moreover, it seems plausible to hypothesise that part of the reason why the small-scale industry has been so easily undermined has to do with the fact that the industry itself has failed to broadly mobilise property owners and local communities in decision-making processes.

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[217] I believe the material presented in this thesis warrants making this claim. Moreover, it is underscored by the two recent Supreme Court decisions in *Jørpeland* (n **??**) and *Otra II* (n **??**).

[218] See Øyvind Lie, 'Energiministeren etterlyser mer regulerbar kraft' (*Teknisk Ukeblad*, 28th October 2014) ⟨http://www.tu.no/kraft/2014/10/28/energiministeren-etterlyser-mer-regulerbar-vannkraft⟩ accessed 15th July 2015 (reporting on recent public statements made by the Minister in support of large-scale development).

[219] See letter from the NVE of 21 March 2012 regarding new routines for the assessment of hydropower applications.

In fact, the small-scale industry has on occasion actively sought to undermine property rights, possibly in an effort to mimic the successes of their large-scale competitors. The industry has argued, in particular, that expropriation should be made more easily available as a tool for small-scale developers and owners who wish to take property from reluctant neighbours.[220] The argument rests on a peculiar form of anti-discrimination reasoning; as long as large-scale developers are allowed to take property by force, small-scale developers should be allowed to do the same. In a world where takings are endemic, this might make some sense. However, it is hardly an attitude that helps the small-scale industry preserve its image as the more sustainable hydropower option.

These critical remarks should not detract from the fact that the growth in small-scale hydropower has led to dramatically increased benefit sharing with many local owners of rivers and waterfalls. However, it is important that this effect is not looked at in isolation, as a matter completely separate from the broader societal consequences of new commercial practices. If one fails in this regard, the pernicious image of owners as socially passive "profit-maximisers" gains a firmer hold both on the political and legal narrative. The negative consequences of this for property as an institution appears to be apparent already in Norway, as I will discuss in the next chapter when I consider recent case law on expropriation for hydropower development.

The call for a broader understanding of the role of small-scale hydropower and owner-led development echoes the theoretical discussion presented in Chapter 2. There I argued that an entitlements-based perspective on property rights fails to do justice to the issues that arise in the context of economic development. In relation to hydropower development, this insight is strongly implicit in *Nordhordlandsmodellen*. However, in the current debating climate in Norway, it seems to be at risk of disappearing from view.

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220 See Ola Brekken, 'Småkraftverk og ekspropriasjon' [2007] (4) Småkraftnytt; Ola Brekken, 'Småkraftverk og ekspropriasjon – replikk til NVE' [2008] (1) Småkraftnytt 21. The articles are written by a leading Norwegian energy lawyer, apparently in his capacity as legal representative of "Småkraftforeningen", an interest organisation for small-scale hydropower (the articles are published in the newsletter of this organisation).

To counter this, I believe the social function view of property must be developed further, so that concrete policy recommendations can be formulated on its basis. The aim, I believe, should be to arrive at frameworks for participatory decision-making regarding hydropower that allows local owners and communities to contribute constructively when society desires commercial development based on their water rights.

I return to this issue in Chapter 6, where I argue that the Norwegian institution of land consolidation can be used to achieve this. First, I will zoom in on the issue of expropriation, where the mechanisms identified in this section often lead to concrete legal disputes. This will bring into focus important issues surrounding the status of economic development takings under Norwegian law.

4.7 Conclusion

In this Chapter, I introduced my case study and provided background information that places it in a broader context with respect to Norwegian law. I presented the legal and regulatory framework surrounding hydropower development, while also tracing its history back to pre-industrial times. I noted that local rights to hydropower has a long tradition in Norway. However, I also observed that after the advent of the industrial age, and particularly following the Second World War, the state took the view that hydropower was a public good that should be exploited for industrial development in the public interest.

The tension that followed now permeates the law on hydropower, particularly following the liberalising reform of the early 1990s. This reform reorganised hydropower development as a commercial pursuit. At the same time, local owners were empowered by the reform, as they were now able to engage in commercial hydropower development themselves. This was made possible by the fact that a market for electricity was set up, founded on the idea that all actors should have access to the electricity grid on non-discriminatory terms.

I discussed the resulting system in some depth, addressing also the question of whether or not the market functions as intended. I noted that the energy reform led to increased concentration of power in the electricity sector, where commercial companies partly owned by the state now wield more power than before. This, I argued, threatens to undermine the intentions behind the reform. I also looked at the extent to which the regulatory framework is able to accommodate new actors and true competition on non-discriminatory terms. I focused particularly on the status of locally led projects as well as the companies that specialise in cooperating with owners. I also discussed controversies that have resulted, particularly relating to the perceived discrimination of smaller actors on the market.

Then I went on to present a prototype for the model by which the smaller actors now tend to organise themselves. I observed that they too appear to have adopted a strongly commercial outlook on the meaning of local hydropower development. I discussed how this departs from earlier ideas, which were based on seeing local development as an expression of local democracy and local management of resources. This earlier vision actively sought to ensure sustainability and incorporate other water interests in the decision-making, a perspective that now seems to be largely missing.

I concluded by arguing that this might be a contributing reason why small-scale development is now falling out of favour. Today, critical voices claim that large-scale development is better, not only because it is more commercially optimal, but also because it is more environmentally friendly. Moreover, issues relating to ownership, control, benefit sharing and local participation, appear only at the fringes, both of the current debate and the current regulatory framework.

This state of affairs, I think, foreshadows many of the issues that will be brought into focus in the next chapter. There, I will look specifically at expropriation of waterfalls, by tracking the position of owners under the current regime. I will argue that the law as it stands is based on a perspective that blocks out both the significant commercial interests of the taker, as well as the

significant social functions and obligations of the original owners. The issue of expropriation, in particular, will invariably raise questions that seem difficult to address without adopting a broader view, which also takes into account the owners' communities and their role within it.

5 Taking Waterfalls

5.1 Introduction

In this chapter, I address expropriation of waterfalls in more depth, particularly the administrative practices that have evolved in relation to such expropriation. My main aim is to shed light on how these practices impact on the position of owners and local communities.

In Norway, the water authorities tend to consider expropriation of riparian rights as a natural component of hydropower development. In particular, a license to expropriate from local owners is typically considered a more or less automatic consequence of a development license. Moreover, as discussed in the previous chapter, the administrative licensing assessment tends to focus on the environmental consequences of development, not how interference in property affects owners and local communities.

As a result, a *presumption* has developed, whereby the administrative decision-makers consider a license to undertake large-scale development as an indication that an expropriation order should also be granted.[1] Importantly, this presumption still remains in place, even though the regulatory and economic context of riparian expropriation has changed dramatically as a result of the liberalisation of the electricity sector in the early 1990s.

In this chapter, I give a detailed presentation of the relevant statutory rules, the history of the

[1] The leader of the hydropower licensing division of the NVE made an explicit statement to this effect in Rune Flatby, 'Småkraftverk og ekspropriasjon – NVEs praksis' [2008] (1) Småkraftnytt 20.

law in this area, and current administrative practices. I then illustrate how the water authorities and the courts perceive and apply the law in this area, by carefully presenting the recent Supreme Court case of *Jørpeland*.[2]

The structure of the chapter is as follows. I begin in Section 5.2 by giving a brief overview of expropriation law generally, as well as special statutory rules relating to hydropower. In Section 5.4, I present the historical context to these rules. In short, I argue that because hydropower development was carried out by public utilities, expropriation for hydropower development enjoyed a high degree of political legitimacy. In addition, the lack of an open market meant that owners could not benefit commercially from developing hydropower themselves. Hence, their financial loss following expropriation was limited. In fact, expropriation (or voluntary sale) of riparian rights was usually the best an owner could hope for in terms of benefiting financially from hydropower.

As discussed in the previous chapter, this changed following liberalisation of the electricity sector in the early 1990s. Ten years later, a new expropriation authority was also introduced, in the Water Resources Act 2000. For the first time in Norwegian history, waterfalls and rivers could now be expropriated for purely commercial gain, also by private companies. In Section 5.5, I place this change in the law in an historical context, before presenting the expropriation framework currently in place. I note that apart from the increased scope of expropriation, the framework developed prior to liberalisation remains largely in place.

In Section 5.6, I use the case of *Jørpeland* to show how the expropriation framework currently in place leaves owners particularly marginalised. Moreover, I note that their standing is very weak under administrative law, as a result of how the expropriation issue is overshadowed by the licensing question.

I then argue that the Supreme Court adheres to a narrow perspective on the meaning of property protection, taking it to be an issue that begins and ends with the question of compensation. In my

[2] See *Ola Måland and others v Jørpeland Kraft AS* Rt-2011-1393.

opinion, this fails to do justice to the most important issue that arises when waterfalls are taken for profit, namely the question of democratic legitimacy.

I conclude the chapter by elaborating on this theme, connecting it also with the theoretical discussion in Part I of the thesis. This sets the stage for the final chapter, where I consider land consolidation as a democracy-enhancing alternative to expropriation in hydropower cases.

5.2 Norwegian Expropriation Law: A Brief Overview

As mentioned in Chapter 3, the right to property is entrenched in section 105 of the Norwegian Constitution. There it is made clear that when property is taken for public use, full compensation is to be paid to the owner. The public use requirement is understood very broadly. According to some legal scholars in Norway, it places no limit at all on the state's authority to expropriate.[3]

However, it is a rule of unwritten constitutional law that administrative decisions which affect the rights of individuals can only be carried out when they are positively authorised by law.[4] Moreover, the Constitution is not understood as providing an authority for the state to expropriate, it merely expresses the presupposition that expropriation is possible.[5] Hence, when applying eminent domain, the government needs to justify this on the basis of specific authorising provisions.

Historically, there was no general act relating to expropriation, and a range of different acts provided the necessary authority to expropriate for specific purposes such as roads, public buildings, and schools.[6] Today, many of these authorities have been collected, broadened, and included in the Expropriation Act 1959.[7] Still, some specific authorities remain, such as section 16 of the

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3 See Jørgen Aall, *Rettsstat og menneskerettigheter* (Fagbokforlaget 2004) 249.

4 See generally Alf Petter Høgberg and Morten Kinander, 'Det formelle legalitetsprinsippet og rettskildelæren' [2011] Tidsskrift for Rettsvitenskap 15.

5 See, e.g., Carl August Fleischer, 'Grunnlovens § 105' [1986] Jussens Venner 1, 6.

6 See Utkast til lov om ekspropriasjon av fast eiendom m.v. 'NUT 1954:1' , 11-12.

7 Act no 3 of 23 October 1959 Relating to Expropriation of Real Property.

Watercourse Regulation Act 1917, which authorises expropriation for watercourse regulation.

Following the introduction of the Water Resources Act 2000, the general authority used to expropriate waterfalls has been included in the general act on expropriation.[8]. Here it is stated that expropriation may take place in order to facilitate "hydropower production". In addition, it is made clear that expropriation can only be authorised if the benefits undoubtedly outweigh the harms.

This sets expropriation orders apart from the various hydropower licenses discussed in Sections 4.3.1-4.3.4 of Chapter 4. For an applicant to obtain development licenses, it is sufficient to show that the benefits outweigh the harms, it need not be ascertained that this is *undoubtedly* the case. However, the practical significance of this difference is limited. According to the Supreme Court, the additional requirement in expropriation cases means only that it should be clear that the benefit is greater, it does not imply that the benefit has to be qualitatively more significant than in the licensing cases.[9]

The authorising authority is the King in Council. However, this authority can be delegated to ministries or other state bodies that the King in Council can instruct.[10] The compensation to the owner is determined following a judicial procedure administered by the so-called appraisement courts.[11] This is the name given to the regular civil courts when they hear appraisement cases, observing the special procedure set out in the Appraisal Act 1917. The appraisal procedure emphasises the importance of factual assessment and lay discretion (the appraisal court typically sits with four lay judges).[12] In addition, there are special rules regarding costs, indicating that the expropriating party is usually required to pay for the procedure, include the owners' legal ex-

8 Expropriation Act 1959, s 2 no 51.

9 See *Løvenskiold-Vækerø Carl Otto Løvenskiold v Staten (Landbruks- og matdepartementet)* Rt-2009-1142.

10 See Expropriation Act 1959, s 5.

11 Expropriation Act 1959, s 2.

12 See Appraisal Act 1917, s 11-12.

penses.[13] In other regards, the appraisal procedure resembles a typical adversarial process before a civil court.[14]

The Expropriation Act 1959 states that unless the Kind in Council decides otherwise, expropriation orders may only be granted to state or municipality bodies. This is formulated as a limiting principle, but in effect it serves as a general authorisation for the executive to decide, without parliamentary involvement, that a larger class of legal persons may be granted expropriation licenses.

For many purposes, directives have been issued that extend the class of possible beneficiaries to any legal person, including companies operating for profit. In 2001, such a directive was issued for the authority to expropriate in favour of hydropower production.[15]

In addition to providing a general authority for expropriation, the Expropriation Act 1959 also contains several procedural rules. These are collected in Chapter 3 of the Act. Here the Act sets out minimal requirements for what an application for an expropriation license must include, stating that it should make clear who will be affected, how the property is to be used, and what the purpose of acquisition is.[16] In addition, the Act requires the applicant to specify exactly what property they require, and to include information about the type of property in question and the current use that is made of it.

The owners must be notified, and the starting point is that every owner should be given individual notice, although this obligation is loosened when it is "unreasonable difficult" to fulfil[17] In such cases, it is sufficient that the documents of the case are made available at a suitable place in the local area. In addition, a public announcement must then be made in the official notification

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13 See Appraisal Act 1917, s 54.

14 See generally Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context, Criteria, and Consequences of Expropriation* (forthcoming, Ius Commune 2015).

15 See Directive no 391 of 06 April 2001.

16 See Expropriation Act 1959 s 11.

17 See Expropriation Act 1959, s 12, para 2.

publication of the government, as well as in two widely read local newspapers.[18]

The licensing authority is required to ensure that the facts of the case are clarified to the "greatest extent possible".[19] This formulation seems very strict, but is also highly non-specific. In practice, the level of scrutiny given to the expropriation question under Norwegian law varies greatly depending on sector-specific administrative practices.

Established practice from several fields, including the hydropower sector, suggests that when expropriation takes place to implement a public plan or a licensed development, little attention is devoted to expropriation as a special issue.[20]

A decision to grant an expropriation license must be justified, and the parties should be informed of the reasons for the decision.[21] This expropriation-specific rule is largely superfluous, however, as the obligation to give reasons would in most cases follow independently from general administrative law, c.f., Section 5.2.1.

The applicant must cover costs incurred by owners in relation to a pending application for expropriation.[22] The exact formulation is that the applicant is obliged to cover the costs that "the rules in this chapter carry with them". That is, the applicant is obliged to cover the costs that are related to the owners' rights pursuant to Chapter 3 of the Expropriation Act 1959. In practice, an owner will be denied costs if the competent authority takes the view that they are unreasonable or disproportionate to their interests in the case.[23]

In addition to the procedural rules in the Expropriation Act 1959, many rules of administrative

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18 See Expropriation Act 1959, s 12.

19 The Norwegian expression is "best råd er", which literally means "best possible way". See Expropriation Act 1959, s 12, para 2.

20 For zoning plans, see *Namsos Kommune v Braaholmen sameie* Rt-1998-416; *Harald Bø v Radøy kommune* Rt-1999-513. For hydropower, see *Jørpeland* (n 8).

21 See Expropriation Act 1959 s 12, para 3.

22 See Expropriation Act 1959, s 15.

23 If the case progresses to an appraisement dispute, the competent authority to decide on costs is the appraisement court. Otherwise, the decision is left with the executive. See Expropriation Act 1959, s 15.

law apply in expropriation cases. In the next section, I give a brief overview of administrative law in Norway, including the most relevant rules of the Public Administration Act 1967.

5.2.1 The Public Administration Act

Starting in the late 19th century, the importance of public administration gradually increased in Norway.[24] This development gained momentum after the Second World War, when administrative bodies also came to be placed more directly under centralised political control. At the same time, the traditional administrative ideal based on strict adherence to the letter of the law was replaced by a form of management that actively sought to pursue political goals.[25] The ambit of administrative decision-making power widened significantly. Many new administrative bodies were set up, while many of those already established were empowered greatly as new statutory rules were introduced that specified the competence of administrative bodies in broader and broader strokes.

As administrative bodies became increasingly powerful, concerns arose regarding the relative lack of procedural safeguards to protect the individuals affected by administrative decisions. This concern was also fuelled by the fact that as the importance of state regulation increased, so did the power of the administrative branch to make decisions that would directly affect the rights and obligations of specific individuals.[26]

In response to this, minimum standards of administrative due process were encoded in the Public Administration Act 1967.[27] This Act sets out the fundamental procedural principles that government bodies must follow when preparing to make administrative decisions. Some rules apply to any such decision, but a particularly important class of rules apply specifically to so-called

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[24] See Innstilling fra Komiteen til å utrede spørsmålet om mer betryggende former for den offentlige forvaltning, 'NUT 1958:3' , 8-12.

[25] See generally Tore Grønlie (ed), *Forvaltning for politikk: norsk forvaltningspolitikk etter 1945* (Fagbokforlaget 2000).

[26] See Innstilling fra Komiteen til å utrede spørsmålet om mer betryggende former for den offentlige forvaltning (n **??**) 12-16.

[27] Act no 86 of 10 February 1967 Relating to Procedure in Cases Concerning the Public Administration.

individual decisions, namely those that affect the rights and responsibilities of one or more specific legal persons.[28] Clearly, owners of property targeted by an expropriation application fall into this category, so the Public Administration Act 1967 applies in expropriation cases.

Many of the rules in the Public Administration Act 1967 mirror those of the Expropriation Act 1959. However, the Public Administration Act 1967 tends to include broader and more detailed formulations. For instance, the duty to give advance notice is accompanied by more information about what kind of information such a notice must contain.[29] In particular, it is said that "the advance notification shall explain the nature of the case, and otherwise contain such information as is considered necessary to enable the party to protect their interests in a proper manner".[30]

Hence, it is not enough simply to inform the party that a case is under way, the Act also stipulates that the notice has to meet a minimum standard of quality. In relation to expropriation of waterfalls this becomes potentially significant, especially in light of the practice I discussed in Chapter 4, whereby applicants send out these notices themselves. One may ask, in particular, what owners are supposed to think when they receive a letter from a commercial company stating that unless a friendly settlement can be reached, their waterfalls and rivers will be expropriated.[31]

The duty to assess cases also follows from the Public Administration Act 1967, mirroring the rules of the Expropriation Act 1959. The formulation is similarly imprecise, as it is declared that cases must be "clarified as thoroughly as possible" before a decision is made.[32] Importantly, the

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28 Public Administration Act 1967, s 2.

29 See Public Administration Act 1967, s 16. Just like the Expropriation Act 1959, the rule in the Public Administration Act 1967 makes clear that individual notices might not be required if the parties are difficult to reach.

30 Public Administration Act 1967, s 16.

31 Such a formulation is typical, used for instance by the expropriating party in *Aktieselskabet Saudefaldene v Hallingstad and others* LG-2007-176723. In general, according to my own experience, a generic letter is sent by the developer to those private individuals who may be affected, with no individuation based on their interests in the case (e.g., based on whether they stand to loose a small-scale hydropower potential or are affected in some (minor) ways by building works). Clearly, this approach can discourage riparian owners from engaging in the administrative process in a manner commensurate with the fact that they own the natural resource in question.

32 Public Administration Act 1967, s 17.

Public Administration Act 1967 includes specific rules that oblige the authorities to inform parties about information they retrieve during their assessment of the case, and to actively solicit further comments from the parties.[33]

The duty to justify and give reasons for administrative decision is also expressed in the Public Administration Act 1967. The duty applies to most individual decision, with some narrowly defined exceptions concerning cases when no party can be assumed to be dissatisfied, or when giving grounds would involve disclosing privileged information.[34] As to the content of the reasons given, the authorities should mention the relevant rules authorising the decision, outline the factual assessment, and describe the main considerations that have been decisive for the use of discretionary power.[35] In case law, the duty to give reasons has some practical significance, since the Supreme Court has declared that insufficient reasons can be taken as an indication that the decision itself suffers from a shortcoming.[36] In hydropower cases, however, the duty to give reasons is understood to pertain to the licensing question as a whole, so that the authorities are not obligated to give individuated reasons to riparian owners, pertaining specifically to the expropriation question.[37]

Sometimes, the parties to an administrative decision are ill-equipped to look after their interests, even if the safeguards mentioned above are respected. This situation often occurs in hydropower cases, as riparian owners often lack the technical, commercial, and legal knowledge necessary to understand the value of their property and their own legal position as owners. The Public Administration Act 1967 establishes a general duty to provide guidance, to ensure that the parties are

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33 See paras 2 and 3 of Public Administration Act 1967, s 17.

34 See Public Administration Act 1967, s 24. Moreover, the King is authorised to limit the duty to give grounds when "special circumstances so require".

35 Public Administration Act 1967, s 25.

36 See *Isene v Staten (Landbruksdepartementet)*; *Hauge v Staten (Landbruksdepartementet)* Rt-2000-1066.

37 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 36); *Jørpeland* (n 8) (discussed in more depth in Section 5.6).

able to look after their interests in the "best possible way".[38] However, it is explicitly stated that the level of guidance must be adapted to the circumstances and the capacity that the government agency has for offering such assistance. At the same time, it is made clear that the decision-making agency must assess, on their own motion, the parties' need for guidance.

To summarise, both the law of expropriation and general administrative law impose a range of procedural rules that ordinarily apply to expropriation cases. In principle, these apply also when rivers and waterfalls are expropriated. In practice, however, they are completely overshadowed by the special rules that regulate the licensing procedure in such cases. I return to this issue in more depth in Section 5.6. First, I elaborate on statutory rules that specifically target expropriation for hydropower, within the context of the relevant licensing procedures.

5.3 Taking Waterfalls by Obtaining a Regulation License

As I mentioned in Chapter 4, Section 4.3.2, the Watercourse Regulation Act 1917 establishes an automatic right to expropriate rights needed to undertake a watercourse regulation. This is not understood to include a right to expropriate rivers and waterfalls needed for the hydropower development. However, it includes a right to transfer water away from a river for development somewhere else.

This is of course a *de facto* license to expropriate riparian rights, since the water as such is taken by the expropriating party. Moreover, it has always been treated as expropriation of riparian rights in relation to the compensation issue.[39] Formally, however, the interference is not considered a riparian expropriation, but rather seen as an expropriation of a right to deprive rivers of water, a sort of easement whereby the developer acquires the right to interfere with the rights of riparian owners in source rivers.

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38 Public Administration Act 1967 s 11.

39 See *Jørpeland* (n 8).

In theory, the rules in the Expropriation Act 1959 and the Public Administration Act 1967 still apply in such cases. Indeed, the rules in the Public Administration Act 1967 express general principles of administrative law, pertaining to all kinds of individual decisions, including both expropriation and licensing decisions. The Expropriation Act 1959, for its part, explicitly states that it applies to property interferences authorised under the Watercourse Regulation Act 1917.[40] However, it is also stated that the rules in the Expropriation Act 1959 only apply in so far as they are "suitable" and do not "contradict" sector-specific rules.[41] This points to the potential caveat that while a range of procedural rules apply in theory, they may be ignored in practice, in so far as they are deemed "unsuitable" by some competent state body.

This is practically significant in hydropower cases. In particular, the established practice among the water authorities is to regard the procedural rules in the Watercourse Regulation Act 1917 as exhaustive.[42] In addition, the material assessment requirement in the Expropriation Act 1959 is not considered to have any independent significance alongside the assessment criterion in the Watercourse Regulation Act 1917.[43] This is so even though case law on the former assessment criterion emphasises the interests of affected property owners in a way that case law on the licensing issue does not.[44]

As a consequence of how the law is understood on this point, it is very hard for owners to challenge the legality of a decision to allow expropriation of their riparian rights, especially when

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40 See Expropriation Act 1959 s 30.

41 Expropriation Act 1959, s 30.

42 This was made clear through the case of *Jørpeland* (n 8), where this practice also got a stamp of approval from the Supreme Court.

43 Again, see *Jørpeland* (n 8).

44 In addition, the formulation in Expropriation Act 1959 s 2 contains the additional qualification that the benefit of interference must "undoubtedly" outweigh the harm, meaning that this clearly must be the case (pertaining to the evidence, not the weight of the benefit compared to the harm), see *Løvenskiold* (n **??**). No corresponding requirement is included in the Watercourse Regulation Act 1917 s 8. Instead, the formulation there is that a license should "normally" not be given unless the benefits outweigh the harms. See also Odd Stiansen and Kjell Haagensen, 'Vannkraftutbygging' in *Vassdrags- og energirett* (2nd edn, Universitetsforlaget 2002) 325-236 (arguing that the "normally" qualification is without practical significance).

expropriation takes place pursuant to the Watercourse Regulation Act 1917.[45] Moreover, even if section 16 of the Watercourse Regulation Act 1917 does not apply, the water authorities tend to approach the affected owners in a similar way. In particular, the practices observed with regard to the issue of property interference is largely the same in all cases when the administrative branch classifies the license application as pertaining to a large-scale project.[46]

For such projects, the water authorities rely on a presumption that the conditions to permit expropriation are fulfilled whenever a development license may be granted.[47] Hence, in order to defend themselves, owners must proceed in a roundabout manner by addressing the licensing question as such. In practice, there is little or no room for arguing on the basis of rules that protect private property. Moreover, in order to argue that the expropriation is unlawful on procedural grounds, the owners must effectively demonstrate that the water authorities dealt with the case in contravention of sector-specific rules and practices pertaining primarily to the licensing question. This is a daunting task, particularly in light of case law developed during the period of monopoly regulation. This body of case law suggests that the courts will largely defer to the administrative branch, even when it comes to interpreting the relevant procedural rules.[48]

As a consequence, procedural objections pertaining to the administrative assessment of existing property interests are unlikely to be successful. I am not aware of any case where such an argument has succeeded. In Section 5.6, I will further demonstrate the present situation by tracking in detail the extent to which the Supreme Court is prepared to tolerate procedural shortcomings pertaining to the expropriation issue in hydropower cases.

First, I give a chronological presentation of how the law on expropriation of waterfalls has

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45 It follows from the discussion in Chapter 5 that large-scale development projects almost always involve a license pursuant to the Watercourse Regulation Act 1917 (or such that the rules from this Act, including s 16 on expropriation apply pursuant to the Water Resources Act 2000).

46 See Flatby (n **??**).

47 See Flatby (n **??**).

48 The deferential stance was expressed most clearly in the *Alta* case discussed in Section 5.4 below.

developed as part of the legal framework for management of hydropower. I begin with the period prior to the reform implemented by the Energy Act 1990.

5.4 Taking Waterfalls for Progress

Historically, Norwegian law did not contain a general authority for expropriation of riparian rights.[49] In the Water Systems Act 1888, a range of provisions authorised appropriation of water rights and land for specific purposes, but the criteria were narrow.[50] Rivers and waterfalls as such could never be made subject to expropriation, and expropriation of other water rights could only be permitted in so far as the affected owners were not thereby deprived of any water power that they could reasonably make use of themselves.[51]

Specifically, expropriation for hydropower development was not permitted, except to the benefit of riparian owners who needed to acquire surrounding land in order to exploit their existing water rights.[52] At the same time, riparian owners could apply for licenses to engage in various industrial exploits, in some cases also when this would prove damaging to other landowners, for instance through deprivation of water or flooding.[53] These rules are similar to many of the rules found in contemporaneous mill acts from the US, c.f., the discussion in Chapter 3, Section 3.5.1. As in the US, the kinds of takings in question here could be classified as economic development takings. However, the source of the economic development potential was never taken from the owners in these cases. Rather, the takings only targeted additional rights that were needed in order for the

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49 See Olaf Amundsen, *Lov om vasdragsreguleringer av 14 december 1917 (nr. 17) med senere tillæg og forandringer: med kommentar* (Aschehough 1928) 29.

50 See WS Dahl, *Den Norske Vasdragsret* (Den Norske Forlagsforening 1888) 69-85. In addition, the purpose of expropriation was largely understood to be binding also on future use, so that the taker would not gain unrestricted control over the rights they acquired. Rather, they were obliged to use these rights to pursue the specific public purpose for which expropriation was authorised. See, e.g., Per Rygh, Ekspropriantens raadighet over ekspropriert ting (Rt-1912-113) 133-140.

51 See Dahl (n **??**) 58,60.

52 See the Water Systems Act 1888, s 15-16. See also the commentary in Dahl (n **??**) 60-65.

53 See Water Systems Act 1888, s 14. See also the commentary in Dahl (n **??**) 54-60.

existing owners to realise the full potential of their own resources.

In fact, an important principle of expropriation law at this time was that no property could be taken if the taker's interest in that property was the same as that of its current owner.[54] This applied regardless of whether or not the owners, subjectively speaking, were likely to pursue those interests optimally. Hence, expropriation of water power was ruled out already as a matter of principle. In particular, as the regulatory system of the day made private hydropower development possible, a private riparian owner was regarded as possessing a hydropower interest. As a result, such owners could not be deprived of their rights by a taker whose interest was also to undertake hydropower development.

Following industrial advances, the interest in hydropower exploded in the late 19th century.[55] As a result, the state increasingly came to see it as a political priority to sensibly regulate the hydropower sector. As discussed in Chapter 4, the most important expressions of this came in the form of two new licensing acts, namely the Watercourse Regulation Act 1917 (Section 4.3.2 and the Industrial Licensing Act 1917 (Section 4.3.3).

Following up on this, parliament soon passed legislation that authorised expropriation of riparian rights for the benefit of public bodies, also when the purpose was hydropower development.[56] In 1940, these authorities were consolidated and integrated in the general water resources legislation, through the Water Systems Act 1940.[57] According to this act, the authority to expropriate waterfalls could be granted only to the state and the municipalities. Moreover, the municipalities could only expropriate waterfalls when the purpose was to provide electricity to the local district.[58]

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54 See Dahl (n **??**) 168-170.

55 See Thor Falkanger, 'Acquisition of Real Property and State Approval' (1987) 31 Scandinavian Studies in Law 57, 58-59. See also the discussion in Chapter 4 Section **??**.

56 Legislation that made it possible to expropriate waterfalls to the benefit of the municipalities was introduced in 1911, and a similar authority that authorised expropriation in favour of the state appeared in 1917, see Amundsen (n **??**) 29.

57 This act has since largely been replaced by the Water Resources Act 2000.

58 See the Water Systems Act 1940, s 148. See also the commentary in A Hugo-Sørensen and Birger Olafsen, *Lov om*

Private parties could only expropriate in exceptional circumstances, when they already owned more than 50 % of the riparian rights that sought to exploit.[59] Moreover, whenever expropriation took place, it was felt that benefit sharing with local owners was required. Hence, special rules were introduced to ensure that takers would have to pay *more* than full compensation (typically a 25 % premium, but in some cases the owner was also given a right to opt for compensation in the form of a proportion of the electricity output of the plant).[60]

As I showed in Chapter 5, the electricity supply in Norway just after the passage of the Water Systems Act 1940 was already well developed, with 80 % of the population having access to electricity. Moreover, in the rural areas the supply often came from one among a vast number of small, local, power plants. In light of the progress already made and the highly decentralised structure of the hydroelectric sector at this time, one might have expected expropriation to remain a relatively rare occurrence.

However, the use of expropriation to facilitate hydropower development increased greatly after the war, as the state itself became engaged much more actively with hydropower development, also for commercially oriented industrial purposes.[61]

Hence, despite the spirit and wording of the Water Systems Act 1940, this was the time when expropriation of rivers and waterfalls became a measure to facilitate economic development. At first, this would still take place on non-commercial, politically governed, terms. But the increased prevalence of expropriation seen during this time had little to do with a pressing need to supply electricity to the people. Rather, it was a consequence of an increased political demand for industrial

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vassdragene av 15. mars 1940: med kommentarer (Tanum 1941) 201-210.

59 See the Water Systems Act 1940, s 55. See also the commentary in Hugo-Sørensen and Olafsen (n 64) 70-74. I remark that this was a novel rule in the 1940 Act, which contradicted earlier theories about the legitimacy of allowing expropriation for private benefit.

60 See Hugo-Sørensen and Olafsen (n 64) 70-91,184,210.

61 See Lars Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (Ad notam Gyldendal 1996) 59-71. See also Dag Ove Skjold, *Statens Kraft 1947–1965: For Velferd og Industri* (Universitetsforlaget 2006).

hydropower, combined with the fact that the hydropower sector was reorganised and brought under increasingly centralised political control.[62]

As I mentioned in the previous chapter, many local, privately owned, hydropower plants were shut down during this period, as a result of an explicit policy meant to create government monopolists.[63] Moreover, as a result of centralisation, a growing share of the financial benefits from development would also accrue to urban areas, as local development companies were replaced by state companies and companies dominated by prosperous city municipalities.[64] The interpretation of the supply requirement in the Water Systems Act 1940 was also significantly relaxed, especially following the development of the national electricity grid. It was no longer obvious, from a technical point of view, when exactly a hydropower development could be said to qualify as making a contribution to the local electricity supply. The electricity was not necessarily used locally. Indirectly, however, one could still argue that the local supply situation would improve whenever more electricity was supplied to the national grid.

5.4.1 The Supreme Court on the Rule of Reversion

The period before liberalisation was not free from conflict regarding the legitimacy of measures undertaken to facilitate hydropower. Already the first major assertion of state control, embodied in the licensing acts of the early 20th century, resulted in significant controversy. At this time, there was a feeling of unease regarding the extent to which the state could regulate the hydropower sector without offending against the property clause in the Constitution.

This debate culminated in the conflict surrounding the rule of reversion that was introduced by

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62 See Thue, *Strøm og styring: norsk kraftliberalisme i historisk perspektiv* (n **??**) 69-71.

63 See Chapter 4 Section **??**.

64 In 2007, as the result of a gradual centralisation process, the 15 largest hydropower companies in Norway, which are largely controlled by the state and some city municipalities, owned roughly 80% of Norwegian hydropower, measured in terms of annual output. In 2006, the public owners of hydropower in Norway benefited from receiving more than NOK 9 billion in dividends. See Ot.prp.nr.61 (2007-2008) , 28.

the licensing acts passed between 1906 and 1917. As mentioned, the rule of reversion meant that in order to purchase riparian rights from private owners, the purchaser had to agree to a licensing condition stating that eventually, after at most 60 years, the state would acquire the waterfalls without paying compensation.

The question that arose was whether this should be regarded as a form of expropriation. If so, compensation would have to be paid pursuant to section 105 of the Constitution. This question resulted in fierce conflict, with some influential legal scholars attacking the rule as a ploy by the state to confiscate Norwegian rivers without compensating owners.[65] However, in a 4-3 decision, the Supreme Court held that section 105 did not apply, since reversion was a licensing condition, not an independent act of property deprivation.[66] No owner was compelled to hand over their rights to the state.[67] Moreover, no owner was compelled to sell their rights. Rather, their willingness to do so was a precondition for the rule of reversion to apply.

One of the judges summed up the majority reasoning by commenting that he would not regard it as expropriation if the state were to forbid sale of riparian rights to private parties altogether.[68] Why then, he asked, should it be regarded as expropriation if such a sale was allowed to take place only on specific conditions? Against this, the minority argued that reversion as a licensing requirement was so severe that it had to be regarded as a *de facto* expropriation, known as a regulatory taking in US terminology.[69] In addition, the minority argued that as the purpose of the reversion rule was to ensure that water rights were eventually brought under state ownership, this rule itself could not be understood merely as an act of regulation. According to the minority,

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65 See Bredo Morgenstierne, Konfiskation eller Ekspropriation (Rt-1914-208, 1914).

66 *Johansen v Den norske Stat ved 1 Regjeringens chef, 2 A/S Furuberg ved dets direktions formand* Rt-1918-403.

67 See *Konsesjonsdommen* (n **??**) 406.

68 See *Konsesjonsdommen* (n **??**) 407.

69 See *Konsesjonsdommen* (n **??**) 412-413. For a brief discussion on regulatory takings, see Chapter **chap:1** Section **??**.

the rule also invoked the power of eminent domain.[70] By contrast, the majority chose to regard the eventual transfer to state ownership as a secondary purpose only, which could justifiably be pursued on the basis of the state's regulatory power alone.[71]

After the Supreme Court upheld the rule of reversion, the legal foundation for tight state regulation of the hydropower sector solidified. As discussed in the previous chapter, the state pursued increasingly complex hydropower projects after the Second World War. At this time, technological and economic advances also made it feasible to divert large amounts of water over great distances (typically through tunnels), to collect water from several different rivers in a common reservoir for joint exploitation. Such projects became known as "gutter" projects, and they grew greatly in scope during the post-War years. Since the relevant licensing procedure was covered by the Watercourse Regulation Act 1917, the practical importance of the expropriation authority in section 16 of this act also increased dramatically.[72]

As discussed in Section **??** of the previous chapter, the opposition to hydropower grew proportionally to the scale and complexity of typical development projects. The critical focus was often on environmental effects, but the interests of local people also featured in these debates. Moreover, local interest were often aligned with the environmental interests. In a situation when local owners could not themselves benefit commercially from hydropower, their response was often to oppose it.

The controversies regarding large-scale development culminated in the case of *Alta*, still argu-

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70 See *Konsesjonsdommen* (n **??**) 415-416.

71 See *Konsesjonsdommen* (n **??**) 407.

72 See Innst.O.I. (1959) 11. This was a proposition to parliament regarding an amendment of the Watercourse Regulation Act 1917. The amendment proposed to remove an earlier rule that applied only to diversion regulations, whereby a license to divert water from a river should *normally* only be granted when the riparian owners in the source river agreed to the measure. This rule made licenses harder to obtain in the diversion cases. However, following the department's recommendation, the rule was removed in 1959. The department argued that the rule had an "unfortunate effect" on the administrative procedure in large-scale diversion cases, noting also the vastly increasing complexity and scale of typical diversion regulations. The minority in the parliamentary committee recommended against the amendment, noting that it would "greatly increase" the authority to expropriate waterfalls, contrasting with the expropriation rules in the Water Systems Act 1940, see Innst.O.I. (n 74) 14. The majority countered this argument by maintaining that the regulatory power of the state would be used to prevent any abuse of power, and that the practical significance of the amendment would be limited to ensuring a "more rational" procedural approach to large-scale applications, see Innst.O.I. (n 74) 14.

ably the most important Supreme Court precedent in the area of hydropower law.

5.4.2 The *Alta* Controversy

The *Alta* case went before the Supreme Court in 1982 after a long period of high-intensity conflict going back to the mid-seventies.[73] In *Alta*, the affected local population largely lacked formal title to the property they sought to defend. This was because the development in question would take place in the northernmost part of Norway, in the native land of the Sami people.[74]

Norway has a history of discrimination against the Sami, and as their culture is largely nomadic, their land rights were never formalised in private law.[75] As a result, land and natural resources in the county of Finnmark are largely owned by the state, at least in the sense of the state appearing as the nominal *in rem* owner.[76]

Due to the sensitive context of interference, the *Alta* plans met with particularly strong criticism, both from environmental groups and groups fighting for aboriginal rights. A broad political movement was mobilised in opposition to the plans, eventually resulting in several serious cases of civil disobedience.[77] The case also came before the courts, as the local population and environ-

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[73] See *Alta Laksefiskeri Interessentskap and others v Staten (Norges Vassdrags- og elektrisitetsvesen) and others* Rt-1982-241. For commentaries, see Torstein Eckhoff, 'Alta-dommen' [1982] Lov og Rett 399; Erik Boe, 'Altadommen – en rettslig løsning på konflikten mellom energiforsyning, naturvern og minoritetsbeskyttelse' (1983) 6(3) Retfærd 76; 'Alta-dommen og Høyesteretts oppgave. En studie i forholdet mellom jus og økologi' [1988] (4) Kart og Plan 401.

[74] For Sami law generally, see Susann Funderud Skoglund, *Samerett: om samenes rett til en fortid, nåtid og fremtid* (Universitetsforlaget 2002).

[75] See Øyvind Ravna, 'Samerett og samiske rettigheter i Norge' in Tore Henriksen og Øyvind Ravna (ed) (Gyldendal juridisk 2012) 149-156

[76] In the past 30 years, partly as a response to the controversy of the *Alta* case, there has been a gradual change in attitude, whereby the rights of the Sami people receives greater legal recognition. In 2007, formal title to most of the land in the county of Finnark was transferred to a special state agency which is regulated by a special statute that obliges it to manage the land with due regard to customary and prescriptive rights of aboriginal groups and local people. See generally Kirsti Strøm Bull, 'Finnmarksloven: finnmarkseiendommen og kartlegging av rettigheter Finnmark' (2007) 46(9) Lov og rett.

[77] This included hunger strikes and attempts at sabotage, see Yngve Nilsen, 'Ideologi eller kompleksitet? Motstand mot vannkraftutbygging i Norge i 1970-årene' (2008) 87(01) Historisk tidsskrift, 80-83. For the Alta controversy generally, see 'Alta Controversy' (*Wikipedia, the free encyclopedia*, 23rd January 2015) ⟨https://en.wikipedia.org/wiki/Alta_controversy⟩ accessed 16th July 2015; Lars Martin Hjorthol, *Alta. Kraftkampen som utfordret statens makt* (Gyldendal akademisk 2006).

mental groups claimed, primarily on the basis of administrative law, that the development licenses that had been granted were invalid.[78]

The *Alta* case did not involve expropriation of the right to harness hydropower. Hence, one might think that the case has limited relevance to the issues addressed in this thesis. However, because of the priority given to the licensing procedure over specific expropriation procedures, the principles expressed in *Alta* also largely determine the legal position of waterfall owners whose rights to hydropower are expropriated.[79]

Alta was admitted to the Supreme Court in plenum, directly on appeal from the district court.[80] The presiding judge commented that as far as he knew, it was the longest and most extensive civil case that the Court had ever heard.[81] In an opinion totalling 138 pages, the Court considers a long range of objections against the development licenses, all of which are either rejected or held to provide insufficient reasons to declare the licenses invalid.

The opponents of the *Alta* development also argued on the basis of human rights and international law.[82] As noted by Eckhoff, these arguments raised subtle legal questions about how to apply the relevant principles of international law to a concrete dispute over hydropower development.[83] However, the Court refused to consider such questions, finding that the negative effect of

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78 See Eckhoff (n **??**).

79 See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 36); *Jørpeland* (n 8).

80 This is a special arrangement available in cases that raise important questions of principle, cf., Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes s 30-2 and Courts of Justice Act 1915, Act No 5 of 13 August 1915 relating to the Courts of Justice, s 5.

81 *Alta* (n 77) 254.

82 First, on the basis of articles 1 and 27 of the International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI) [1966]. Second, on the basis of Indigenous and Tribal Populations Convention, ILO Convention No 107 [1957] (later replaced by Indigenous and Tribal Peoples Convention, ILO Convention No 169 [1989]). Third, on the basis of P1(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, as amended by Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 13 May 2004, entered into force 1 June 2010) CETS No 194 (ECHR).

83 See Eckhoff (n **??**) 351-352. One of the most important international instruments, namely ILO Convention No 107, was not ratified by Norway at the time of *Alta* (Norway later ratified its replacement, ILO Convention No 169). However, it was argued that it had the status of customary international law. See generally Asbjørn Eide, 'Menneskerettigheter og samenes rettigheter' [1980] Lov og Rett 139.

the hydroelectric plant was not so severe as to raise human rights issues.[84]

Instead, the Supreme Court approached the case on the basis of administrative law, focusing on the procedural rules of the Watercourse Regulation Act 1917. In this regard, the opponents of the *Alta* development had pointed to a large number of purported shortcomings of the decision-making process.

First, it had been argued that the original licensing application did not meet the requirements stipulated in section 5 of the Watercourse Regulation Act 1917. Essentially, the original application contained little more than technical details about the planned development, with hardly any identification or assessment of deleterious effects.[85] This shortcoming had been openly acknowledge by the water authorities themselves, who had nevertheless initiated a public hearing.[86]

The Supreme Court concluded that this was "clearly unfortunate".[87] However, several reports and assessments had subsequently been provided, to fill the gaps left open by the initial application. For this reason, the Supreme Court held that the initial mistakes were irrelevant, since it was the licensing process as a whole that should be assessed.[88] Shortcomings at specific stages in the assessment would not be given weight unless they could be seen to imbue the process with a dubious character overall.[89]

The Court then moved on to assess whether the process as a whole fulfilled procedural requirements, particularly those laid down in sections 5 and 6 of the Watercourse Regulation Act 1917. In addition, it had to be considered whether the assessment of the licensing criteria in section 8 of

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84 See *Alta* (n 77) 299-300. See also Eckhoff (n **??**) 351-352.

85 See *Alta* (n 77) 264-265.

86 See *Alta* (n 77) 265.

87 *Alta* (n 77) 265.

88 See *Alta* (n 77) 265-266.

89 *Alta* (n 77) 265.

the Watercourse Regulation Act 1917 had been sufficiently detailed.[90]

In this regard, those who objected to the licenses pointed to a range of negative effects that they believed had not been considered, or had not been considered in enough depth. In relation to nomadic reindeer interests, it was argued that the water authorities had failed to adequately consider the indirect negative consequences of hydroelectric development on reindeer farming in the local area.[91] These effects were described as "practically catastrophic" by some expert witnesses.[92] By contrast, the water authorities had not devoted much attention to the possibility of indirect consequences, citing the difficulty (described as an "impossibility") of attempting to quantify such effects.[93]

After considering the reports and assessments in some depth, the Supreme Court did not find fault with the procedure in this regard. Importantly, the Court stressed that the water authorities had been well aware of the possibility of indirect negative consequences. The water authorities had simply chosen, as a matter of expert discretion, not to place much weight on such consequences.[94] This, according to the Supreme Court, could be regarded as an expression of disagreement with those claiming that the effects would be catastrophic.[95] As a result, the grounds for claiming procedural error disappeared, as the lack of attention directed at indirect consequences was held to reflect an (implicit) factual assessment to the effect that they where not particularly severe.

The structure of the argument used here is more interesting than the factual question. The argument structure, in particular, serves to recast a lack of assessment, a possible procedural error, as an exercise of factual discretion.

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90 Recall section 16 of the Public Administration Act 1967, requiring assessments to be as detailed as "possible".

91 See *Alta* (n 77) 176-179.

92 See *Alta* (n 77) 278.

93 See *Alta* (n 77) 277.

94 See *Alta* (n 77) 279.

95 See *Alta* (n 77) 278.

The *Alta* Court also made some apparent statements of principle in this regard. In particular, the Court held that since the licensing decision itself is discretionary, it is appropriate to grant the executive some margin of appreciation also with regard to the question of how to interpret vague requirements of administrative law.[96]

The Court made a second decision of principle when it supported the state's contention that the administrative licensing assessment did not have to be as thorough as that required in a subsequent appraisement dispute.[97] Hence, the meaning of the obligation to clarify cases to the best possible extent is put into perspective: assessments of deleterious effects may sometimes be omitted at the decision-maker's discretion, also in circumstances when such assessments will be needed later to clarify the owners' actual loss for the purpose of calculating compensation.

In relation to the negative effects on fishing, the Court conceded that the assessments could have been better, but went on to point out that the purpose of assessment was only to answer yes or no to development, not to give a detailed presentation of its effects.[98] Crucially, the Court noted that if additional negative effects were uncovered after the licences had been granted, this could be addressed through compensation payments and future regulatory measures.[99]

In effect, the risk of factual error is downplayed by making reference to the owners' compensation right and the regulatory power of the state. This echoes the dichotomy mentioned in Chapter 4, whereby there is a tendency in Norwegian law to perceive the interests of local people as revolving around financial entitlements.

In *Alta*, the Court agreed that erroneous information had been provided in relation to some issues, particularly regarding alternative ways to meet the need for electricity in Finnmark.[100]

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96 See *Alta* (n 77) 262-264.

97 See *Alta* (n 77) 279.

98 *Alta* (n 77) 330.

99 *Alta* (n 77) 330.

100 See *Alta* (n 77) 346-357.

However, the Supreme Court did not regard the factual errors in this regard as relevant to the licensing decision.[101]

Here a third clarification of principle took place. The Court held, in particular, that the duty to consider alternatives – different ways in which the public purpose could be satisfied – is very limited in hydropower cases.[102] This position of principle, in turn, was the key building block that the Court used to argue that errors and inadequacies in the information provided about alternatives were irrelevant.[103]

The Court's perspective in this regard was at odds with how parliament has actually approached the case. There was little doubt that the favourable political assessment of the *Alta* development depended heavily on the perceived electricity crisis in Finnmark and the supply situation in Norway generally, as well as the perceived inadequacies of alternative solutions.[104]

In relation to this question, the legal counsel acting for the state in *Alta* openly argued that as these aspects came into focus only at the political stage of the decision-making, they were largely irrelevant.[105] This line of argument is rather striking, since the decision to grant the license was made by parliament, which had indeed dealt with the case on three separate occasions.[106]

The Supreme Court did not address the state's arguments in this regard explicitly. However, it is worth noting how briefly the Court comments on the issue of factual errors concerning alternatives.[107] By contrast, the Court goes into painstaking detail regarding issues that seem to have been far less important to the political decision-makers.

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101 See *Alta* (n 77) 346.

102 See *Alta* (n 77) 346.

103 *Alta* (n 77) 346.

104 See *Alta* (n 77) 338-347.

105 *Alta* (n 77) 341.

106 See *Alta* (n 77) 342.

107 See also the surprise expressed in Eckhoff (n **??**) 349-351.

The dismissive attitude towards the duty to correctly assess alternatives is a controversial aspect of the *Alta*-decision.[108] More generally, the decision in *Alta* has met with criticism from commentators arguing that the decision shows the extent to which the courts in Norway tend to identify themselves with other organs of state.[109]

Due to the perceived weaknesses of the decision, some argued that *Alta* would have a limited impact as a precedent.[110] This has not proved to be the case. Indeed, *Alta* continues to receive favourable citations by the Supreme Court. It appears to enjoy significant influence, not only in hydropower law, but in administrative law more generally.[111]

It should be mentioned, however, that after the *Alta* decision, the legal position of the Sami people have greatly improved.[112] Moreover, the controversy surrounding *Alta* has been regarded as a catalyst for change in this regard.[113] Hence, it is unlikely that the courts today would be as quick as the *Alta* court to dismiss arguments based on aboriginal rights.[114]

With regard to the position of local owners, on the other hand, the *Alta* decision is regarded to express key principles that still apply.[115] That said, administrative practices have changed since *Alta*, arguably also in direct response to the criticism that was directed at this decision.[116]

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108 See Stiansen and Haagensen (n **??**) 311. For criticism of the Supreme Court on this point, see Inge Lorange Backer, *Naturvern og Naturinngrep* (Universitetsforlaget 1986) 580-584.

109 See Hans Petter Graver, 'Norms and Decisions' (1988) 32 Scandinavian studies in law 49, 64 (commenting also that "government prestige" was at stake).

110 SeeBacker, *Naturvern og Naturinngrep* (n **??**) 580-584.

111 See *Naturvernforbundet i Oslo og Akershus med flere v Staten v/Miljøverndepartementet og Oslo Kommune* Rt-2009-661; *Jørpeland* (n 8).

112 See generally Jon Gauslaa, 'Utviklingen av sameretten de siste 25 årene og betydningen for arealforvaltning og rettspleie' in Øyvind Ravna (ed), *Areal og Eiendomsrett* (Universitetsforlaget 2007). Gauslaa presents the emergence of *Sami law*, a collection of rules and principles serving to protect established land use patterns and the Sami way of life while also giving the Sami people a better opportunity to partake in decision-making processes that affect them as group.

113 See Ravna, 'Samerett og samiske rettigheter i Norge' (n 80) 156.

114 See Gauslaa (n 119) 180.

115 See *Jørpeland* (n 8). See also Stiansen and Haagensen (n **??**) 312.

116 See Inge Lorange Backer, 'Åpenhet - betraktninger fra en jurist' (2010) 27 Nytt norsk tidsskrift 186, 122-123.

Today, the assessment of licensing applications typically involve a more extensive assessment of environmental effects and possible alternatives that are less environmentally intrusive.[117] However, as I will discuss in more depth below, the position of local owners during the assessment stages appears unaltered by the increased intensity of assessment regarding the environment.

In particular, the key administrative procedures in hydropower cases have not been adapted to account for the liberalisation of the electricity sector. Today, key characteristics both of the typical taker and the typical owner are very different than they were at the time of *Alta*. First, as discussed in the previous chapter, takings of waterfalls now have the effect of depriving original owners of a resource that they could potentially develop themselves. Second, as I discuss in the next section, takings of waterfalls have become pure takings for profit.

5.5 Taking Waterfalls for Profit

After the legal and regulatory reforms of the 1990s, takings of waterfalls for hydropower have become takings for profit. However, this change in the function of expropriation received little attention when these reforms were introduced. Moreover, when the Water Resources Act 2000 was proposed, the new expropriation authority was not singled out for political consideration. In fact, the increased scope of expropriation was not mentioned at all when the Ministry presented their proposal to parliament. Rather, the new expropriation authority was described merely as a "simplification" of existing law.[118]

This was grossly inaccurate. For the first time in Norwegian history, private commercial interests would be able to expropriate waterfalls. The original proposal to this effect stemmed from the report handed to the Ministry by a commission appointed to prepare a new act relating to water

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[117] For an overview of current procedures, see Chapter 4 Section **??**. See also Backer, *Naturvern og Naturinngrep* (n **??**) 625-659.

[118] Ot.prp.nr.39 (1998-1999) (Proposal to parliament for the Water Resources Act 2000,) 223-225.

resources. The commission report mentions briefly that the proposed expropriation authority would imply increased scope for expropriation. However, it does not discuss the desirability of this in any depth.[119]

The report totals almost 500 pages, but devotes only three of those pages to discussing the new expropriation authority. Here the committee notes that a range of different authorities for expropriation has long co-existed in the law, with many of them positing strict and concrete public interest requirements as a precondition for granting a license. This, the commission argues, is not a very "pedagogical" way of providing expropriation authorities.[120] Moreover, the commission notes that it runs the risk of omitting important purposes for which expropriation should be possible. Hence, the commission proposes to replace all older authorities by a sweeping authority that makes expropriation possible for any project that involves "measures in watercourses".[121]

The commission comments that their formulation might seem wide, but remark that this is not a problem since the executive can simply refuse to issue an expropriation order when they regard expropriation as undesirable.[122] The commission does not reflect on the constitutional consequences of such a perspective, neither in relation to property rights nor in relation to the balance of power between the legislature, the executive and the courts. Instead, the commission offers a brief presentation of the rationale behind dropping the local supply restriction for municipal expropriation. They comment that these rules complicate the law and might make desirable expropriations impossible.[123] Nothing is said to clarify what kind of desirable expropriations the committee think might be left out.

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119 Lov om vassdrag og grunnvann, 'NOU 1994:12' (Report to the Ministry of Business and Energy from a special committee appointed by the Crown Prince Regent in Council 09 November 1990,) 235-237.

120 Lov om vassdrag og grunnvann (n **??**) 235.

121 Lov om vassdrag og grunnvann (n **??**) 235-236.

122 Lov om vassdrag og grunnvann (n **??**) 235.

123 Lov om vassdrag og grunnvann (n **??**) 235.

Importantly, the committee do not relate their proposals to the recent market-based reform of the energy sector. Hence, the obvious practical consequence of their proposal, namely that expropriation of waterfalls would be made available as a profit-making mechanism, is not discussed or critically assessed.

The issue of *who* should be permitted to benefit from an expropriation license is also dealt with very superficially. In this regard, the commission structure their presentation around the so-called *redemption* rule of the Water Systems Act 1940. As mentioned briefly in Section 5.4, this rule made it possible for the majority owners of a waterfall to compulsorily acquire minority rights, if this was necessary to facilitate hydropower development. Hence, it was a rule that provided only a limited opportunity for private takings, restricted to owners themselves or external developers that had been able to reach a deal with a locally based majority.

The main justification given by the commission for introducing a general private takings authority is that the special redemption rule had not been much used in practice.[124] Why this is an argument in favour of opening up for private expropriation in general is not made clear. Indeed, it seems just as natural to regard it as an argument *against* doing so. Why extend the possibility for private expropriation if the demand for such expropriation has been limited?

Presumably, the commission thought there would be a demand for such expropriation in the future, but this is not stated explicitly, nor is the appropriateness of it discussed. As to the requirement that private takers must already control a majority of the waterfall rights in the local area, the commission only remarks that it regards such a restriction as old-fashioned.[125] No discussion is offered regarding the consequences for local owners.

Since the passage of the Water Resources Act 2000, it has become clear that the new authority for expropriation is a highly significant and controversial aspect of the act. Today, practically all

[124] Lov om vassdrag og grunnvann (n **??**) 236.

[125] Lov om vassdrag og grunnvann (n **??**) 236.

cases of waterfall expropriation imply that local owners are deprived of a small-scale development potential in favour of a commercial company.

5.5.1 *Sauda*

In *Sauda*, a case before the court of appeal, the riparian owners formally protested a license that granted a private company the right to expropriate their rivers and waterfalls.[126] The owners' principal argument was that the executive could not grant such a right to a private party, since this had not been sanctioned by parliament.

This argument appeared weak, since the Expropriation Act 1959 had been amended to ensure that the executive would be authorised to decide what legal persons could expropriate for hydropower purposes. However, the owners argued that the executive had not appropriately informed parliament that this would be the consequence of the amendment. In particular, the amendment itself had been passed as a mere formality following the adoption of the Water Resources Act 2000.

The owners presented the written testimony of two members of the parliamentary committee that had prepared the Act. Neither of them could recollect that they had been aware that the Act would make private expropriation possible. This was not conveyed to them by the executive. Moreover, it was not explicitly stated anywhere in the Act itself. Rather, it followed implicitly from three different sections in two separate acts. In the entire collection of preparatory documents, the change was discussed only once, in the report from the committee to the Ministry.

On this basis, the owners argued that the purported expropriation authority was not constitutionally valid, since parliament had not intended it. Unsurprisingly, this argument was rejected. According to the court, it had to be assumed that parliament understood the consequences of their own legislative actions.

However, while the owners lost the validity dispute, the level of compensation they received

[126] See *Aktieselskabet Saudefaldene v Hallingstad and others* (n 36).

was dramatically increased compared to earlier practice. Because of this, the development company appealed the decision to the Supreme Court, with the owners lodging a counter-appeal regarding the question of legitimacy. The Supreme Court decided not to hear the case.

Indeed, it had recently addressed the compensation question in the case of *Uleberg*.[127] Here a new principle of market-value compensation was introduced, for those cases when small-scale development by owners was deemed to have been "foreseeable" in the absence of expropriation.

If this requirement is met, the owners can now expect at least 10-20 times more in compensation than they would get under the traditional approach, which was based on a theoretical estimation of the value of the riparian rights.[128]

In addition to raising the compensation issue and the issue of constitutional legitimacy, *Sauda* raised procedural questions. The owners argued that mistakes had been made and that the administrative expropriation decision was therefore invalid. The court did not agree.

The procedural arguments made here foreshadow the later case of *Jørpeland*. Here the owners were initially successful, as the district court held that the decision to expropriation was invalid due to procedural mistakes. In particular, the district court held that the practices developed during the monopoly era were no longer appropriate.[129]

This decision was overturned on appeal, a decision that was in turn upheld by the Supreme Court. Eventually, the case was decided by an application of the precedent set by *Alta*, demonstrating the continued importance of this case in the context of expropriation for commercial development.[130] In the next section, I will consider the *Jørpeland* case in depth, to bring out how administrative practices relating to expropriation for hydropower can work in practice.

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127 See *Agder Energi Produksjon AS v Magne Møllen* Rt-2008-82.

128 For a more in-depth presentation of compensation issues, I refer to Dyrkolbotn, 'On the compensatory approach to economic development takings' (n **??**) 71-76.

129 See the decision by Stavanger Tingrett in *Jørpeland Kraft AS v Ola Måland and others* TSTAV-2007-185495.

130 See the decision by Gulating Lagmannsrett in *Jørpeland Kraft AS v Ola Måland and others* LG-2009-138108. See also the Supreme Court decision in *Jørpeland* (n 8) (*Jørpeland*).

5.6 *Ola Måland v Jørpeland Kraft AS*

The expropriating party was a public-private commercial partnership, Jørpeland Kraft AS. This limited liability company is jointly owned by Scana Steel Stavanger AS, with 1/3 of the shares, and Lyse Kraft AS, with the remaining shares.[131] The former is a private steelworks company located in the small town of Jørpeland in Rogaland county, south-western Norway. Historically, this company was a major employer in Jørpeland, which is located by the sea, next to a mountainous area.

The main source of energy for the steel industry in Norway is hydropower and Scana Steel Stavanger AS was no exception. The company used energy harnessed from the rivers in the area, particularly the river which reaches the sea near Jørpeland. Moreover, the water from this river is supplemented by water from other rivers in the area that are diverted so that it can be exploited along with the water from the Jørpeland river.

Recently, Norwegian steel companies have become less profitable, due largely to increased foreign competition and a significant increase in costs of operation associated with this type of industry in Norway.[132] This has led to many such companies shifting their attention away from labour-intensive steel production, focusing instead on producing electricity, selling it directly on the national grid. Jørpeland Kraft AS was established as part of such a move to exploit the energy resources in Jørpeland.

The role played by the majority shareholder, Lyse Kraft AS, is important in this regard. Indeed, as I discussed in Chapter 4, Norwegian law favours companies where the majority of the shares are held by the state or the municipalities. Lyse Kraft AS operates for profit, organised as a limited liability company, but it is publicly owned, with the city of Stavanger as the main shareholder. Hence, it is a very valuable partner to Scana Steel. In addition to being under public ownership,

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[131] See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 2.

[132] Salary costs, in particular, have become prohibitive. See, e.g., *Information Booklet about Norwegian Trade and Industry*, published by the Ministry of Trade and Industry in 2005.

Lyse Kraft AS is responsible for the electricity grid in the region, so is well-positioned to access the electricity market.

As attention shifts from harnessing rivers for the purpose of industrial production to the purpose of producing electricity to sell on the national grid (and, increasingly, to export abroad), new variables determine the degree of profitability. On the cost side, what matters most is the one-time investment required to construct the hydropower plant. Maintaining and operating a hydropower station tends to be comparatively inexpensive. On the income side, what matters is the price of energy on the electricity market, a market that is no longer anchored in local conditions of supply and demand.

Importantly, as long as energy production is the sole focus, the business no longer depends in any significant way on the local labour force. Hence, large-scale exploitation becomes much more profitable than the medium or small-scale power plants that would otherwise be suitable for local industrial exploits. Indeed, it was in keeping with a general trend in Norway when Jørpeland Kraft AS, following their new commercial strategy, proposed to undertake measures to increase their energy output. This could be achieved relatively cheaply, by further constructions aimed at diverting water away from nearby rivers into dams that were already built to collect the water from the Jørpeland river.

5.6.1 The Facts of the Case

One relatively small river from which Jørpeland Kraft AS suggested to extract water was not located in Jørpeland. Rather, it runs through the neighbouring municipality of Hjelmeland, on the other side of a mountain range, until it eventually reaches the sea at Tau, another neighbouring municipality.

The plans to divert the river would deprive the riparian owners of water along some 15 km of riverbed, all the way from the mountains on the border between Hjelmeland and Jørpeland, to the

sea at Tau. Not all the water would be removed, but the flow of water would be greatly reduced in the upper part of the river known as *Sagåna*, the rights to which is held jointly by Ola Måland and five other local farmers from Hjelmeland.

The water in question comes from a lake called *Brokavatn*, located 646 meters above sea level, where altitude soon drops rapidly, making the river suitable for hydropower development. Plans were already in place for such a project, which would use the water from just below the altitude of Brokavatn, to the valley in which the original owners' farms are located, about 80 meters above sea level.

A rough estimate of the potential of this project was made by the NVE itself, stating that the energy yield would be 7.49 GWh per annum.[133] This is about five times more energy than the water from Brokavatn would contribute to the project proposed by Jørpeland Kraft AS.[134]

Importantly, the estimate was not made in relation to the expropriation case, but as part of a national project to survey the remaining energy potential in Norwegian rivers.[135] Ola Måland and the other owners of the river were not identified as significant stakeholders and were not notified of the assessment that had been made. Moreover, even after Jørpeland Kraft AS had submitted a formal application for permission to divert the water, the owners were not notified by the water authorities.[136]

Moreover, the procedural approach to the case was the traditional one, with an assessment directed at evaluating the environmental impact. Many interest groups were called on to comment on environmental consequences, and public debate arose with respect to the balancing of commercial

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133 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 16.

134 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

135 The survey was carried out in 2004 and its results are summarised in Torodd Jensen (ed), *Beregning av Potensial for Små Kraftverk i Norge* (Rapport nr. 19-2004, NVE 2004).

136 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 16. However, a generic orientation letter was apparently sent by Jørpeland Kraft AS, a letter that the owners themselves could not remember having received. See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 5.

interests and the desire to preserve wildlife and nature.[137]

One of the local owners, Arne Ritland, also commented on the proposed project. He did this in an informal letter sent directly to Scana Steel Stavanger AS.[138] In this letter, he inquired for further information and protested the proposed diversion of water from Brokavatn. He also mentioned the possibility that an alternative hydropower project could be undertaken by original owners, but he did not go into any details, stating only that a locally owned hydropower plant had previously been in operation in the area.

The plant he was referring to dates back to the time before there was a national grid. It ensured a local supply of electricity, but has since been shut down, in keeping with the general trend mentioned in Chapter 4.

Arne Ritland received a reply from Scana Steel Stavanger AS, which stated that more information on the project and its consequences would soon be provided. Ritland did not pursue the matter further at this time. Meanwhile, Scana Steel Stavanger AS submitted his letter to the NVE, who in turn presented it as a comment directed at the application.[139]

This prompted the majority owner of Jørpeland Kraft AS, Lyse Kraft AS, to undertake their own survey of alternative hydropower in Sagåna.[140] The conclusions were sent to the water authorities, but the owners were not informed that such an investigation was being conducted.[141] Moreover, the water authorities did not take steps to investigate the commercial potential of local hydropower on their own accord. Instead, they referred to the conclusion presented by Jørpeland Kraft AS, stating that if the local owners decided to build two hydropower plants in Sagåna, then one of them, in the upper part of the river, would not be profitable, neither with nor without the

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137 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

138 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 17.

139 *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 18.

140 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

141 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 23.

contested water. The other project, in the lower part, could apparently still be carried out, even after the diversion.[142]

No mention was made of what the original owners stood to loose, nor was there any argument given as to why it made sense to build two separate small-scale power plants in Sagåna. Nevertheless, the NVE handed the expropriating party's findings over to the Ministry, without conducting their own assessment and without informing the original owners.[143]

In addition to the report made by Jørpeland Kraft AS, the municipality government of Hjelmeland also commented on the possibility of local hydropower. In their statement to the NVE, they directed attention to the data in the NVE's own national survey, which suggested that a single hydropower plant in Sagåna would be a highly beneficial undertaking.[144] On this basis, they protested the diversion, arguing that original owners should be given the possibility of undertaking such a project.

This statement was not communicated to the original owners, and in their final report the NVE dismissed it by stating that the most efficient use of the water would be to transfer it and harness it at Jørpeland.[145]

In addition to the statement made by Ritland, one other property owner, Ola Måland, commented on the plans.[146] He did so without having any knowledge of the commercial potential of the waterfall and without having been informed of the statement made by the municipality of Hjelmeland. Therefore, Måland expressed his support for Jørpeland Kraft's plans, citing that the risk of flooding in Sagåna would be reduced.[147] He also phrased his letter in such a way that it

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142 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 23.

143 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 22-23.

144 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

145 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

146 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 17.

147 He later joined the other owners in opposition to the expropriation.

could be interpreted as a statement on behalf of the owners as a group.[148] However, Måland was the only person who signed.

In the final report to the Ministry, the NVE refer to Måland's letter and state that the original owners are in favour of the plans.[149] For this reason, the NVE concludes that the opinion of the municipality of Hjelmeland should not be given any weight.[150] The NVE neglects to mention that Arne Ritland's statement strongly opposed expropriation. Moreover, earlier in the report, where all incoming statements are reported, Ritland is referred to as a private individual, while Ola Måland is referred to as a property owner who speaks on behalf of the owners as a group.

The report made by the NVE was not communicated to the affected local owners at all, so the owners had no chance of correcting mistakes. However, the report was sent to many other stakeholders, including the municipality of Hjelmeland.[151] In light of the report, the municipality changed their original position and informed the Ministry that they would not press for local hydropower, since this was not what the affected owners (i.e., Ola Måland) wanted.[152]

This happened without the owners' knowledge. However, while the case was being prepared by the water authorities, the original owners had begun to seriously consider the potential for hydropower on their own accord. In late 2006, Jørpeland Kraft's application reached the Ministry and a decision was imminent. At the same time, the owners were under the impression that they would receive further information before the case progressed to the assessment stage.

As the owners had now come to realise the commercial value of the water from Brokavatn, they approached the NVE, inquiring about the status of the plans proposed by Jørpeland Kraft AS. They were subsequently informed that an opinion in support of the transfer had already been

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148 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 17.

149 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

150 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 19.

151 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 24.

152 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 24.

delivered to the Ministry. This communication took place in late November 2006, summarised in minutes from meetings between local owners, dated 21 and 29 November.[153] On 15 December 2006, the King in Council granted a concession for Jørpeland Kraft AS to transfer the water from Brokavatn to Jørpeland.[154]

At this point, it had become clear to the original owners that the water from Brokavatn would be crucial to the commercial potential of their own project. They also retrieved expert opinions that strongly indicated that the NVE was wrong when they concluded that diverting the water would be the most efficient use of the water.[155] In light of this, the owners decided to question the legality of the licence (with the corresponding permission to expropriate). They argued, in particular, that the administrative decision to grant the license was invalid.

In the following section, I present the main legal arguments relied on by the parties, as well as a summary of how the three national courts judged the case.

5.6.2 Legal Arguments

First, the owners argued that procedural mistakes had been made by the water authorities when preparing the case.[156] This, in turn, had resulted in factual mistakes forming the basis of the decision to grant the development license. Since the outcome might have been different if these mistakes had not been made, the owners concluded that the development license could not be upheld.

Second, the owners argued that expropriation of their rights would result in the loss of an economic development potential.[157] Moreover, they argued that the economic loss would be greater

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153 Available upon request.

154 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 3.

155 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 23.

156 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 12.

157 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 5.

than the gain even for the public, since the owners were in a position to make more efficient use of the water rights in question. Therefore, allowing expropriation would only serve to benefit the commercial interests of Jørpeland Kraft AS, to the detriment of both local and public interests. On this basis, the owners contended that the decision to grant the licence was a manifestly ill-founded decision that could not be upheld.

Third, the owners argued that the government had not fulfilled its duty to consider the case with due care.[158] In particular, the assessment of local community interests and the interests of local owners had not been satisfactory. Particular attention was directed at the fact that local owners had not been informed about the progress of the case, and had not been told of assessments pertaining to their interests.

Fourth, the owners argued that irrespective of how the matter stood with respect to national law, the expropriation was unlawful because it would be in breach of the provisions in P1(1) of the ECHR regarding the protection of property.[159]

Jørpeland Kraft AS protested, arguing that there were no factual errors in the report from the NVE.[160] The relevant assessments were those pertaining to the licensing question as a whole, and it would be incorrect to focus on specific elements.[161] Moreover, it was likely that Måland had discussed the diversion of water with other affected owners, and that they had all agreed to support it.[162] Furthermore, it was argued that all the procedural rules of the Watercourse Regulation Act 1917 had been observed. Other procedural rules might be relevant, but only if they are compatible with the rules in the Watercourse Regulation Act 1917.[163] Jørpeland Kraft AS also argued that

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158 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 12.

159 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 07-08.

160 See *Jørpeland* (n 8) 16.

161 See **jorpeland11a)**

162 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 2.

163 See *Jørpeland* (n 8) 16.

it was not for the courts to subject the assessment of public and private interests to any further scrutiny, since this was a matter for the administrative branch.[164] Finally, Jørpeland Kraft AS argued that diverting the water did not represent a breach of the owners' human rights.[165] They argued for this by pointing to the fact that the procedural rules had been followed and that the material decision was beyond reproach. Moreover, Jørpeland Kraft AS argued that since the owners would be compensated financially for whatever loss they incurred, it was clear that no human rights issues were at stake.[166]

The matter went before the district court in the city of Stavanger, which decided in favour of the owners on 20 May 2009.[167] In the following, I offer a presentation of the reasons given by this court, leading to the conclusion that the expropriation was unlawful and that the diversion of Brokavatn could not be carried out.

5.6.3 The District Court

The district court of Stavanger agreed with the original owners that the decision to grant the license was based on an erroneous account of the relevant facts.[168] Moreover, the court concluded that it was evident that allowing the applicants to use the water from Brokavatn in their own hydroelectric scheme would be the most efficient way of harnessing the hydropower potential.[169] This, the court noted, directly contradicted what the NVE had stated in their report.[170]

The court backed up its decision by giving several direct quotes from the report made by the NVE. For instance, it quoted how the NVE had commented on the statement from the municipality

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164 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 2.

165 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 2.

166 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 2.

167 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**).

168 See *Jørpeland* (n 8) 25.

169 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 22-23.

170 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 23.

of Hjelmeland:

> The municipality of Hjelmeland would like the hydroelectric potential in the waterfall to be exploited by local property owners. This contrasts with the statement submitted by the property owners themselves, who wish that the transfer of water takes place, so that damage due to flooding can be somewhat reduced. NVE thinks that the best use of the water with respect to hydroelectric production is to allow a transfer, since this means that the water can be exploited over the greatest distance in elevation. When this is also the property owners' own wish, we will not attribute any weight to the views of the municipality of Hjelmeland.[171]

The district court concluded that as this was a factually erroneous account of the situation, the decision made to allow transferral of the water could not be upheld. In light of this, the district court concluded that the decision to grant concession for diversion of water was invalid. Here the court relied on a well-established principle of administrative law: while the exercise of discretionary powers is usually not subject to review by court, a decision based on factual mistakes is invalid if it can be shown that the mistakes in question were such that they could have affected the outcome.[172] Since the small-scale alternative would in fact represent a more effective use of the water in question, the court was not in doubt that this principle applied here.[173]

Since the district court held that the license to allow diversion was invalid because it was based on factual mistakes, there was no need to consider claims regarding the legitimacy of the diversion with respect to human rights law. However, the district court did comment that the traditional procedure used to deal with diversion cases was inadequate and had to be supplemented by looking

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171 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 12.

172 See Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (10th edn, Universitetsforlaget 2014) 407-410. For the requirement that the mistakes must have been such that they could have affected the outcome, see Public Administration Act 1967, s 41

173 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 25.

to the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967.[174]

Moreover, the court made a crucial statement about expropriation of riparian rights in general, regarding the duty of the water authorities to properly assess whether or not an expropriation license should be granted.[175] This duty, the court held, included a duty to properly consider negative effects on small-scale development potentials.[176] According to the court, this was the natural consequence of the increasing interest in small-scale development. If this principle had become part of Norwegian hydropower law, it would have had significant implications for the water authorities, directly confronting their traditional lack of interest in the expropriation question. However, it was not to be, as the court's decision was overturned on appeal.

5.6.4 The Court of Appeal

The court of appeal approached the case very different than the district court. Specifically, its decision does not rely on any close assessment of the facts and the report made by the NVE. Instead, the court of appeal largely base its decision on the opinion that the rules in the Watercourse Regulation Act 1917 exhaustively regulate the administrative procedure.[177] According to the court of appeal, the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967 do not apply to diversions of water authorised under section 16 of the Watercourse Regulation Act 1917.[178]

The reason given for this that the more specific rules of the Watercourse Regulation Act 1917 have priority under the so-called *lex specialis* principle, which applies in case of conflict between

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174 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 21.

175 The duty is a general principle of administrative law, expressed both in Expropriation Act 1959, s 12 and Public Administration Act 1967, s 16.

176 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 22.

177 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 7.

178 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 7.

different sets of rules.[179] Apparently, the court must have thought that there was such a conflict between general administrative law and the rules that apply specifically in hydropower cases.[180] With regard to the procedural rules of the Watercourse Regulation Act 1917, the court does not go into much detail, but concludes that the assessment of the water authorities met all general requirements and was clearly adequate. Regarding the fact, the court is very brief, commenting only the following:

> It was not a mistake to take Ola Måland's statement into consideration, as he was, and still is, a significant property owner. NVE's statement to the effect that granting the concession will facilitate a more effective use of the water seems appropriate, as it refers to a current hydroelectric plant that exploits a waterfall of 13.5 meters.[181]

Here the court mentions a hydroelectric plant further downstream which would be only very marginally affected by the transfer of water away from *Brokavatn*. The owners of this plant were not parties to the dispute (their interests were obviously quite negligible). Moreover, the downstream plant had nothing to do with the statement made by the municipality of Hjelmeland, which precipitated NVE's comments on the effectiveness of small-scale hydropower.[182] The court of appeal never mentions this statement, nor the fact the small-scale alternative suggested there involved exploiting the contested water over a difference in altitude of about 550 meters.

Instead, the court of appeal points out that the NVE was well aware of the possibility of developing small-scale hydropower, was well-informed about such development, and had considered

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179 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 7.

180 The decision is not entirely clear on this point, however, as the court also makes a sweeping remark to the effect that the rules in the Watercourse Regulation Act 1917 conform to all "basic and general" procedural demands of administrative law.

181 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 8.

182 This is clear from decision of the district court, which quotes from the statement submitted by the municipality, see *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 16.

it during their assessment.[183] The court of appeal admits that the NVE's written assessment on this point was brief, but argues that this must be understood as a natural response to the lack of input from local owners.[184]

The owners appealed the court of appeal's decision to the Supreme Court, which decided to hear the juridical aspects of the case.[185]

5.6.5 The Supreme Court

The Supreme Court approached the case in much the same way as the court of appeal. Regarding the facts, the Court emphasises that the majority owner of Jørpeland Kraft AS had considered the possibility that a hydroelectric scheme could be undertaken by local property owners.[186] As mentioned, this resulted in a report based on the premise that the owners could have built two separate small-scale plants in the same river. The conclusion is that one of these would be unprofitable regardless of the diversion, while the other one could still be carried out.[187] However, the report does not explain why anyone would want to build two consecutive small-scale plants in the same river, an approach that diverges from all other expert reports retrieved about small-scale potentials.[188]

In any event, the most relevant question would obviously be what the owners stood to loose when the water from Brokavatn disappeared. Both the report and the Supreme Court remained silent on this. Moreover, the Court does not mention that the report was never handed over to the applicants, nor that the details of the calculations were never independently considered by the

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183 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 9.

184 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 9.

185 See *Jørpeland* (n 8) 8. Specifically, the Supreme Court would not engage in any independent factfinding, but only consider legal questions, including how the law should be applied to the facts.

186 See *Jørpeland* (n 8) 53.

187 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 23.

188 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 16.

NVE. Just like the court of appeal, the Supreme Court also neglects to mention that small-scale development would be a more efficient use of the water, according to the national survey of small-scale potentials carried out by the NVE itself.[189] Furthermore, no mention is made of the fact that the NVE claims that the opposite is true in the report to the Ministry, contradicting also the statement made by the municipality of Hjelmeland.

Regarding the legal questions raised by the case, the Supreme Court rejects the view that the procedural rules in the Expropriation Act 1959 and the Public Administration Act 1967 do not apply to the case.[190] However, the Court holds that these procedural rules do not imply a more extensive duty to assess the expropriation question, compared to established practices in hydropower cases.[191]

There is no rule in the Watercourse Regulation Act 1917 which states that the authorities are required to consider specifically the question of how the regulation affects the interests of property owners. Moreover, administrative practice suggests that this is not normally done, except to perhaps to a limited extent when the issue is raised during the hearing.[192] However, a rule explicitly demanding this is found in section 2 of the Expropriation Act 1959. This is not regarded as a procedural rule, however, as it pertains to the material considerations that the administrative branch is required to carry out in expropriation cases.

Indeed, according to the Supreme Court, the rule does not apply at all when expropriation takes place on the basis of section 16 of the Watercourse Regulation Act 1917.[193] This is the conclusion

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189 See *Jørpeland Kraft AS v Ola Måland and others* (n **??**) 16.

190 See *Jørpeland* (n 8) 32-34.

191 See *Jørpeland* (n 8) 51-52 (citing also the *Alta* case, *Alta* (n 77)).

192 See Ragnhild Stokker (ed), *Konsesjonshandsaming av vasskraftsaker – Rettleiar for utarbeiding av meldingar, konsekvensutgreiingar og søknader* (Rettleier nr 3/2010, NVE 2010). This is the water authorities' own guideline for the assessment of large-scale applications. The previous version of this guideline (which also fails to mention the interests of owners) was presented to the Supreme Court. The Court also refers to it explicitly when it comments that existing practices are beyond reproach. See *Jørpeland* (n 8) 51.

193 See *Jørpeland* (n 8) 30.

despite the fact that section 30 of the Expropriation Act 1959 explicitly states that the provisions of that act apply to expropriations pursuant to the Watercourse Regulation Act 1917, in so far as they are compatible with the rules therein. It would appear to follow, by implication, that the Supreme Court does *not* think that directing more attention at owners' interests, as prescribed by section 2 of the Expropriation Act 1959, is compatible with the Watercourse Regulation Act 1917.

This is a clear rejection of the principled position taken by the district court, whereby the water authorities should generally be obliged to consider small-scale alternatives before allowing expropriation. According to the Supreme Court, no special procedural obligations arise at all in such cases, compared to cases when the water power already belongs to the applicant. Expropriation is to remain a non-issue during the licensing process pursuant to the Watercourse Regulation Act 1917.

Formally, this implication of *Jørpeland* only applies to expropriations carried out on the basis of section 16 of that act. However, in practice, there is reason to believe that it will have a uniform impact in all cases involving large-scale hydropower development. Indeed, the water authorities themselves do not appear to make any significant distinction between such cases based on whether or not a separate license to expropriate waterfalls is formally required.[194]

It also bears noting that the facts in *Jørpeland* appear to suggest that the procedural shortcomings underlying that case were much more obvious than the shortcomings complained of in *Alta* (although the scale of the underlying conflict was much greater in *Alta*). To further illustrate the extent to which *Jørpeland* signals a dismissive attitude towards owners and local communities, I will conclude by offering a quote from Harald Solli, director of the hydropower licensing section at the Ministry. Sollie submitted written evidence to the Supreme Court regarding the practices observed in cases involving expropriation of water power. Below, I quote two exchanges that demonstrate how current practices leave local owners in a precarious position.

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[194] See Flatby (n **??**).

> Q: In cases pursuant to the Watercourse Regulation Act 1917, is it common for the water authorities to send prior written notices to the private owners that may be affected by a loss of small-scale hydropower potential?
>
> A: The procedural rules that apply to cases pursuant to the Watercourse Regulation Act 1917 are found in section 6. To give such a written notice to private owners is not required. As far as I am aware, it is also not done, but I have no first-hand knowledge of this, since the NVE is responsible for the case at this stage.
>
> Q: In cases such as this, should owners affected by the loss of a small-scale hydropower potential be kept informed about the factual basis on which the authorities plan to make their decision? I am thinking especially about cases when the authorities do in fact provide an assessment of the potential for small-scale hydropower on private properties.
>
> A: Affected owners must look after their own interests. The assessments made by the NVE in their report is a public document, and it can be accessed through the homepage of the NVE.

By their reasoning in *Jørpeland*, it appears that the Supreme Court gave this dismissive attitude towards local owners a stamp of approval. In light of this, I believe the study of the law in a socio-legal setting becomes all the more relevant. For while the dismissive attitude might be a part of the national legal order, it seems pertinent to ask if it is a reasonable attitude to take towards local owners of valuable natural resources. Also, one may ask if a case can be made with respect to human rights, by arguing that the protection awarded is insufficient with regard to P1(1). This point was raised in *Jørpeland*, but did not receive any attention from the Supreme Court.[195]

[195] The *Jørpeland* case resulted in a complaint to the ECtHR which has yet to be considered by the Court.

5.7 Conclusion

In this Chapter, I have studied the law and practices relating to the taking of riparian rights under Norwegian law. I observed that the question of striking a balance between private and public interests is approached under the presumption that private property rights embody mainly private values, while public values are pursued through regulation that ensures public ownership and control. I tracked how this perspective shaped the law of expropriation of waterfalls, so that expropriation could only take place for narrowly defined public purposes and only to the benefit of public bodies.

I noted, however, how the increasing centralisation of the energy sector and the increasing scale of projects following the Second World War led to increased worry about the legitimacy of interference in property and the natural environment. I concluded that the ensuing conflicts failed to make much of an impact on the law relating to hydropower, which was still organised as a public service at this time. The degree of political control over the sector, which was perceived to be great, meant that courts shunned away from adopting a strict view on legitimacy.

However, this did not mainly apply to the question of the authority to expropriate, which was hardly raised at all in the period between the reversion controversy of the early 20th century and the market-reform of the early 1990s. It applied mainly to general procedural rules. Here the Supreme Court adopted a stance whereby these rules were themselves considered largely "discretionary" in nature. Hence, it would fall under the authority of the executive to determine their scope and application in concrete cases.

I noted how this perspective has been maintained by the courts and the executive even after liberalisation. I argued that today, expropriation for hydropower development must be regarded as takings for profit, typical examples of economic development takings. I discussed how the law came to be changed on this point, with a dramatically widened expropriation authority introduced

in conjunction with the Water Resources Act 2000.

I concluded with a description of the fallout from this, as expressed concretely in the case of *Jørpeland*. This case served to illustrate that administrative practices developed and sanctioned during the monopoly days are now applied uncritically in the context of competing commercial interests. As a result, expropriation has become an important tool that the powerful market players can use to gain the upper hand in competition with locally based companies or smaller companies that rely on cooperation with owners. I noted that the law as it stands is unprepared for dealing with this dynamic.

Still, in the case of *Jørpeland*, the Supreme Court explicitly denied that established practices were in need of revision. Moreover, the Court refused to reconsider the established interpretation of the scope of procedural rules in hydropower cases, rejecting arguments to the effect that these must now be understood to provide protection for waterfall owners that matches the protection offered to other affected parties.

In the next chapter, which is the last chapter of the thesis, I consider land consolidation as an alternative to expropriation. I will argue that it has great potential for successfully addressing holdouts among local owners without giving rise to many of the problems associated with using expropriation to facilitate commercial development of hydropower. However, as demonstrated in the present chapter, Norwegian courts do not seem willing to recognise the shortcomings of the current system. Until they do, or are directed to do so by political bodies or international tribunals, it is unlikely that expropriation law will evolve much from its current fixation on the compensation issue and its unshaken belief in public-private commercial partnerships as arbiters of the common good.

6 Compulsory Participation in Hydropower Development

6.1 Introduction

In this Chapter, I will consider an alternative to expropriation in the context of economic development. This picks up the thread from the final section of Part I, where I presented and analysed the land assembly proposal put forth by Heller and Hills in the US. I now return to this way of approaching the issue of economic development takings, by exploring the Norwegian institution of *land consolidation*.

In recent years, this institution has been used extensively to facilitate hydropower projects. So far, however, it is used almost exclusively for small-scale development projects organised by local owners. In these situations, expropriation orders are rarely sought and rarely authorised, even if some owners object to the plans. Instead, various consolidation measures are used, including the practically important "use directives", serving to set up organisational frameworks for compulsory implementation of a development plan, possibly against the owners' own wishes. Importantly, however, use directives presuppose the continued participation of owners in the development, making this measure clearly distinct from a traditional taking.

Essentially, a use directive can be used to take some of the holdout power away from owners, without depriving them of their property. Instead, owners are compelled to cooperate and parti-

cipate in a decision-making process that has economic development as an overarching, binding, aim.

The importance of this kind of land consolidation is most clearly felt in relation to traditional agrarian pursuits and, more recently, hydropower development. However, recent legislative developments in Norway mean that the consolidation alternative is also gaining importance in relation to other forms of development. This includes urban and non-agrarian development projects, marking a departure from the tradition of land consolidation as a purely agricultural institution.

Some argue that novel uses of land consolidation leave the owners in a precarious position by weakening private property rights.[1] In this Chapter, I explore the opposite hypothesis, namely that the use of consolidation for economic development can strengthen property as an institution, particularly when use directives replace traditional expropriation proceedings. In fact, I will argue that the Norwegian system of land consolidation can be used to address the democratic deficit of economic development takings in an elegant way.

This vision presupposes that the land consolidation process continues to function as a service to owners and local communities, as a means of helping them to implement development projects in accordance with public interests. Arguably, this requires a clear commitment on part of the state to prevent abuse of consolidation measures by commercial interests and public-private partnerships that seek access to property rights held by weaker parties.[2] Assuming that such a commitment is made, to protect the integrity of the established system, I will argue that the land consolidation alternative is a highly promising way to deal with many of the challenges that arise at the intersection between private property, local community, and economic development in the public

1 See, e.g., Geir Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' [2007] Tidsskrift for Eiendomsrett 293.

2 As I will discuss in this chapter, the main worry in this regard is that the land consolidation procedure itself might be transformed, if the consolidation alternative gains relevance in relation to large-scale economic development. To address this worry, I will consider the safeguards that are meant to protect the integrity of the traditional process, to assess whether they are strong enough to prevent the process from degenerating when new and powerful actors enter the consolidation scene.

interest. I also believe the Norwegian model can inspire similar solutions elsewhere, particularly in jurisdictions that are committed to an egalitarian ideal of property ownership.

The structure of the chapter is as follows. I begin in Section 6.2, by presenting the basic idea of using land consolidation as an alternative to expropriation. I first discuss land consolidation as a concept, relating this also to the discussing found in Heller and Hills' article. Then I point out some special features of the Norwegian system. I argue that this system has special features that make it particularly natural to consider further as an alternative to expropriation in the context of economic development.

Then, in Section 6.3, I present the Norwegian system of land consolidation in more depth, focusing on the procedural rules and the rules that protect property rights against disproportionate interference. I focus particularly on the so-called "no-loss" guarantee, which states that a consolidation measure can only be implemented when the benefits will make up for the harms, for all affected properties individually.[3]

This safeguard is itself an indication that land consolidation is quite distinct from expropriation. In particular, the consolidation narrative does not rely on a perspective whereby interference takes place because property rights must give way to public interests. Rather, consolidation relies on proof that benefits will outweigh harms at the local level, with respect to each affected property. However, this requirement targets the property as a functional unit, irrespective (in principle) of the specific interests of its current owner. Hence, depending on what functions are regarded as more

[3] In terms of economic theory, this amounts to requiring that all measures should lead to Pareto improvements, see Thomas J Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (Cambridge University Press 2011) 59-61. Moreover, what is required is actual improvement, not merely *potential* improvement (known as Kaldor-Hicks improvement, see Miceli (n 8) 61-63). Unusually, the no-loss guarantee requires Pareto improvements in or in relation to the affected *properties*; no mention is made of their respective individual owners. As a result, the no-loss criterion is also averse to the monetization of benefits and harms – it is normally not possible to fulfil the no-loss requirement by paying compensation to the owners of adversely affected properties, see Per Kåre Sky, 'Jordskiftets ulike effekter' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009) 394. Improvements must typically be rendered in kind, in a manner that offsets potential losses to the property as such, independently of the owner's own (hidden or revealed) valuations, see Sky, 'Jordskiftets ulike effekter' (n 9) 371-372. Hence, the starting point here is completely different from that normally assumed in economic analyses of takings law, where complete monetization and individuation is standard (usually starting from the notion of the owners' *reservation price* – the price at which they would be willing to sell if they behaved non-strategically).

important, the interests of the owner might have to give way to other, locally grounded, priorities.

Hence, land consolidation in Norway relies on a very clear commitment to a social-function perspective on property: property functions, not individual entitlements, take center stage throughout the process. This might limit the power of owners, but it does not marginalise them. After all, it is hard to deny that one of the primary functions of private property is to bestow rights and obligations on its owner. Moreover, in normal circumstances, it would be safe to assume that when a property benefits, then so does whoever owns it. In addition, as I will discuss below, the land consolidation process contains special safeguards that protect owners as individuals.

Importantly, the consolidation perspective can justify imposing economic development project against the wishes of owners, without giving rise to a marginalising eminent domain narrative whereby all links are to be severed between the original owners and their property. Indeed, the no-loss criterion can typically be satisfied in cases of commercial development, through appropriate forms of benefit sharing anchored in local property units (sharing the benefit with the owner as an individual is, in principle, not sufficient). In this way, land consolidation becomes a practically feasible alternative to economic development takings, in a manner that also underscores the current owners' right to participate in, and derive a profit from, the undertaking.

In Section 6.4, I explore this idea concretely, in light of empirical evidence. Specifically, I discuss the use of land consolidation as an alternative to expropriation in relation to hydropower development. I consider several cases in detail, based on court documents and a recent master thesis on land consolidation, for which the author carried out interviews with affected owners.[4] Then, in Section 6.5, I offer an assessment and discuss some future challenges. I also note some shortcomings of the current system, while arguing that these do not detract from the great potential of using consolidation to facilitate economic development, particularly in commercial settings.

[4] See Sæmund Stokstad, 'Bruksordning ved Jordskifte i Samband med Utbygging av Småskalakraftverk' (Master Thesis, 2011).

6.2 Land Consolidation as an Alternative to Expropriation

The notion of land consolidation is widely used on the international stage, but it is somewhat ambiguous. Often, it refers to mechanisms whereby boundaries in real property are redrawn to reduce fragmentation, without affecting the relative value of the different owners' holdings.[5] However, it is also common to use consolidation to refer to mechanisms for pooling together small parcels of land to create larger units.[6] There is a tension between these two notions of consolidation, with some claiming that consolidation in the latter sense is sometimes used to surreptitiously bestow benefits on powerful property owners, at the expense of weaker groups.[7]

In light of this, I should stress at the outset that I will use the term land consolidation in a very broad sense in this chapter, much wider than *both* of the interpretations mentioned above. Land consolidation, as I use the term, refers to any mechanism by which the state intervenes, at the request of some interested party, to (re)organise property rights and uses in a given local area. Hence, a consolidation measure might as well involve *increased* fragmentation of property, if this is deemed a rational form of consolidation of the property *values* of the affected area. Importantly, I also use land consolidation to refer to efforts directed at *managing* property, not just redrawing boundaries.

Some might argue that this terminology is strained, but I adopt it for a reason. It is motivated by the fact that in Norway, the institution known as "jordskifte", which is officially translated as land consolidation, has exactly such a broad meaning.[8] I note that land consolidation also

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5 See, e.g., the entry on *land consolidation* in Susan Mayhew, *A Dictionary of Geography* (Oxford University Press 2009).

6 See, e.g., Zvi Lerman and Dragoş Cimpoieş, 'Land Consolidation as a Factor for Rural Development in Moldova' (2006) 58(3) Europe-Asia Studies 439.

7 Michael Lipton, *Land Reform in Developing Countries: property rights and property wrongs* (Routledge 2009) 237-239.

8 See, e.g., Magne Reiten, 'Avgjerd om fremme av jordskiftesak' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009); Jørn Rognes and Per Kåre Sky, 'Intervention methods in land disputes' (2003) 11(8) European Planning Studies 965.

has a broad scope in many other jurisdictions of continental Europe, as well as in Japan and in parts of the developing world.[9] Moreover, in Heller and Hills' work on land assembly districts, a comparison with land consolidation is presented, based on broad definitions of that term.[10] One of my main aims in this chapter is to pick up on this, by offering a more detailed comparison and assessment, specifically anchored in the Norwegian system and its application in the context of hydropower development. The Norwegian system deserves special attention in this regard because it is particularly broad, especially in its authority to issue use directives.

As land consolidation tends to involve interference in property rights, one may ask about the legitimacy of various consolidation measures, held against rules that protect private property owners.[11] Such legitimacy issues have been raised before the ECtHR on a few occasions, resulting in the Court finding fault with the Austrian system of land consolidation in particular.[12] Moreover, one may sometimes argue that a land consolidation measure *is* a form of expropriation, even if it is not recognised as such by the legislature or the executive. In the US, for instance, a land consolidation provision ordering escheat (to Indian tribes) of fractional property interests in Indian reservations was struck down as an uncompensated taking by the Supreme Court.[13]

In relation to the legitimacy issue, the Norwegian system stands out in two important respects. First, the consolidation procedure is managed by judicial bodies, namely the *land consolidation*

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9 See Per Kåre Sky, 'Internasjonalt perspektiv på jordskifte' in Øyvind Ravna (ed), *Areal og eiendomsrett* (Universitetsforlaget 2007); Arvo Vitikainen, 'An overview of land consolidation in Europe' (2004) 1(1) Nordic journal of surveying and real estate research.

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

11 For an analysis of the Norwegian land consolidation process held against the provisions of the ECHR, I refer to Karl Arne Utgård, 'Jordskiftedomstolane og Den europeiske menneskerettskonvensjonen' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (2009).

12 These decisions must be understood in light of the potentially excessive duration of consolidation proceedings under Austrian law, during which restrictions are also imposed on the owners, limiting their opportunities to enjoy their properties while awaiting a final outcome. See, e.g, *Erkner and Hofauer v Austria* (1987) Series A no 61; *Poiss v Austria* (1987) Series A no 103.

13 See *Hodel v Irving* 481 US 704 (1987).

courts.[14] Second, land consolidation is largely seen as a service to owners, not a tool for increased state control and top-down management.[15] In particular, a case before the land consolidation courts is almost always initiated by (some of) the affected owners themselves and the court often acts as a "problem-solver", aiming to facilitate dialogue and cooperation among owners.[16] Moreover, the no-loss requirement is a core principle of consolidation law, ensuring that no consolidation measure can take place unless the benefits make up for the harms, for all the properties involved.[17] Indeed, this remains on of the key principles of land consolidation in Norway.[18] The combination of a judicial procedure that emphasises owner-participation and a no-loss criterion that ensures local benefits means that, arguably, land consolidation in Norway *strengthens* property as an institution.

Moreover, land consolidation can serve as an effective countermeasure against two of the most widely discussed challenges to any property regime. First, consolidation can serve to protect an egalitarian distribution of property rights against the deleterious effect of inefficiency and under-development that might otherwise arise from fragmentation. Importantly, it can do so without disturbing the underlying property structure and without bestowing disproportionate benefits or harms on certain owners or other select groups (assuming egalitarian property rights and/or legal standing for local property dependants in consolidation proceedings). In particular, land consolidation can ensure commercial development without pooling together property rights and without handing property over to powerful market actors. Second, land consolidation can serve to ensure

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14 See generally Tor Langbach, 'Jordskiftedomstolene og de alminnelige domstoler – likheter og ulikheter' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009). The fact that the land consolidation process is administered by a judicial body appears to be unique to Norway, see Per Kåre Sky, 'Jordskifte i andre land – organisering og prosess' [2001] Kart og Plan 43, 45.

15 See generally Sky, 'Jordskiftets ulike effekter' (n 9).

16 See generally Jørn Rognes and Per Kåre Sky, *Mediation in the Norwegian Land Consolidation Courts* (Working Papers, 12808, University of Wisconsin-Madison, Land Tenure Center 1998) ⟨http://EconPapers.repec.org/RePEc:ags:uwltwp:12808⟩; Rognes and Sky, 'Intervention methods in land disputes' (n 14); Kjell Jørn Rognes and Per Kåre Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' [2007] (Øyvind Ravna ed 511.

17 See the Land Consolidation Act 1979, s 3 a).

18 See generally Ola Rygg, 'Jordskiftelova § 3 a)' [1998] Kart og Plan 179.

sustainable and rational management of jointly owned land, without necessarily forcing an enclosure process (enclosure *can* be the result of land consolidation, but it is only one of many measures in the consolidation toolbox).

In short, land consolidation can be used to address both commons[19] and anti-commons[20] problems, in a way that protects, and possibly enhances, desirable social functions of property, through a judicial system that combines participatory and adversarial decision-making. Hence, land consolidation in Norway is based on a conceptual premise that – potentially – offers protection to owners and their properties, by recognising them as members of a community that are mutually dependent on each other. In this way, the form of property protection offered in the context of land consolidation is distinct from the protection offered in the context of expropriation. This in itself is interesting, particularly from the perspective of property's social functions.

The vision of land consolidation at work here is one that sees it as a means for setting up a mini-democracy on demand, to organise decision-making processes in a way that grants those most intimately affected – the owners and (possibly) other property dependants – a say that is proportional to their stake in the matter at hand. As discussed in Part I, this is something that it often seems hard or impossible to achieve through the standard administrative/political route, particularly when powerful commercial actors engage in extensive lobbying and are allowed to assume the position of primary stakeholders in projects involving the property of others.

Importantly, since land consolidation can be used to impose specific uses of property, it can also be an *effective* alternative to expropriation, a compulsory measure that can obviate the need for depriving owners of their property rights. Depending on the compensation regime, the costs associated with eminent domain can be higher than those associated with land consolidation.[21]

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19 Garrett Hardin, 'The Tragedy of the Commons' 162(3859) Science 1243.

20 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) Harvard Law Review 621.

21 This is the case, for instance, when consolidation is used to facilitate owner-led hydropower development, as discussed

Clearly, consolidation as an alternative to expropriation is particularly natural for economic development projects. The no-loss criterion will typically be possible to fulfil in these cases, through benefit sharing. Moreover, it becomes the responsibility of the land consolidation court to *ensure* that a sufficient degree of benefit sharing results, so that consolidation measures may be applied in accordance with the law.[22]

Interestingly, it is usually also assumed that the benefits resulting from consolidation should be distributed among the affected properties in accordance with their relative value prior to the consolidation measure[23] Hence, it may be argued that the principle of benefit sharing at work here is not compensatory at all, but rather one that sees the owners as active participants in the development project, even when it takes place against their will. I find this highly interesting, particularly from the point of view of the social obligation and human flourishing conceptions of property that I discussed in Part I. Under such theories, it makes sense to impose obligations on owners to participate in the fulfilment of public interests, particularly when they themselves also stand to benefit from doing so.

The emphasis on benefit sharing in land consolidation also reveals a concrete advantage of this institution compared to traditional expropriation. In particular, while benefit sharing is typically required under consolidation law, it is hardly ever achieved through compensation in the context of expropriation for economic development.[24] This means that the use of land consolidation in

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below.

22 For a detailed discussion of the extent of the court's duties in this regard, also discussing recent changes in the law that might indicate a weakening of the no-loss guarantee, see Katrine Broch Hauge, 'Erstatningsnivået ved tvangsovertaking av fallrettar' (PhD Thesis, 2015).

23 This principle is not as strictly encoded as the no-loss criterion, but is formulated as an "ought"-rule. See the Land Consolidation Act 1979 s 31. In my opinion, this is a weakness of the current framework. I mention that for the special case of consolidation to implement a zoning plan, the rule is absolute, see Land Consolidation Act 1979, s 3 b). See also Hauge (n **??**).

24 This is largely due to the so-called *no scheme* principle, which states that compensation to the owner following expropriation should not reflect changes in value that are due to the expropriation scheme. I am not aware of a single jurisdiction that does not include a variant of this principle. For a detailed investigation into the question of whether or not it stands in the way of benefit sharing in economic development cases, I point to Sjur K Dyrkolbotn, 'On the compensatory approach to economic development takings' in H Mostert and others (eds), *The Context,*

place of expropriation has considerable potential also in relation to the worry that owners are undercompensated following economic development takings.[25]

This also means that commercially motivated developers may have an *incentive* to favour expropriation over consolidation. Hence, the question becomes whether or not owners should be able to use land consolidation as a *defence* against expropriation. If owners are granted such a right, it would become a very powerful version of what is known in some jurisdictions as the "self-realisation" mechanism, a rule whereby owners can sometimes preclude a proposed taking by proposing to implement the underlying project themselves.[26] Even in the absence of any legislative initiate in this direction, one might ask whether owners can already achieve this under Norwegian consolidation law. Can the owners preclude expropriation by asking the court to organise the desired development as a consolidation measure?

As long as the expropriation application is still pending a final decision, the owners could theoretically do this. Moreover, in many cases of large-scale hydropower development, it would no doubt be desirable from the point of view of both the owners and their properties to avoid expropriation of riparian rights. Hence, one might wonder if the land consolidation courts would not in fact be *obliged* to take on such a case. I am not aware on any case law that sheds light on this and I imagine that land consolidation courts would hesitate quite a bit, particularly if the proposed expropriation concerns large-scale development. Moreover, it is not clear how the expropriation authorities would react if the land consolidation courts did decide to get involved. In principle, an ongoing consolidation case, or even a formally valid use directive, would not in itself

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Criteria, and Consequences of Expropriation (forthcoming, Ius Commune 2015).

25 Many scholars adhering to an entitlements-based perspective on property argue that the tendency for undercompensation is in fact the core problem associated with economic development takings.**fennel04**; Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107(7) Columbia Law Review 1704; Abraham Bell and Gideon Parchomovsky, 'Taking Compensation Private' (2007) 59(4) Stanford Law Review 871.

26 General rules to this effect are found in several jurisdictions in continental Europe (but not in Norway). See generally Jacques Sluysmans, Stijn Verbist and Regien de Graaff, 'Compensation for Expropriation: How Compensation Reflects a Vision on Property.' (2014) 2014(1) European Property Law Journal 3.

prevent expropriation from taking place.

After an expropriation order has been granted, the law as it stands leaves little or no room for a consolidation defence. Quite the contrary, the land consolidation courts would have to respect a valid expropriation order and might even be called on to implement it, by awarding replacement land or financial damages to affected owners as part of a consolidation procedure.[27]

In the future, if the consolidation alternative to expropriation is to develop successfully, I believe the the owners' right to request consolidation in place of expropriation must be strengthened. Moreover, the property narrative should emphasise the owner-empowering potential inherent in using consolidation as an alternative to expropriation. So far, there are not many signs of this happening in Norway. Rather, the Norwegian system is moving along a trajectory where land consolidation as an alternative to expropriation is increasingly seen as a service to developers and the state. It is noteworthy, in particular, that following a change in the law that takes effect in 2016, private developers without established property interests will be granted the right to bring a case before the land consolidation courts, to seek help in implementing projects that would otherwise necessitate expropriation. Developers might well be motivated to do so, since this could result in reduced administrative costs and (cheaper) consolidation measures replacing the need for paying monetary compensation (e.g., because the land consolidation court provides affected owners with replacement property).

In light of this, one must ask the following: will land consolidation remain a service to owners, or will it become a service to developers who seek cheap access to property owned by others? This question is about to become pressing in Norway, as the scope of land consolidation continually broadens, making it intersect with expropriation law to a greater extent than before. In addition to the new rules granting developers a formal standing in certain consolidation disputes, this development is also strongly felt in the move to apply land consolidation also in the context of

[27] See Land Consolidation Act 1979, s 6.

urban development, outside the traditional scope of agricultural pursuits.[28]

The idea that consolidation can serve as an alternative to expropriation also raises practical questions concerning how it would work. Here there is already some interesting empirical data available, arising mainly from situations when some owners wish to undertake economic development projects on jointly owned land against the will of other owners. In these situations, it is quite common for the owners who desire development to bring a case before the consolidation courts, rather than seeking permission to expropriate.

Interestingly, in the context of hydropower development, this use of land consolidation has become very important in recent years. In 2009, the Court Administration reported that land consolidation had helped realise 164 small-scale hydropower projects with a total annual energy output of about 2 TWh/year.[29]

Moreover, in a recent Supreme Court case, the importance of land consolidation was stressed specifically, as a justification for requiring a commercial taker to pay additional compensation to the owners of riparian rights taken for hydropower development.[30]

In the next section, I give further details on the Norwegian system, focusing on the system of use directives. Then, in Section 6.4, I consider land consolidation to facilitate small-scale hydropower specifically. I approach this as a test case for the proposition that land consolidation can be a legitimacy-enhancing alternative to expropriation for economic development more generally.

6.3 Land Consolidation in Norway

Rules regarding land consolidation have a long history in Norwegian law. The first consolidation rules were included already in King Magnus Lagabøte's *landslov* (law of the land) from 1274, the

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[28] See generally Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' (n 8).

[29] See **gevinst09** For the scale, I mention that 2 TWh/year is roughly what it takes to supply Bergen with electricity, the second largest city in Norway with around 250 000 inhabitants.

[30] See *BKK Produksjon AS v Austgulen and others* Rt-2011-1683.

first piece of written legislation known to have been introduced at the national level in Norway.[31] The earliest rules targeted jointly held rights in farming land, giving owners and rights holders on that land an opportunity to demand apportionment that would give them exclusive rights on a parcel of land corresponding to their share of the joint rights.[32] The land consolidation courts still provide this function, but additional rules were introduced during the 19th century. At this time, the main use of land consolidation was to pool together fragments and divide up jointly owned land, to create larger single-owner parcels that could facilitate higher-intensity farming and, it was believed, better resource management. However, it was noted that individuation of property rights was not necessarily required or desirable. Indeed, collective-action mechanisms often seemed more appropriate, as a means to avoid disturbing the established property structure.[33]

The rules regarding use directives emerged from this context. They were introduced to facilitate a legal framework for land management rooted in property interests. At the same time, the rules would facilitate a considerable pooling of resources and decision-making power, to set the stage for more intensive and coordinated forms of land use.

The initial objective was to enable rural communities to adapt to changing economic conditions without fundamentally altering them or leading to displacement or depopulation. Moreover, the scope of use directives was typically limited to the regulation and reorganisation of already

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31 See Chapter 4, Section 2 of Jordskifterettens stilling og funksjoner, 'NOU 2002:9' (Report to the Ministry of Agriculture from special committee appointed by the King in Council 10 October 2000,).

32 The share in joint rights belonging to each individual farm was historically determined based on the amount of rent ("skyld") that each farmer paid to the land owner (a figure that was also used to determine the level of taxation). However, following the union with Denmark and especially after the advent of enlightened absolutism, tenant farmers in Norway increasingly bought their land from their land owners. Indeed, tenant farming became relatively uncommon in Norway after the 18th Century. But the notion of "skyld" was kept as a measure of the share each farm had in the now jointly owned larger estates. The notion is still important, for instance in apportionment proceedings, as discussed in Øyvind Ravna, 'Skiftegrunnlaget i sameier' in Øyvind Ravna (ed), *Perspektiver på jordskifte* (Gyldendal Akademisk 2009).

33 This idea was behind a range of provisions introduced during the 19th century, not all pertaining to land consolidation. For instance, a special management structure was set up to govern forestry on common land, to avoid overexploitation and ensure rational management without necessitating enclosure. See generally Geir Stenseth, 'Bygdeallmenningenes rettshistorie og dens møte med fremtidens landbruk' in Kirsti Strøm Bull (ed), *Natur, Rett, Historie* (Oslo Studies in Legal History 5, Akademisk Publisering 2010).

established forms of joint use. It was relatively uncommon to employ use directives to facilitate completely new kinds of development.

Over the last few decades, this has changed. Today, use directives are increasingly applied also to organise development projects that are not agricultural in the traditional sense, even for properties that have no prior connection with one another. Moreover, many additional mechanisms of land consolidation have been introduced, all aiming in various ways to ensure better organisation of land use and ownership. It is helpful to recognise three main categories of consolidation tools, as summarised in the following table:

- *Apportionment of land*: Rules that empower the court to dissolve systems of joint ownership by apportioning to each estate a parcel corresponding to its share, or by reallocating property through exchange of land.[34]

- *Delimitation of boundaries:* Rules that empower the court to determine, mark and describe boundaries between properties and the content and extent of different rights of use attached to the land.[35]

- *Directives for use*: Rules that empower the court to prescribe rules for the use of jointly held land, and to organise such use, including setting up organisational units for carrying out specific development projects.[36]

In all cases, the consolidation court can only employ these tools when they are called on to do so by someone with legal standing.[37] This was traditionally limited to the owners and those holding

[34] This is the traditional form of land consolidation in Norway and the main legislative basis for it is provided in the Land Consolidation Act 1979 s 2 a)-b).

[35] The main legislative basis for this form of consolidation is found in the Land Consolidation Act 1979, s 88.

[36] These rules are found in the Land Consolidation Act 1979, s 2 c).

[37] See Land Consolidation Act 1979, s 5.

time-unlimited rights of use.[38] Today, the government also has legal standing in many kinds of consolidation cases, but most cases (about 90 %) are still initiated by owners.[39] From 2016, when the Land Consolidation Act 2013 comes into force, legal standing will be granted to a larger class of non-state actors, including development companies that may be granted and expropriation licence.[40] Moreover, legal standing will be granted to all rights- or ground lease holders.[41]

After a case has been brought before the court, the consolidation court can implement consolidation measures in so far as they are needed to alleviate problems and difficulties preventing rational use of the affected land.[42] To determine whether or not this requirement has been met, the court will look to the prevailing economic and social situation, as well as predictions for the future.[43] In this regard, the court is also influenced by what it regards as the prevailing public interests in property use. Today, the role of the perceived public interest is gaining importance. Moreover, recent reforms have sought to increase the importance of public interests in consolidation disputes.[44]

The contextual nature of land consolidation has always been clear. Indeed, the basic building blocks of the current system can be traced back to the influence of technological advances in farming and the modernisation processes that Norwegian society underwent in the 19th century. The law responded to these changes by making consolidation an increasingly powerful instrument for change and development. It was also at this time that it was decided to establish a tribunal

38 See Land Consolidation Act 1979, s 5.

39 See, e.g., Øystein Jakob Bjerva, 'Jordskiftedomstolene og forvaltningsmyndighetene – to kokker og ingen oppskrift?' 72 Kart og Plan 130, 135.

40 See Land Consolidation Act 2013, s 1-5(3).

41 See Land Consolidation Act 2013, s 1-5(1).

42 See the Land Consolidation Act 1979, s 1.

43 See generally Reiten, 'Avgjerd om fremme av jordskiftesak' (n 14).

44 See generally Prop. 101 L (2012-2013) (proposal from the Ministry of Agriculture to the parliament regarding the Consolidation Act 2013).

system for administering the process, first in the Land Consolidation Act from 1857, which was revised and developed further in 1882 and 1950.[45] The procedural rules closely mimics those that pertain to the regular civil courts. This ensures that consolidation measures are only applied by the court following a public hearing where all involved parties are given an opportunity to present their case, give supporting evidence, and contradict each others' testimony. For a more detailed description of the consolidation court, I refer the reader to Section 6.3.1 below.

The current system for land consolidation is based on the Land Consolidation Act 1979, which will be replaced in 2016 when the Land Consolidation Act 2013 takes effect.[46] The new act does not introduce any dramatic changes to the law, but it further widens the scope of consolidation in non-agrarian contexts. Moreover, the new act contains the following explicit description of the purpose of land consolidation, which provides a interesting bird's eye view on the legislature's perspective:

> Section 1-1 The purpose of the Act
>
> The purpose of the Act is to facilitate efficient and rational use of real property in the best interests of the owners, the rights holders and society. This objective will be pursued by the land consolidation courts which will implement remedies for impractical structures concerning ownership and use of property, ascertain and determine property boundaries, as well as decide appraisal disputes and other cases pursuant to this and other acts.
>
> The Act also seeks to facilitate fair, responsible, quick and effective processing of cases in independent and impartial public courts that will operate in such a way as to enhance

[45] An overview of the history of consolidation law is given in Chapter 3 of Prop. 101 L (2012-2013) (n **??**).

[46] Act no 97 of 10 June 2013 relating to the determination and change of structures of ownership- and rights to real property etc.

confidence in the consolidation process.[47]

This statement of purpose highlights how the new act incorporates and extends the trend towards giving the consolidation process wider scope. I also note how it reiterates and emphasises that the process is to be tribunal in nature. More generally, the quote illustrates that land consolidation is likely to become more important in the future, increasingly also outside the traditional agricultural setting within which this body of law has hitherto developed.[48]

It is now explicitly stated that the purpose of land consolidation is to make conditions of property use more favourable for all the affected owners and rights holders. Hence, the new act underscores how consolidation represents a form of interference that is fundamentally different from expropriation. As before, the consolidation court is not empowered to take action unless it is called on to do so by one of the stakeholders in the property.[49] However, according to the new Act, a developer who (might?) has obtained permission to expropriate is to be counted as a stakeholder in that land for the purposes of consolidation.[50] This flags how the relationship between expropriation and consolidation is now becoming an important topic in Norwegian land law.

In 2005, the Ministry of Agriculture made some comments in this regard, in connection with a revision of the Land Consolidation Act 1979 that gave consolidation greater applicability in urban areas and with respect to implementing public plans.[51] Some members of the preparatory committee had raised the concern that giving consolidation extended scope in this way would be

47 Land Consolidation Act 2013 s 1.

48 For instance, following a change in the Land Consolidation Act 1979 in 2006, land consolidation may now also be called on in order to manage restructuring of ownership in urban areas, in connection with specific development schemes. This rule has been extended further in the new Act. It will be interesting to see how this will affect the division of power between planning authorities, regular civil courts and the (distinctly organised) land consolidation courts. See also Stenseth, 'De nye reglene om "urbant jordskifte". En presentasjon og vurdering' (n 8).

49 See Land Consolidation Act 2013 s 1-5.

50 Previously, a developer was only regarded as a stakeholder in consolidation in some cases of public projects, c.f., Land Consolidation Act 1979, s 5.

51 See, in particular, Land Consolidation Act 1979, s 2 h-i).

problematic since it would encroach on expropriation law. Also, the concern was raised that it would effectively render consolidation as a form of expropriation. The Ministry disagreed, commenting as follows.

> The Ministry would like to point out that one of the main preconditions for consolidation is that a net profit is created for the land in question. This profit is then divided among the parties in an orderly fashion. Individually, the law also guarantees that no one suffers a loss, see s 3 a). [...] In the Ministry's opinion, expropriation takes place on a different factual and legal basis. In cases of expropriation the public makes decisions that deprives the parties of economic value. The purpose then becomes to compensated them in accordance with s 105 of the Constitution, not to increase the value of their land or the annual income they may derive from it.[52]

When preparing the new act, the Ministry of Agriculture reiterated this position, but they did not reflect further on the question of the exact relationship between consolidation and expropriation. They observed, however, that changing the law so that expropriating parties could appear in consolidation cases was *reasonable*, since it would then be left up to the developer whether to make use of their permission to expropriate or to rely on consolidation.[53]

The choice made by the expropriating party in this regard will be of great importance to the affected owners and rights holders. In particular, as the Ministry themselves makes clear, it is an absolute precondition for the implementation of a rights-altering consolidation measure that it serves to make the structure of ownership and use more favourable. This requirement, moreover, refers explicitly to the *area within which consolidation takes place*.[54] No similar rule is in place to

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52 See Chapter 3.3 of Ot.prp. nr. 78 (2004-2005) (report to parliament from the Ministry regarding changes in the Land Consolidation Act 1979.

53 See Prop. 101 L (2012-2013) (n **??**) 84.

54 See the Land Consolidation Act 2013, s 3-3.

protect the affected local community following expropriation. Moreover, the practices that have developed for dealing with consolidation cases are centred on the interests of the local owners and their communities to a far greater extent than prevailing expropriation procedures.

For instance, the rule regarding expropriation that corresponds most closely to the no-loss rule requires merely that the benefit to private and public interest exceeds the disadvantages *overall*, not locally and certainly not for each individual plot of land.[55] At the same time, consolidation rules do not place any restrictions on the kinds of development that can be carried out. The consolidation rules pertain instead to *how* it should be organised.

Moreover, the consolidation courts must always base their decisions on existing public regulations of the property use.[56] Hence, if the public interest suggests a particular form of land use, the fact that a planning decision detailing development of such use is implemented through consolidation does not entitle the court to review the plans themselves, going against the public interest. But it does introduce an obligation, emerging at the time of implementation, to turn specifically to the interests of original owners and rights holders. Importantly, the court must look for solutions that minimise the burden and maximises the benefit for all the properties involved.

The rules that give the consolidation court authority to give directives of use are particularly relevant in this regard. Before giving further details about these rules, I briefly present the consolidation process step by step.

6.3.1 The Consolidation Process

A consolidation case is usually initiated by an owner or a permanent rights holder.[57] The request for consolidation measures is to be directed at the relevant district consolidation court, one of the

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55 See the Expropriation Act 1959, s 2.

56 In the Land Consolidation Act 2013, s 3-17 it is explicitly stated that the consolidation court cannot prescribe solutions that are not in keeping with such regulation. However, it is also made clear that the consolidation court itself can apply for necessary planning permissions on behalf of the owners and the land in question.

57 See s 5, para 1 of the Land Consolidation Act 1979.

34 district courts for land consolidation that have been set up by the King in accordance with section 7 of the Land Consolidation Act 1979. The request is meant to include further details about the affected properties, the owners and rights holder involved, as well as the specific issues that consolidation should address.

However, this requirement is not usually interpreted very strictly, meaning that the consolidation court will often be inclined to take steps to clarify further what the case should encompass, more so than in regular civil disputes.[58] However, the court may still reject the consolidation request if it finds that it suffers from formal shortcomings, pursuant to the same rules as those that apply to civil disputes.[59]

If the court decides that the request is well-formed and that it includes sufficient detail to permit material consideration, they go on to prepare public hearings, following the rules set out in Chapter 3 of the Land Consolidation Act 1979. These rules mirror those that are in place for civil hearings in general, including the duty to inform affected parties, the parties' right to present their claims, as well as their duty and right to give testimony and provide evidence supporting it.[60] As in civil cases, a decision is usually made only after at least one oral hearing where the parties may present and comment on the evidence and the issues raised by the case.

Unlike in civil cases, the main hearing typically takes place on the disputed land itself and often revolves around practical rather than legal issues. Moreover, a consolidation case will usually not take the form of a two-party adversarial process, but rather as a multi-party discussion where the court interacts with a large number of interested persons who may have a range of common as well as conflicting interests. The typical case involves 5-10 people, but in some cases there can be

58 Langbach (n 20) 39.

59 See section 12, paragraph 2 of the Land Consolidation Act 1979, which refers to section 16-5 of the Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes.

60 See the Land Consolidation Act 1979, s 13.

hundreds of parties involved.[61] In addition, it is quite common that the parties are not represented by legal council.[62] And even if they are, the owners themselves are typically expected to take an active part in the proceedings.[63]

The request for consolidation will be the court's point of departure when assessing the case. However, the court is not bound by the claims put forth by the parties. This again marks a differences with most civil disputes. With a few exceptions explicitly listed in statute, the consolidation court may decided to use any measure that it deems suitable to ensure a favourable structure of rights and ownership for the future. However, there is some restriction placed on the court in that the measures taken must be regarded as *necessary* in light of considerations based on the original request.[64] In short, the court should remain focused on the issues raised by the parties, but is free to address these issues using the tools they deem most suited for the job. The consolidation court, in particular, is meant to be a "problem solver", more so than an ordinary civil court.[65]

When a decision is reached, the parties are notified and the decision is presented and argued for in keeping with the rules of the Civil Dispute Act 2005, Act No 90 of 17 June 2005 relating to the Mediation and Procedure in Civil Disputes.[66] The appropriate format for the decision depends on its content. A regular civil ruling is the form used for decisions that only involve ascertaining the boundaries between properties, while a special "consolidation decision" is used to implement apportionment and directives of use. The difference in form affects the appeals procedure; while civil rulings are dealt with by the regular courts of appeal, the consolidation decisions can only be

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61 Langbach (n 20) 39.

62 Kjell Jørn Rognes and Per Kåre Sky, 'Megling i domstolene, særlig i jordskifteretten' [2000] Lov og Rett 101, 109-111.

63 See generally Rognes and Sky, 'Megling i domstolene, særlig i jordskifteretten' (n **??**).

64 See s 26 and 29 of the Land Consolidation Act 1979.

65 See generally Rognes and Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' (n 24).

66 See the Land Consolidation Act 1979 s 7.

appealed to one of 4 designated consolidation courts of appeal.[67]

The procedural rules remain largely the same before the consolidation court of appeal, who provide an entirely new consolidation assessment.[68] The decision of the consolidation court of appeal can only be appealed on the grounds that it is based on an incorrect understanding of the law, or that procedural mistakes were made. In this case, the ordinary appeal courts have authority in the first instance, while the Supreme Court is the last instance of possible appeal.[69]

In general, consolidation cases are different from other civil cases mainly in that they have fundamentally different scope. A consolidation case is not primarily concerned with deciding the merits of individual claims, but focuses on introducing structures of ownership and rights that will prove favourable to the community of owners. In this respect, the process has an administrative character. However, the fact that it is organised similarly to a civil dispute means that the affected parties can expect to play a more prominent role in the decision-making process than they do when decisions are made by administrative bodies.

Given the special context of arbitration, it is not surprising that the judges appointed to the consolidation courts are required to have a special skill set, different from that of regular civil law judges. In fact, consolidation judges are required to have successfully completed a special master level degree in consolidation. This is not a law degree, but a distinct form of professional education.[70]

The consolidation court also relies on the participation of lay people who sit alongside the specialist judge.[71] These lay judges are appointed by the specialist judge from a committee of

67 See the Land Consolidation Act 1979, s 61.

68 See s 69 of the Land Consolidation Act 1979.

69 See s 71 of the Land Consolidation Act 1979.

70 See s 7, para 5 of the Land Consolidation Act 1979. The degree in question is currently offered only at the Norwegian College of Life Sciences and Agriculture.

71 See section 8 of the Land Consolidation Act 1979.

lay persons that are elected by the local municipalities.[72] Ideally, the appointed laymen should have special knowledge of the issues raised by the case. However, they are drawn from the general population.[73]

Summing up, the consolidation process has both administrative, adversarial and participatory characteristics. While the content and scope of the court's decision will often have an administrative flavour and is not primarily directed at settling any specific dispute, the process is judicial. Hence everyone is entitled, and to some extent even *obliged*, to have his voice heard and to partake in the process. Moreover, while the process is guided and overseen by the court, it is fundamentally based on considerations arising from the interests of the parties and their expression of these interests in their own words.

However, the owners' interests are always understood also in light of prevailing notions of what counts as favourable and rational property use. Importantly, in relation to this latter assessment, the court will look beyond the expressed interests of the individual owners. The court will pose the question with regards to the use of the land as such, drawing on its understanding of the relevant economic, social and political conditions.[74] At the same time, the decisions are made on the basis of information that is presented and discussed in public hearings. Moreover, the affected parties will take part in discussions that may also address more overarching concerns about the form of land use that should be regarded as favourable for the area in question.[75]

To flag the dual nature of the consolidation process it is tempting to designate it as a process of judicially structured *deliberation*. The final decision-making authority is granted to the court, but the court is required to act on behalf of the rights holders, on the basis of their wishes, but

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72 See section 8 of the Land Consolidation Act 1979 (the appointment itself is regulated in the Courts of Justice Act 1915, Act No 5 of 13 August 1915 relating to the Courts of Justice, s 64).

73 See section 9, paragraph 5 of the Land Consolidation Act 1979.

74 See generally Reiten, 'Avgjerd om fremme av jordskiftesak' (n 14); Sky, 'Jordskiftets ulike effekter' (n 9).

75 See also Rognes and Sky, 'Konfliktløsning og fast eiendom – ekisterende og nye arenaer' (n 24).

always also in the best interest of their properties and their community.

This form of decision-making based on multi-party deliberation is interesting in its own right, as it provides a template for management of land that caters to the idea of public oversight and control as well as to the idea of local participation and self-governance. It is a form of land management that seems especially suitable as a means to implement concrete projects undertaken in the public interest, particularly when these would otherwise appear to adversely affect individual land owners and local communities.

Moreover, the notion of land consolidation can serve as an additional conceptual layer between the planning stage and the implementation step of a development plan, a layer of management devoted to translating public interests and private plans into concrete action on private property. This, I believe, is a layer of administration that deserves more attention and more fine-grained tools than those currently offered in systems relying on expropriation. Clearly identifying a consolidation layer in property management for economic development can also make for a cleaner delineation between commercial implementation on the one hand, governed by the market, and public planning on the other, governed by administrative law and political bodies. In this way, one may also hope to avoid unhealthy coalescence between the two.

In the next section, I argue that Norwegian consolidation law already include tools that make it possible to rely on the consolidation courts to provide this service. The rules that I believe warrant this conclusion are the rules relating to use directives, which I now present in more detail.

6.3.2 Organising the Use of Property

Traditionally, use directives targeted property rights that were owned jointly or for which some form of shared use had already been established.[76] However, in the 1979 Act, the power of the courts to issue use directives was extended, so that directives could also be issued when there

[76] In accordance with s 2 c) of the Land Consolidation Act 1979.

was no prior connection between the rights and properties in question, provided *special reasons* made this desirable.[77] Traditional examples include directives for the shared use of a private road which crosses several different properties, or regulation of hunting that takes place across property boundaries.

The joint use rules emerged as an alternative to apportionment of jointly owned property, a more subtle and less invasive measure that could often give rise to the same positive effect as a full division of ownership, without leading to unwanted fragmentation. Hence, in the now repealed Land Consolidation Act 1950 it was stated that use directives should be the *primary* mechanism of consolidation, such that apportionment could only take place if such directives were deemed insufficient to reach the goal of creating more favourable conditions for the use of the land.[78] In the 1979 Act, the two mechanisms were formally put side by side, but the intention behind this was to ensure greater flexibility of the system, not to reduce the scope of use directives. Quite the contrary, the 1979 Act explicitly intended to promote the increased use of such directives, also in conjunction with other measures.[79]

Since the act was introduced, there has been a gradual increase in the willingness of the courts to rely on use directives to facilitate *new development* on the land, not just as a means to regulate an existing activity.

The Land Consolidation Act 1979 lists a range of different concrete circumstances in which such directives can be applied.[80] Importantly, the list is not understood to be exhaustive. Hence, as the notion of agriculture has broadened to include activities such as small-scale hydropower

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77 See s 2 c), para 2 of the Land Consolidation Act 1979.

78 See s 3 no 3 and 4 of the Land Consolidation Act 1950 and the discussion in Revisjon av jordskifteloven, 'NOU 1976:50' (Report to the Ministry of Agriculture from a special committee appointed by the King in Council 12 May 1972,) 30-37.

79 See the discussion in Revisjon av jordskifteloven (n **??**) 35-37 and Ot.prp. nr. 56 (1978-1979) , 47-48.

80 See s 35 of the Land Consolidation Act 1979.

development, the scope of use directives has followed suit.[81]

In the Land Consolidation Act 2013, the list of purposes is replaced by an explicit general rule which makes it clear that the consolidation courts have the authority to give directives whenever they regard this to be favourable to the properties involved.[82] In addition to this, the new Act also introduces a general rule which gives the court authority to *set up* systems of joint ownership when a joint use directive is deemed insufficient.[83] Hence, apportionment and pooling of property is now on equal footing, although a priority rule is introduced for the latter; pooling will only be considered if directives of joint use are regarded as an insufficient means to ensure more favourable conditions. Moreover, the new Act maintains the principle that directives regarding joint use of land for which there are no existing joint rights can only be given if there are special reasons.

This requirement is not intended to be very strict and the Ministry of Agriculture was initially inclined to remove it.[84] However, it was eventually decided that it should be kept in order to flag that two distinct questions arise in such cases. First, the court must consider the question of whether or not joint use is in fact desirable, before moving on to the question of how it should be organised.

In addition to giving directives prescribing how joint use is to be organised, the consolidation court may give rules compelling owners to take joint action to realise potentials inherent in their land. Rules to this effect were novel to the Land Consolidation Act 1979. Moreover, joint action could only be prescribed in special circumstances.[85] Currently, joint action directives can only be directed at *in rem* property owners, not other parties.[86] Following the new Land Consolidation Act

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81 Ot.prp. nr. 57 (1997-1998) , 103.

82 See s 3-8 of the Land Consolidation Act 2013.

83 See s 3-5 of the Land Consolidation Act 2013.

84 For a discussion on this see Prop. 101 L (2012-2013) (n **??**) 140-141.

85 The rules are given in the Land Consolidation Act 1979, s 2 e).

86 See the Land Consolidation Act 1979, s 34 a).

2013, however, the consolidation courts will be authorised to prescribe joint action also to right holders. In addition, the existing list of circumstances that warrant joint action will be replaced by a general joint action rule.[87]

When commenting on this change in the law, the Ministry noted that the joint action rules currently in place have been widely used. Indeed, applying them is now one of the core responsibilities of the consolidation courts.[88] Joint action directives can even include prescriptions for joint investments.[89] On the one hand, this means that such directives can be used to facilitate capital-intensive new development, making consolidation a more effective tool to implement economic development. On the other hand, questions arise regarding the extent to which it is legitimate to rely on compulsion in this regard.

The magnitude of the joint actions and investments required to undertake projects can easily become quite burdensome for individual owners, a worry that is particularly likely to arise in case of large-scale commercial development. The Land Consolidation Act 1979 attempts to resolve this by a rule stating that if joint actions or investments may come to involve "great risk", the court must set up two *distinct* organisational units to undertake it.[90] First, the rights needed to undertake the scheme will be pooled together and managed by an owners' association. Then, to undertake the scheme itself, a cooperative company structure will be set up on behalf of the owners.

In this way, the risk is diverted away from the individual owners onto a company controlled by them. This company will be entitled to the profit from the scheme, but it will also be required to pay rent to the owners' association on terms established by the parties themselves, with the help of the court.[91] Moreover, the owners are entitled to shares in this company proportional to their

87 See s 3-9 of the Land Consolidation Act 2013.

88 See Prop. 101 L (2012-2013) (n **??**) 146.

89 See s 3-9 of the Land Consolidation Act 2013.

90 See the Land Consolidation Act 1979, s 34 b).

91 See s 34 b) of the Land Consolidation Act 1979.

share of the relevant rights in the land, as determined by the consolidation court. The owners are not obliged to take part in the undertaking by acquiring such shares. Moreover, they will benefit from membership in the owners' association regardless of whether or not they also purchase shares in the development company.

This two-tier system provides a mechanism that could potentially empower owners to undertake large-scale projects that also involve external commercial actors. In particular, the owners' association could strike a deal with such a developer, if the owners themselves do not desire to undertake the actual development. In this regard, new conflicts may arise between the owners, if some desire to undertake development themselves, while others wish to strike a deal with an external developer. Should the owners that wish to undertake their own development be prioritised by the owners' association? Should the land consolidation court be empowered to order such a prioritisation? This question has arisen in several cases concerning hydropower, as discussed in the next section.

For now, I conclude that the system currently in place already provides tools that allow consolidation courts to organise large-scale development on behalf of owners, even when this requires considerable property (re)organisation and diversification of risk. Importantly, I note that the consolidation rules also point to a form of implementation that is likely to allow the public to exercise more extensive oversight and control. This follows from the fact that the system clearly *curbs* the power and influence of purely commercial forces by emphasising both the owners' interests and the social, economic and political aims which motivate the underlying planning decisions. Effectively, commercial development through consolidation gives the public a greater say during the implementation stage. After all, the organisational structure and the implementation plans are formulated by courts which are explicitly obliged to consider public and societal interests.

In addition to this, both planning authorities and commercial developers may take up a role as formally recognised parties in the consolidation process. This seems particularly useful in con-

nection with large-scale industrial development, as it might otherwise be hard to implement such projects successfully. In these cases, then, the consolidation system sets up an arena for interaction and deliberation between the three main groups of stakeholders: the public, the local owners and the commercially motivated developers. Such an arena is so far missing at the implementation stage of big development projects. At this stage, owners and their communities in particular tend to become completely marginalised, particularly when expropriation is used.

It remains unclear to what extent the Norwegian consolidation rules will actually be used to give property owners a leading voice in development projects involving their properties. The tension between expropriation and consolidation has yet to arise in case law from this angle. However, consolidation is beginning to receive much attention as a practical alternative to expropriation. Hence, I believe it is only a matter of time before deeper questions of participation rights and benefit sharing will also arise.

To sum up, use directives are highly versatile tools that may be used to organise extensive projects of land development on behalf of local owners. This form of development organisation makes it possible for original owners to maintain their interest in the land, obviating the need for expropriation, while giving the public a greater opportunity to influence and control how their planning decisions are implemented in practice.

In the next section, I consider in depth the particular case of hydropower, where the consolidation courts have recently started to make use of a wide arsenal of its tools to ensure that development can be carried out in this way.

6.4 Compulsory Participation in Hydropower Development

In this section, I look at four recent cases in detail, all of which involved directives of use for hydropower development by local owners. The waterfalls and rivers dealt with in these cases are all located in the county of *Hordaland*, in south-western Norway. Three of the cases involved small-

scale hydro-power which some of the owners wanted to develop themselves, while the fourth was a case when the owners were also considering a development plan which would involve cooperation with an external energy company. The cases are particularly useful because we have access to data on how the process of consolidation was perceived by the owners themselves.[92]

In the following, I first present each case separately, focusing on the organisational issues, the solutions prescribed by the court, and the subsequent reception among the parties. I then assess this from the point of view of developing a better understanding of compulsory cooperation as an alternative to expropriation. I conclude with some unresolved questions, particularly regarding the relationship between consolidation law and other legal frameworks.

6.4.1 *Vika*

The case was brought before the consolidation court in 2005, by riparian owners who had all agreed to pursue hydropower development.[93] The owners disagreed on how to organise the owners' association, and on how the shares in this association should be divided among the properties involved, 15 in total. However, a consensus had formed regarding the main organisational principle, namely that the owners would rent out their waterfall to a separate development company which every owner would have a right (but not a duty) to take part in.

The parties in *Vika* were closely involved in the consolidation process and the statutes for the owners' association were based on suggestions made by the owners themselves. The main point of disagreement concerned how the shares in this association should be allotted, a question that was made more difficult by the fact that some owners benefited from old water-mill rights in the river.

In the end, the consolidation court held that these rights were tied to the form of use relevant

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92 This material is due to Sæmund Stokstad, who conducted interviews for his master thesis on land consolidation, devoted to the study of how consolidation measures can be used to facilitate hydropower development. See Stokstad (n 11).

93 *Vika* 1210-2005-0014, [2005] Haugalandet og Sunnhordland jordskifterett.

at the time they were established. Hence, the rights were not regarded as having any financial value and could therefore be extinguished without compensation.[94]

There was also some disagreement about whether the voting rights in the owners' association should be tied to the number of shares belonging to each owner, or if the owners should simply be allotted one vote each, irrespectively of their share of the relevant riparian rights. The consolidation court went for the first option. However, the way shares where allotted deserves special mention. In particular, the court decided to take into account that some additional water entered the main river from smaller rivers where only a sub-group of the owners held riparian rights. These owners' share in the association was increased accordingly. This is surprising in light of Norwegian water law, as ownership of riparian rights usually arises from ownership of land along the relevant riverbed, regardless of where the water itself comes from.[95] Hence, this is an illustration of how the land consolidation court can opt for organisational solutions that seem rational given the concrete circumstances, even if they do not follow from any generally recognised principles of law.

The statutes of the owners' association in *Vika* also contains a second interesting provision, based on a suggestion made by the owners. This provision states that all rights in the association are to be tied to the underlying agricultural properties so that they can not be sold separately. In Norway, a division of agricultural property requires permission from the local municipality.[96] In recent years, however, this protection of farming communities has grown weaker in practice. It is interesting, therefore, that the owners in *Vika* decided that a dissociation of water rights from the underlying agricultural properties should be explicitly forbidden.

According to Stokstad, a general consensus had developed among the parties whereby the land consolidation procedure was seen as a success. It allowed for an orderly and fair decision-making

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94 As provided for in the Land Consolidation Act 1979, s 2.

95 See the Water Resources Act 2000, s 13.

96 See s 12 of the Land Act 1995.

process regarding the conflicts that had arisen. The resolution of the case followed continuous interaction between the owners and the court, where everyone felt they had been given an opportunity to have their voice heard.

Initially, there were severe tensions among the owners, but the consolidation process had served to alleviate existing conflicts. Some owners also pointed to the fact that the main hearing had been physically conducted in the local community, in a meeting hall that was familiar to the owners. This also gave them a feeling that they were meant to actively partake in the decision-making process.

When the interviews were conducted, 5 years after the case was concluded, the owners also appeared to agree that the association was working as intended and that the climate of cooperation among the owners was good. The hydropower scheme itself had been completed in 2008, yielding an annual production of around 15 GWh/year, providing enough energy for around 700 households.

Moreover, following the experience of land consolidation, a culture of deliberation towards consensus had developed among the owners. The owners now emphasised the search for a common ground, aiming to reach agreement on important issues. This was reflected, for instance, in the fact that the owner who contributed the land for the power station was given a generous annual fee, in addition to his compensation as a riparian owner.

According to Stokstad, this fee exceeds what he would be likely to get if this decision had been left to the discretion of the consolidation court. Hence, it reflects a premium that the owners were now willing to pay to ensure agreement and a continued good climate for cooperation.

In light of this, the case of *Vika* serves as an excellent example of how land consolidation can empower local communities and enable them to embark on substantial development projects.

6.4.2 *Oma*

The case of *Oma* was brought before the courts in 2006.[97] The case involved four properties. The owners of three of them, A, B and C, wanted to develop hydropower, while the fourth owner, D, was opposed to the plans. Rather than attempting to expropriate the necessary rights from owner D, owners A, B and C took the case to the consolidation court. They argued that development would benefit all the properties involved. Moreover, they pointed out that an alternative project which would not make use of owner D's rights would be less profitable. Hence, in their view, the consolidation court should compel D to cooperate in a joint scheme.

Owner D protested, arguing that the project would not economically benefit him, and that it would also be to the detriment of his plans to build holiday cottages in the same area.

The case of *Oma* differs from that of *Vika* in that the question of whether it was appropriate to use compulsion was more prominent. In particular, this aspect came up already in relation to the question of whether or not hydropower development should be pursued at all. As I discussed in Section 6.3, the fact that some owners do not desire development does not prevent the consolidation court from putting directives in place to facilitate it.

However, the courts often exercise restraint in such cases. In *Oma*, however, the court agreed with the majority that an owners' association with compulsory membership should be set up.[98]

To justify the use of compulsion against D, the court first observed that joint development of hydropower would benefit all the properties in question, including that owned by D. Then they commented specifically on owner D's plans for building holiday homes, noting first that he was unlikely to be given planning permission, and secondly that a hydropower plant would not adversely affect such plans in any significant way. Moreover, the court noted that while owner D's

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97 *Oma* 1200-2006-0015, [2006] Nord- og Midthordaland jordskifterett.

98 In doing so, the court relied on s 2 c) of the Land Consolidation Act 1979.

rights were relatively minor, they were quite crucial for the profitability of the project, particularly because owner D controlled the best location for the construction of a dam to collect the water used in the scheme. Overall, the court's conclusion was that a joint hydropower scheme would be a better option for everyone than a project that did not include owner D's property.

The question then arose as to how the shares in the owners' association should be divided among the owners and their land. In regard to this question, the court departed significantly from one of the basic principles of Norwegian hydropower law. This is the principle stating that no right to hydropower can be derived from being in possession of land suitable for the construction of dams or other facilities necessary to exploit other riparian rights.[99] The land consolidation court broke with this principle in the case of *Oma*, deciding instead to set the value of the land designated for construction of a dam and a power station at 6% of the total value of the rights that went into the owners' association.

The proportion of financial benefit and decision-making power awarded to the unwilling owner D thus increased accordingly, since these rights were all held by him. In fact, his share went from 1.75% to 7.75%, so the consolidation process itself led to a situation where he would have a far greater incentive for supporting the development. Hence, the decision in *Oma* was more to the benefit of owner D than any other among the involved parties. If the rights in question had been expropriated, D would have been given next to nothing in compensation and would lose his rights forever. Instead, the solution prescribed by the consolidation court gave him a lasting and substantial interest in local hydro-power.

According to Stokstad, interviews conducted with the parties show how the process and outcome of consolidation served to create a much better climate for further cooperation. Indeed, when the interviews where conducted, 4 years after the courts' decision, owner D had changed his mind

[99] The principle is well-established in expropriation law, going back to the Supreme Court decision in *Hosanger, Haus og Hamre kommunale kraftverk v Askild Fusesen Vare and others* Rt-1922-489.

and was now in favour of the development. Moreover, he had also decided that he wanted to take part in the development company. He was not obliged to do so, but his right to take part was ensured by the agreement with the development company, regulated by the statutes of the owners' association.[100]

The owners all reported that the consolidation process had been very successful and that the court had listened to them, allowing everyone to have their voices heard. Moreover, some owners reported that the court had cleverly maintained a "birds eye view" on the best way to develop the land in question, ensuring both long term benefits to all involved properties as well as creating an improved climate for cooperation and mutual understanding. The consensus was that making concessions to owner D was appropriate and had been in the interest of everyone involved. In 2011, the hydropower project was completed and today its output is roughly 3 GWh/year.

Oma serves as a good illustration of how consolidation can be an effective instrument for facilitating locally controlled development, also in cases when this requires the use of compulsion against some owners. Interestingly, in this case the successful outcome appears to be partly due to the fact that the consolidation court actively used its discretionary powers when deciding how to organise joint use. This power allowed them to deviate from established rights-based legal doctrine and adopt a more context-dependent approach, pursuing solutions that better suited the situation. Interesting legal questions arise in this regard, particularly regarding the competence that the consolidation court has in such cases.

For instance, one may ask what would have happened if the majority owners in *Oma* had appealed the decision to the regular courts on the basis that D was awarded too many shares in the owners' association. Would this be regarded as a question of the court's interpretation of the law regarding the owners' *rights*, or would it be regarded as a discretionary decision regarding

[100] The owners' right to take part in the development company is obligatory in some situations, pursuant to Land Consolidation Act 1979, s 34 b) no 3.

the best way to organise development? If a rights-based perspective was adopted, the decision would almost certainly be overturned. If not, it would seem beyond reproach, as an exercise of the consolidation courts' discretionary power.[101]

A second interesting question that arises is whether or not consolidation can work as well as it did in *Oma* in cases where conflicts run more deeply, or where the parties favouring development are a minority among the owners. The next two cases I consider shed some light on this issue.

6.4.3 *Djønno*

This case was brought before the courts in 2006, by a local owner A who wanted to develop hydropower in a small river crossing his land, the so called *Kvernhusbekken*.[102] A wanted the court to help him implement a hydropower project, by compelling the other owners, B, C and D, to rent out their share of the waterfall on terms dictated by the court. The starting point for the other owners was that they did not want hydropower development. Hence, they were not willing to rent out their rights to owner A or any other developer. There was also a dispute regarding the ownership of the waterfall rights, with A believing initially that he controlled a large majority. It soon became clear that this was not the case. As it turned out, owner A's share of the riparian rights was only 5%, so his financial interest in hydropower was in fact very limited compared to the owners who did not want any development.

On the other hand, the land rights needed for the necessary physical constructions were predominantly held by owner A alone. For this reason, A maintained that the court should use compulsion to allow him to go on with his plans.

The court agreed that hydropower would be rational use of the waterfall, and they initially

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[101] Recall that consolidation decisions can only be appealed to the regular courts on procedural grounds or on the ground that the law has been applied incorrectly.

[102] *Djønno Indre Kaland* 1230-2006-0010, [2006] Indre Hordaland jordskifterett.

assessed the case against the rules relating to compulsory joint action.[103] This could have resulted in concrete directives regarding how the hydropower development should be carried out, down to the level of specific investments and building steps.

However, the court eventually held that this approach would place too much of a burden on the owners opposing hydropower. Hence, they chose to resolve the case using directives for joint use. By doing so, the court also restricted the scope of their decision to the establishment of an owners' association that would be responsible for renting out the rights. The court would not consider the question of deciding on a concrete scheme.

The model used for the owners' association was similar to the one the court adopted in *Oma*. This included allocating shares in the owners' association in a way that took into account the special importance of land needed for physical constructions. In total, this land was held to correspond to 6% of the shares in the association. Since these rights were held by owner A alone, his share in the association doubled. In addition to this, owner A purchased the shares from owner B, so that his total share ended up amounting to 22%. Still, for the majority, membership in the association was imposed on them against their will.

The wording of the statutes for the association took into account that it would be run by a majority of unwilling shareholders. In particular, it was stated clearly that the association was going to rent out the rights in the waterfall such that hydropower could be developed. In *Oma* and *Vika*, by contrast, the statutes only stated that this was the *purpose* of the association, leaving the shareholders with the freedom to determine whether or not to go through with development.

In interviews, those who were compelled to take part in the association against their will expressed dissatisfaction and surprise at the result. Moreover, while the association had apparently tried to be loyal to the wording of the statutes, by looking for interested developers, there had been no willingness among the majority to engage actively with this work. No deals had been made, no

[103] See the Land Consolidation Act 1979, s 2 e).

separate development company had been set up, and the conflict among the owners was ongoing.

Hence, while the case of *Djønno* is an example that consolidation can be used even when it involves compulsion against the majority of owners, it also serves to illustrate that the chance of a successful outcome may be more limited.

The question arises as to how such cases should be dealt with by courts in the future. According to owner *A*, the problem was that the directives of use were not specific enough. In his opinion, the directives should not have been restricted to merely setting up an owners' association for renting out the rights. In addition, the court should have actively engaged also with the question of how the development company should be organised. Moreover, the court should have provided concrete directives as to *who* should carry it out. Among the majority owners, on the other hand, the prevailing feeling was that the development in question, which they would be required to partake in against their will, was more or less doomed to fail from the start.

Hence, the case of *Djønno* illustrates that unless one is prepared to increase the level of direct external management, compulsory cooperation might require agreement among a majority that development should indeed take place.

6.4.4 *Tokheim*

This case was brought before the consolidation court in 2008, by the owners of *Tokheimselva*.[104] The five involved owners all agreed that development should take place, but they disagreed about how it should be done and about the proportion of each owners' share of the riparian rights. Some owners argued that development should be organised by the owners themselves, while other owners thought it would be best to rent out the rights to an external developer. The case was further complicated by the fact that the proposed development was so substantial that it might require a transferral concession pursuant to the Industrial Licensing Act 1917. As discussed in

[104] *Tokheim* 1230-2008-0020, [2008] Indre Hordaland jordskifterett.

Section **??** of Chapter **??**, such a concession can only be given to a company in which the state controls at least $\frac{2}{3}$ of the shares.

The consolidation court eventually decided to set up an owners' association. However, unlike in the previous cases I have considered, there was no adjustment made for land that would be needed for physical constructions. Instead, the statutes state that owners will be entitled to a lump sum estimated on the basis of the damages and disadvantages that a concrete hydropower project will bring. This marks a different kind of departure from established practice in expropriation law, where it has been a long established principle that owners can be compensated on the basis of *either* the value of their waterfalls *or* the damages and disadvantages caused by the project, not both.[105]

In other respects, the statutes for the owners' association follow the same model adopted in the previously considered cases. They do not, however, resolve any of the controversial questions regarding how development should be carried out. Moreover, they fail to address the question of the extent to which interested owners should be given the opportunity to develop the water resource themselves. This was the main issue raised by the case, but the consolidation court explicitly decided not to address it. In particular, the statutes of the owners' association explicitly provides separate rules depending on how the development is to be carried out.

In interviews, the owners expressed that they were happy with how the case was dealt with by the court. Everyone was heard and the owners' association was set up in consultation with the parties. However, the main issues were still unresolved after the case concluded. Some of the owners expressed criticism against the court for not engaging more actively with the most pressing issue.

The case of *Tokheim* serves to illustrate that established practices of consolidation, while being well received and understood by local owners, face some new challenges in relation to hydropower, challenges that consolidation courts might be reluctant to take on. It seems that the court in

[105] See for instance the case of *Vikfalli*, *Endre Vange and others v Fellesskapet Vikfalli* Rt-1971-1217.

Tokheim felt that they were not in a position to assess the question of what kind of development would be best. Moreover, it also seems that they were particularly cautious about expressing an opinion about the legal status of a project led by local owners, in relation to concession law. The court did not, in particular, form an opinion about whether it would be possible for local owners to carry out their own large-scale development in a waterfall that might otherwise be subject to the provisions set out in the Industrial Licensing Act 1917.

It remains to be seen whether such an agnostic attitude can be maintained by the consolidation courts, as local owners increasingly turn to them for help in resolving disputes regarding hydropower. Moreover, it will be interesting to see how the new Land Consolidation Act 2013 will influence case law in this area. It seems that a case like *Tokheim* could benefit from the court taking a broader view, possible even by including public bodies as parties in the case, as will be possible after the new Act takes effect.

6.5 Assessment and Future Challenges

The concrete cases that I discussed in the previous section shows, in my opinion, that the system of land consolidation is well suited as an alternative to expropriation in the context of hydropower development. At the same time, the cases suggest that the land consolidation courts may find it hard to deliver effective directives if owners disagree fundamentally about how their water resources should be managed. In addition, one may question the effectiveness of land consolidation courts in contexts when rules and regulations from other areas of law come into play. It seems, in particular, that the land consolidation courts might be overly cautious about implementing solutions that they fear will contradict sector-specific provisions. In so far as sector-specific rules disadvantage owners and benefit external commercial interests, as in the case of hydropower, the worry is that land consolidation courts will become impotent as soon as a potential conflict with large-scale interests

emerges.[106]

Paradoxically, the potential weaknesses of the land consolidation courts in this regard may be enhanced by the fact that they are not authorised to make use of appropriate forms of compulsion against owners, on pain of interfering too much in property as an individual right. A lack of power to compel threatens to undermine the effectiveness of the land consolidation court, thereby making it possible to argue that the public interest in development can not be sufficiently accommodated through the use of consolidation measures. Hence, one may decide to fall back on expropriation, to the detriment of owners, particularly those that oppose development.

In fact, there is some evidence to suggest that land consolidation law is currently quite vulnerable to this mechanism. One indication of this is the Supreme Court case of *Holen v Holen*, concerning a quarry owned and operated by a local landowner.[107] In order to continue extracting his minerals, the owner of the quarry would have to interfere with the property of a neighbouring owner, who was using his land for more traditional forms of agriculture. The farmer was unwilling to reach an agreement with the quarry owner, so the latter brought a case before the land consolidation court. The court noted that it would be possible to reach an accommodation that would benefit both parties and issued directives of use that would allow the quarry to continue its operations.

The directives gave the quarry owner access to the farmer's land, who was in turn granted replacement property from the quarry owner. The consolidation court also noted that the quarry would, in the future, be likely to extract minerals that belonged to the farmer. Hence, a directive of use was issued that gave the quarry owner a right to extract these minerals, provided he paid market value for them.

Hence, not only was the farmer awarded replacement property for agricultural purposes, he

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106 As far as I am aware, there is not yet any case law on this issue.

107 *Holen v Holen* Rt-1995-1474.

was also granted a share of the benefits that would result from the continued operation of his neighbour's quarry. This was clearly beneficial to his property, economically speaking. The owner himself, however, objected to the arrangement. The Supreme Court found in his favour. This was not because they sanctioned his right to block the continued operations of the quarry, or because they thought the replacement property or the payment model was inappropriate. Instead, the Court held that the right to extract the farmer's minerals could not be transferred to someone else by a consolidation measure, even if the farmer was ensured payment. This, the Court held, was a form of compulsion that fell outside the scope of use directives in land consolidation.

The perspective underlying this decision is interesting, because it underscores a reluctance to use land consolidation in what would otherwise be a fairly typical economic development scenario. However, *Holen v Holen* was decided in 1995, and as I have already mentioned, the law has developed in recent years in the direction of increased use of land consolidation as an alternative to expropriation. However, I think *Holen v Holen* reminds us that critics might still be able to raise convincing formal objections against compulsion in land consolidation, on the basis of earlier case law. More generally, the exact relationship between land consolidation and expropriation law, including the constitutional property clause, appears to be an increasingly relevant open question that awaits further clarification.

Some might be inclined to argue that land consolidation offers less protection to owners than administrative expropriation. Admittedly, the property protection offered in the context of land consolidation has a different flavour. But that is not to say that it is weaker. However, how one judges this might depend on one's vision of property. In particular, it seems to depend on which one of property's functions one finds most worthy of protection.

Granted, an administrative expropriation procedure can offer more extensive *formal* safeguards. A range of procedural rules must be observed, pertaining to notification to the owners, impact assessments, a duty to provide guidance and reasons for the decision, and a possibility (sometimes

several) for administrative appeal. Then, after an expropriation order has been granted, the owner can still challenge it before the appraisal courts, in principle at the expropriating party's expense.

In practice, however, the administrative expropriation procedure often leaves the owners marginalised, as they are overshadowed by more powerful stakeholders. This is particularly clear in situations when expropriation arises as a result of more comprehensive planning or licensing procedures. As discussed in Chapter 4, this is particularly clear in the context of hydropower development.

In addition to this, the possibility of raising validity objections before the courts in expropriation cases is mostly a theoretical one in Norway.[108] It is very unusual for such objections to be made successfully, as the courts typically defer to the discretion of the administrative decision-maker in expropriation cases.

More generally, the narrative of expropriation is one where the owners may have to endure a loss in the public interest, for which they must be compensated as individuals. By contrast, the narrative of consolidation is one where the owners themselves are tasked with making a *contribution* to the development project, in the best interest of both the local community and society in general. In particular, the owner's role is no longer than of a passive *obstacle* to development, but is transformed to that of an active *participant*, one who might have to be nudged to fulfil their potential. In addition, the properties as such receive recognition as important units of assessment, independently of the interests of their current owners. Moreover, the owners as a *group* come into focus, as the process is meant to facilitate rational *collective* action.

This is achieved by placing owners in a partly deliberative, partly adversarial, context, which not only tolerates but also presupposes and critically depends on their active input to the decision-making process. In addition, the *grounds* for imposing compulsory measures that interfere with property rights need to be anchored explicitly in the social functions of the affected properties.

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[108] For a discussion on this with further references, see Dyrkolbotn, 'On the compensatory approach to economic development takings' (n 33) x.

A measure is warranted only when it enhances property values, possibly also in the sense of improving conditions for the communities that takes their livelihoods from the affected properties. Clearly, this broader sense in which consolidation serves to protect property is not matched by any administrative safeguards in expropriation law.

Hence, I conclude that land consolidation is highly attractive, even when it involves compulsion directed against owners. In a system based on private property rights, it seems only reasonable that owners and their communities retain their position as primary stakeholders, even if the development is large-scale, takes places in the public interest, and is imposed by compulsory means. This is not achieved through the use of expropriation. However, the institution of land consolidation demonstrates that a better option might be available, provided there is political will to prescribe it.

It bears noting, however, that this positive assessment is premised on the fact that property is distributed in an egalitarian manner among the members of local populations in Norway, particularly in rural communities. In so far as land consolidation is used outside of this context, even in urban Norway, the question arises as to whether or not the processes truly empowers the community as opposed to merely the landowners.

As long as consolidation is used to complement other organs for land use planning and local decision-making, without coming into direct conflict with such organs, it is tempting to see this mainly as a worry that land consolidation is an incomplete solution. It might give owners enhanced protection, specifically by facilitating a practical alternative to expropriation, but it does so in a way that neither weakens nor strengthens the position of non-owners.

To some extent, this might be so, but it is also a way of thinking that appears oversimplified. For one, a strong land consolidation system might have indirect effects, for instance because it makes implementation of public policies more difficult in practice. Or it could undermine local democracy by giving the owners and incentive to use land consolidation as a means of removing

certain property issues from the broader political agenda. However, there is another side to this that should not be overlooked. Specifically, it seems wrong to assume that increased protection of owners cannot possibly benefit non-owners.

At least as long as the owners are themselves *members* of the local community, the fact that they are offered increased protection through land consolidation should positively affect the community as a whole. As I discussed at length in Chapter 1, the social function theory of property asks us to recognise that property is a building block of communities. As such, it gives rise to entitlements and duties for owners and non-owners alike, rooted in the mutual dependencies and interactions between them. Hence, a local community represented by a handful of its own property owners might be in a much better position to participate meaningfully in decision-making processes concerning its future than a local community represented by non-local politicians, expert planners, or judges. In addition to this comes the fact that the land consolidation process *does* in fact include at least one participant that has to take non-owners into account, namely the judge. As discussed at length above, the judge is consistently asked to consider what is best for the properties, not the owners. This not only emphasises that broader community interests are relevant, it also reinforces the idea that the owners participating in the process are in fact representatives of something more than their own self-interest.

That being said, it seems that in situations where either the scope of consolidation is broad, or else the community representation ensured through property's social function is narrow, wider representation might be in order. In these cases, it might be considered whether the class of persons with legal standing should be extended to cover non-owners without formally recognised property rights (e.g., neighbours, tenants or employees). However, there are reasons for caution in this regard. First, there are obvious pragmatic concerns related to increased costs and complexity, possibly causing inefficiency of the process. From the Norwegian experience, it seems that a few hundred parties, while complex, is still manageable without undermining the process. More than

that, and it seems that new ideas would be required.

However, there are more serious concerns arising with respect to the core function of consolidation as a legitimacy-enhancing alternative to expropriation. Indeed, it seems that the presence of new actors, even local ones, might make consolidation a less effective instrument for protecting those that are most intimately affected and most in risk of marginalisation. It is clear, for instance, that if a large-scale development involves razing an impoverished part of town, it will not be a good idea to give legal standing in consolidation to the employees of the development company that stands to benefit. This would be so even if the employees could be classified as "locals". Moreover, it would arguably hold true even if the employees largely outnumbered the owners that would lose their homes.

Of course, the meaning of this must still be debated and defined by persons, but by emphasising that the improvement of property, not personal gain, is the purpose, the decision-making process now takes on some of those characteristics that make some argue that disinterested experts should be granted the power to decide about land uses.

More specifically, the question becomes how to ensure that land consolidation used to facilitate economic development will remain an enabler of property's proper functions. Will it continue to be respectful towards owners and their communities, or will it gradually be transformed into a service for developers who seek cheap access to property owned by others? This is an empirical question concerning the robustness of specific land consolidation procedures.

In Norway, any legal person with a right to expropriate may now act as a party to a consolidation dispute, so the question is bound to arise. What will the role of the new parties be? Will they be embedded in the legal framework in such a way that they become potential partners that owners can rely on to implement projects in the public interest, or will they be regarded as the main stakeholders, whom the land consolidation courts should assist so that they may successfully impose their will on recalcitrant owners? It will be very interesting to follow this development further, to

see if the promise of using land consolidation to regain legitimacy for economic development under compulsion can be fulfilled.

6.6 Conclusion

In this Chapter, I have addressed land consolidation as an alternative to expropriation for economic development, anchored in a case study of hydropwer. I started by presenting the basic idea of using land consolidation to organise commercial projects and I emphasised that the notion of consolidation at work here is a broad notion that includes measures seeking to compel owners to use their property in the public interest. I briefly presented an overarching vision of this kind of land consolidation.

I then presented the Norwegian system, which is based on a judicial decision-making framework that sets the land consolidation procedure apart from that found in many other jurisdictions. I also noted how the procedure is conceptualised as a service to owners, with a no-loss guarantee in place to ensure that consolidation measures are only implemented when the benefits make up for the harms for all the involved properties individually.

I then went on to present rules pertaining to compulsory use of property, rules that empower the consolidation courts to organise specific development projects on behalf of owners, also against their will. I noted how recent changes in the law envisions an extended scope for such rules, including in the context of non-agrarian and urban development. I then went on to consider some concrete examples of hydropower development, where owner-led projects already tend to rely heavily on land consolidation rather than expropriation.

From this case study, I concluded that the land consolidation alternative works well when there is basic agreement among the owners that development is desirable, but can be less effective when there is deep disagreement about whether or not development should proceed at all, or if some owners object to the idea of owner-led development because they prefer to cooperate with

an external developer. In these contexts, I argued, it might be necessary to enhance the power of the land consolidation court, also in the direction of extending its authority to compel owners to engage with development projects that they fundamentally disagree with. This is already possible, but only to a limited extent. Moreover, the exact boundaries are an open legal question, as recent legislative changes might suggest that case law on this issue is ripe for review.

I then argued against critics that see increased consolidation powers as a threat to property rights. In particular, I suggested that the procedural protection offered by administrative law is far less effective at protecting the interests of owners and their communities than the safeguards inherent in the consolidation process. Importantly, the land consolidation process seeks to empower owners so that they may participate, while the administrative expropriation process tends to see them as obstacles who need to be removed, but who may be entitled to protection against excessive interference.

I went on to note that recent changes in the law grant developers the right to act as parties in consolidation cases and to bring cases before the courts themselves, if they favour it over expropriation. On the one hand, such a change will enhance the power of the land consolidation court, making it more effective in dealing with cases that involve external parties. On the other hand, there is a possibility that the presence of new and powerful stakeholders will change the nature of the land consolidation process itself, so that it transforms from a property-enhancing institution for self-governance into a planning and implementation instrument for developers.

In general, I believe this Chapter has shown that the land consolidation regime in Norway functions in a way that sheds interesting light on collective-action alternatives to expropriation. Land consolidation is also a dynamic and versatile framework, more so than other suggestions, such as the land assembly districts proposed by Heller and Hills.[109] Hence, the institution of land consolidation can provide a useful kind of democracy-on-demand for compulsory economic

[109] Heller and Hills (n **??**).

development, facilitating a better balance between the interests of owners, local communities, and society as a whole. In this vision, external commercial actors are at worst going to be partners in crime, at best partners in progress. They will not, however, be allowed to dictate the terms on which development takes place.

7 Conclusions

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 Many Aspects of Taking

The most obvious way to describe a taking is to say that it involves the transfer of property from one legal person to another. However, as I noted in the first chapter of this thesis, property itself is highly multifaceted, serving a range of social and individual functions. Hence, when we begin to unpack the property bundle, we are confronted with a multitude of different senses 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.

This is unfortunate. Even if riparian rights should be stripped of all content except a financial entitlement, this should happen on the basis of debate and democratic decision, not because the law fails to cater to a descriptively accurate notion of property.

not how a taking should be carried out, nor does it meet the standard

the decision-making process *will* normally reflect the power of property, if other contextual factors are not

although to different degrees depending on other contextual factors, most notably the social status of the owner. Hence, property plays a constuti

particularly

Property is not merely a placeholder for transient entitlements. It also both help make up and is shaped by the social and political context.

This was the key point that I argued for in Chapter 1 of the thesis, by looking to the social function theory of property and the notion of human flourishing.

which focuses specifically on property rights only *after* the public interest has been mapped out and formulated by the decision-makers?

individual financial entitlements

However, the property perspective, which is imposed onl

As I have demonstrated in this thesis, the economic development takings turn this narrative completely on xplored in depth in this thesis, the con

Rather, the typical narrative places such aspects

After all, on the taker side, many of the primary concepts used to conceptualise typical takings are neither economic nor individualistic.

on the owner side, do not

The consequence of this can be that former owners and their communities will be marginalised more generally, as their position within society weakens. In turn, it will become easier to take more property from them, under increasingly weaker arguments of public interest. In the end, when egalitarian property rights no longer provide a foundation for decision-making about land use, the risk is high that a corresponding inequality in decision-making power will follow quite generally. Democracy as such might be at risk.

In any event, the land-less will not have a voice unless they can find different means of asserting themselves. The possibility of achieving participatory equality without egalitarian property should not be overlooked, of course. However, it seems safe to say that the track record of alternative ideas, whereby equality is pursued through institutional arrangements alone, is unimpressive.

In almost all countries that score well on parameters such as democracy, living standard, transparency, and the rule of law, we find private property rights as a core legal principles. Moreover, while property might be unequally or unfairly distributed among the population, property rights

are typically distributed widely enough to give rise to a natural division of power and a plurality of perspectives. Indeed, even the land-less may sometimes attain a voice, albeit a very limited one, if they are still in possession of their own labour.

The negation of property rights

This, in turn, is the very foundation of both democracy and the rule of law.

as an underlying source of division of power.

7.2 Some Ways of Giving Back

7.2.1 Locating Primary Stakeholders; The importance of Communities

7.2.2 Making Influence Proportional to Stakes; the Closeness-to-Consequences Test

7.2.3 Robust and Flexible Institutions for Collective Action; the Possibility of a Judicial Approach

7.2.4 Beware of Big Units; the Fine Line between Representation and Usurpation

7.2.5 The Importance of Redundancy; Property Regained

It seems that property dislikes being concentrated in the hands of the few.